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THE
ENGLISH AND EMPIRE DIGEST
WITH
COMPLETE AND EXHAUSTIVE
ANNOTATIONS.

VOLUME XXXII.

THE ENGLISH AND EMPIRE DIGEST

WITH
COMPLETE AND EXHAUSTIVE
ANNOTATIONS

BEING

A COMPLETE DIGEST OF EVERY ENGLISH CASE REPORTED
FROM EARLY TIMES TO THE PRESENT DAY, WITH ADDITIONAL
CASES FROM THE COURTS OF SCOTLAND, IRELAND, THE EMPIRE
OF INDIA, AND THE DOMINIONS BEYOND THE SEAS,

AND INCLUDING

COMPLETE AND EXHAUSTIVE ANNOTATIONS GIVING ALL THE
SUBSEQUENT CASES IN WHICH JUDICIAL OPINIONS HAVE BEEN
GIVEN CONCERNING THE ENGLISH CASES DIGESTED.

VOLUME XXXII.

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LOCAL COURTS.

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REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS

A. C. (preceded by date)	Law Reports, Appeal Cases, House of Lords, since 1890 (<i>e.g.</i> , [1891] A. C.)	Eng.
A. Jur. Rep.	...	...	Australian Jurist Reports	...	...	...	...	...	Aus.
A. L. T.	...	...	Australian Law Times	...	...	...	...	...	Aus.
A. R.	...	...	Ontario Appeals	...	...	...	...	...	Can.
Act.	...	...	Acton's Reports, Prize Causes, 2 vols., 1809—1841	...	...	...	...	...	Eng.
Ad. & El	...	...	Adolphus and Ellis's Reports, King's Bench and Queen's Bench, 12 vols., 1834—1842	...	...	...	...	...	Eng.
Adam	...	...	Adam's Justiciary Reports (Scotland), 1893—(current)	...	...	...	...	...	Scot.
Add.	...	...	Addams' Ecclesiastical Reports, 3 vols., 1822—1826	...	...	...	...	...	Eng.
Agra	...	...	Agra High Court	...	...	...	...	...	Ind.
Agra F. B.	...	...	Agra High Court, Full Bench	...	...	...	...	...	Ind.
lc. & N.	...	...	Alcock and Napier's Reports, King's Bench (Ireland), 1 vol. 1813—1833	...	...	...	...	...	Ir.
Alc. Reg. Cas.	...	...	Alcock's Registry Cases (Ireland), 1 vol., 1832—1841	...	...	...	...	...	Ir.
Aleyn	...	...	Aleyn's Reports, King's Bench, fol., 1 vol., 1646—1649	...	...	...	...	...	Eng.
All.	...	...	New Brunswick Reports (Allen)	...	...	...	...	...	Can.
Alta. L. R.	...	...	Alberta Law Reports	...	...	...	...	...	Can.
Amb.	...	...	Ambler's Reports, Chancery, 1 vol., 1716—1783	...	...	...	...	...	Eng.
And.	...	...	Anderson's Reports, Common Pleas, fol., 2 parts in one vol. 1535—1605	...	...	...	...	...	Eng.
Andr.	...	...	Andrews' Reports, King's Bench, fol., 1 vol., 1737—1740	...	...	...	...	...	Eng.
Anst.	...	...	Anstruther's Reports, Exchequer, 3 vols., 1792—1797	...	...	...	...	...	Eng.
App. Cas.	...	...	Law Reports, Appeal Cases, House of Lords, 15 vols., 1875—1890	...	...	...	...	...	Eng.
App. Ct. Rep.	...	...	Appeal Court Reports	...	...	...	...	...	N.Z.
App. D.	...	...	South African Law Reports, Appellate Division	...	...	...	...	...	S. Af.
Architects' L. R.	...	...	Architects' Law Reports, 4 vols., 1904—1909	...	...	...	...	...	Eng.
Argus L. R.	...	...	Argus Law Reports	...	...	...	...	...	Aus.
Arkley	...	...	Arkley's Justiciary Reports (Scotland), 1 vol., 1846—1848	...	...	...	...	...	Scot.
Arm. M. & O.	...	...	Armstrong, Macartney, and Ogle's Civil and Criminal Reports (Ireland), 1840—1842	...	...	...	...	...	Ir.
Arn.	...	...	Arnold's Reports, Common Pleas, 2 vols., 1838—1839	...	...	...	...	...	Eng.
Arn. & H.	...	...	Arnold and Hodges' Reports, Queen's Bench, 1 vol., 1840—1841	...	...	...	...	...	Eng.
Ashb.	...	...	Ashburner's Principles of Equity, 1902	...	...	...	...	...	Eng.
Asp. M. L. C.	...	...	Aspinall's Maritime Law Cases, 1870—(current)	...	...	...	...	...	Eng.
Atk.	...	...	Atkyns' Reports, Chancery, 3 vols., 1736—1754	...	...	...	...	...	Eng.
Ayl. Pan.	...	...	Ayliffe's New Pandect of Roman Civil Law	...	...	...	...	...	Eng.
Ayl. Par.	...	...	Ayliffe's Parergon Juris Canonici Anglicani	...	...	...	...	...	Eng.
B.	...	...	Barber's Gold Law	...	...	...	...	...	S. Af.
B. & Ad.	...	...	Barnewall and Adolphus' Reports, King's Bench, 5 vols., 1830—1834	...	...	...	...	...	Eng.
B. & Ald.	...	...	Barnewall and Alderson's Reports, King's Bench, 5 vols., 1817—1822	...	...	...	...	...	Eng.
B. & C.	...	...	Barnewall and Cresswell's Reports, King's Bench, 10 vols., 1822	...	...	...	...	...	Eng.
B. & C. R. (preceded by date)	...	...	Reports of Bankruptcy and Companies Winding up Cases, 1918—(current) (<i>e.g.</i> , [1918—19] B. & C. R.)	...	...	...	...	...	Eng.
B. & S.	...	...	Best and Smith's Reports, Queen's Bench, 10 vols., 1861—1870	...	...	...	...	...	Eng.
B. C. R.	...	...	British Columbia Reports	...	...	...	...	...	Can.
B. Dig.	...	...	Bose's Digest	...	...	...	...	...	Ind.
B. L. R.	...	...	Bengal Law Reports	...	...	...	...	...	Ind.
B. L. R. A. C.	...	...	Bengal Law Reports, Appeal Cases	...	...	...	...	...	Ind.
B. L. R. P. C.	...	...	Bengal Law Reports, Privy Council	...	...	...	...	...	Ind.
B. L. R. Sup. Vol.	...	...	Bengal Law Reports, Supp. Vol.	...	...	...	...	...	Ind.
B. W. C. C.	...	...	Butterworths' Workmen's Compensation Cases, 1907—(current)	...	...	...	...	...	Eng.
Bac. Abr.	Bacon's Abridgment	Eng.
Bail Ct. Cas.	Bail Court Cases (Lowndes and Maxwell), 1 vol., 1852—1854	Eng.

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Baild.	Baildon's Select Cases in Chancery (Selden Society, Vol. X.)	Eng.
Ball & B.	Ball and Beatty's Reports, Chancery (Ireland), 2 vols., 1807—1814	Ir.
Bankr. & Ins. R. ...	...	Bankruptcy and Insolvency Reports, 2 vols., 1853—1855	Eng.
Bar. & Arn. ...	...	Barron and Arnold's Election Cases, 1 vol., 1843—1846	Eng.
Bar. & Aust. ...	...	Barron and Austin's Election Cases, 1 vol., 1842	Eng.
Barn. Ch. ...	...	Barnardiston's Reports, Chancery, fol., 1 vol., 1740—1741	Eng.
Barn. K. B. ...	...	Barnardiston's Reports, King's Bench, fol., 2 vols., 1726—1734	Eng.
Barnes ...	...	Barnes' Notes of Cases of Practice, Common Pleas, 1 vol., 1732—1760	Eng.
Batt. ...	...	Batty's Reports, King's Bench (Ireland), 1 vol., 1825—1826	Ir.
Beat. ...	...	Beatty's Reports, Chancery (Ireland), 1 vol., 1813—1830	Ir.
Beav. ...	...	Beavan's Reports, Rolls Court, 36 vols., 1838—1866	Eng.
Beav. & Wal. ...	...	Beavan and Walford's Railway Parliamentary Cases, 1 vol., 1846	Eng.
Beaw. ...	...	Beawes's Lex Mercatoria	Eng.
Bell, C. C. ...	...	T. Bell's Crown Cases Reserved, 1 vol., 1858—1860	Eng.
Bell, Ct. of Sess. ...	...	R. Bell's Decisions, Court of Session (Scotland), 1 vol., 1790—1792	Scot.
Bell, Ct. of Sess. fol. ...	...	R. Bell's Decisions, Court of Session (Scotland), fol., 1 vol., 1794—1795	Scot.
Bell, Dict. Dec. ...	...	S. S. Bell's Dictionary of Decisions, Court of Session (Scotland), 2 vols., 1808—1833	Scot.
Bell, Sc. App. ...	...	S. S. Bell's Scotch Appeals, House of Lords, 7 vols., 1842—1850	Scot.
Bellewe ...	...	Bellewe's Cases <i>temp.</i> Richard II., King's Bench, 1 vol.	Eng.
Belt's Sup. ...	...	Belt's Supplement to Vesey Sen., Chancery, 1 vol., 1746—1756	Eng.
Ben. ...	...	Benloe's Reports, Common Pleas, fol., 1 vol., 1357—1579	Eng.
Benl. ...	...	Benloe's (or Bendloe's) Reports, King's Bench, fol., 1 vol., 1440—1627	Eng.
Ber. ...	...	New Brunswick Reports (Berton)	Can.
Bing. ...	...	Bingham's Reports, Common Pleas, 10 vols., 1822—1834	Eng.
Bing. N. C. ...	...	Bingham's New Cases, Common Pleas, 6 vols., 1834—1840	Eng.
Biss. & Sm. ...	...	Bisset and Smith's Digest	S. Af.
Bitt. Prac. Cas. ...	...	Bittleston's Practice Cases in Chambers under the Judicature Acts, 1873 and 1875, 1 vol., 1875—1876	Eng.
Bitt. Rep. in Ch. ...	...	Bittleston's Reports in Chambers (Queen's Bench Division), 1 vol., 1883—1884	Eng.
Bl. Com. ...	...	Blackstone's Commentaries	Eng.
Bl. D. & Osb. ...	...	Blackham, Dundas, and Osborne's Reports, Practice and Nisi Prius (Ireland), 1 vol., 1846—1848	Ir.
Bli. ...	...	Bligh's Reports, House of Lords, 4 vols., 1819—1821	Eng.
Bli. N. S. ...	...	Bligh's Reports, House of Lords, New Series, 11 vols., 1827—1837	Eng.
Bluett ...	...	Bluett's Isle of Man Cases	I. of M.
Bom. ...	...	Bombay High Court Reports	Ind.
Bom. A. C. ...	...	Bombay Reports, Appellate Jurisdiction	Ind.
Bom. Cr. Ca. ...	...	Bombay Reports, Crown Cases	Ind.
Bom. O. C. ...	...	Bombay Reports, Original Civil Jurisdiction	Ind.
Bos. & P. ...	...	Bosanquet and Puller's Reports, Common Pleas, 3 vols., 1796—1804	Eng.
Bos. & P. N. R. ...	...	Bosanquet and Puller's New Reports, Common Pleas, 2 vols., 1804—1807	Eng.
Bott. ...	...	Bott's Laws Relating to the Poor, 2 vols., 6th ed., 1827	Eng.
Bourke ...	...	Bourke's Reports	Ind.
Br. & Col. Pr. Cas. ...	...	British and Colonial Prize Cases, 3 vols., 1914—1919	Eng.
Bract. ...	...	Bracton De Legibus et Consuetudinibus Angliæ	Eng.
Bro. Abr. ...	...	Sir R. Brooke's Abridgement	Eng.
Bro. C. C. ...	...	W. Brown's Chancery Reports, 4 vols., 1778—1794	Eng.
Bro. Ecc. Rep. ...	...	W. G. Brooke's Ecclesiastical Reports, Privy Council, 1 vol., 1850—1872	Eng.
Bro. N. C. ...	...	Sir R. Brooke's New Cases, 1 vol., 1515—1558	Eng.
Bro. Parl. Cas. ...	...	J. Brown's Cases in Parliament, 8 vols., 1702—1800	Eng.
Bro. Supp. to Mor. ...	...	M. P. Brown's Supplement to Morison's Dictionary of Decisions, Court of Session (Scotland), 5 vols.	Scot.
Bro. Synop. ...	...	M. P. Brown's Synopsis of Decisions, Court of Session (Scotland), 4 vols., 1532—1827	Scot.
Brod. & Bing. ...	...	Broderip and Bingham's Reports, Common Pleas, 3 vols., 1819—1822	Eng.
Brod. & F. ...	...	Broderick and Fremantle's Ecclesiastical Reports, Privy Council, 1 vol., 1705—1864	Eng.
Broun ...	...	Broun's Justiciary Reports (Scotland), 2 vols., 1842—1845	Scot.
Brown. & Lush. ...	...	Browning and Lushington's Reports, Admiralty, 1 vol., 1863—1866	Eng.
Brownl. ...	...	Brownlow and Goldesborough's Reports, Common Pleas, 2 parts, 1569—1624	Eng.
Bruce ...	...	Bruce's Decisions, Court of Session (Scotland), 1714—1715	Scot.

Buch. ...	...	Buchanan's Reports of the Supreme Court of the Cape of Good Hope, 1868—1879	S. Af.
Buch. A. C. ...	...	Buchanan's Reports of Appeal Court (Cape)	S. Af.
Buchan. ...	...	Buchanan's Reports, Court of Session and Justiciary (Scotland), 1806—1813	Scot.
Buck ...	...	Buck's Cases in Bankruptcy, 1 vol., 1816—1820	Eng.
Bull. N. P. ...	...	Buller's Nisi Prius (published, London, 1772)	Eng.
Bulst. ...	...	Bulstrode's Reports, King's Bench, fol., 3 parts in 1 vol., 1610—1626	Eng.
Bunb. ...	...	Bunbury's Reports, Exchequer, fol., 1 vol., 1713—1741	Eng.
Burr. ...	...	Burrow's Reports, King's Bench, 5 vols., 1756—1772	Eng.
Burr. S. C. ...	...	Burrow's Settlement Cases, King's Bench, 1 vol., 1733—1776	Eng.
Burrell ...	...	Burrell's Reports, Admiralty, ed. by Marsden, 1 vol., 1648—1840	Eng.
C. A. ...	...	Court of Appeal Reports, 3 vols., 1867—1877	N.Z.
C. & P. ...	...	Carrington and Payne's Reports, Nisi Prius, 9 vols., 1823—1841	Eng.
C. B. ...	...	Common Bench Reports, 18 vols., 1845—1856	Eng.
C. B. N. S. ...	...	Common Bench Reports, New Series, 20 vols., 1856—1865	Eng.
C. B. R. ...	...	Canadian Bankruptcy Reports Annotated, 1920—(current)	Can.
C. C. Ct. Cas. ...	...	Central Criminal Court Cases (Sessions Papers), 1834—1913	Eng.
C. L. Ch. ...	...	Common Law Chambers	Can.
C. L. J. ...	...	Cape Law Journal	S. Af.
C. L. J. N. S. ...	...	Canada Law Journal, New Series, 1865—(current)	Can.
C. L. J. O. S. ...	...	Canada Law Journal, Old Series, 10 vols., 1855—1864	Can.
C. L. R. ...	...	Common Law Reports, 3 vols., 1853—1855	Eng.
C. L. R. ...	...	Commonwealth Law Reports	Aus.
C. L. R. ...	...	Calcutta Law Reporter	Ind.
C. L. T. ...	...	Canadian Law Times	Can.
C. L. T. Occ. N. ...	...	Canadian Law Times, Occasional Notes	Can.
C. P. ...	...	Upper Canada Common Pleas	Can.
C. P. D. ...	...	Law Reports, Common Pleas Division, 5 vols., 1875—1880	Eng.
C. P. D. ...	...	Cape Provincial Division Reports	S. Af.
C. R. [date] A. C. ...	...	Canadian Reports, Appeal Cases	Can.
C. T. R. ...	...	Cape Times Reports of the Supreme Court of the Cape of Good Hope	S. Af.
C. W. N....	...	Calcutta Weekly Notes	Ind.
Cab. & El. ...	...	Cababé and Ellis's Reports, Queen's Bench Division, 1 vol., 1882—1885	Eng.
Cald. Mag. Cas. ...	...	Caldecott's Magistrates' Cases, 1 vol., 1776—1785	Eng.
Calth. ..	...	Calthrop's City of London Cases, King's Bench, 1 vol., 1609—1618	Eng.
Cam. Cas. ...	...	Cameron's Supreme Court Cases	Can.
Cam. I rac. ...	...	Cameron's Supreme Court Practice	Can.
Camp. ...	...	Campbell's Reports, Nisi Prius, 4 vols., 1807—1816	Eng.
Can. Com. Cas. ...	...	Commercial Law Reports of Canada	Can.
Can. Crim. Cas. ...	...	Canadian Criminal Cases, Annotated	Can.
Can. Gaz. ...	...	Canadian Gazette	Can.
Can. Ry. Cas. ...	...	Canadian Railway Cases	Can.
Car. & Kir. ...	...	Carrington and Kirwan's Reports, Nisi Prius, 3 vols., 1843—1853	Eng.
Car. & M. ...	...	Carrington and Marshman's Reports, Nisi Prius, 1 vol., 1841—1842	Eng.
Car. C. L. ...	...	Carrington's Treatise on Criminal Law	Can.
Card. Doc. Ann. ...	...	Cardwell's Documentary Annals of the Reformed Church of England, 2 vols., 1546—1716	Eng.
Carl. ...	...	New Brunswick Reports (Carleton)	Can.
Carp. Pat. Cas. ...	...	Carpmael's Patent Cases, 2 vols., 1802—1842	Eng.
Cart. ...	...	Carter's Reports, Common Pleas, fol., 1 vol., 1664—1673	Eng.
Cart. ...	...	Cases on British North America Act (Cartwright)	Can.
Carth. ...	...	Carthew's Reports, King's Bench, fol., 1 vol., 1687—1700	Eng.
Cary ...	...	Cary's Reports, Chancery, 1 vol.	Eng.
Cas. in Ch. ...	...	Cases in Chancery, fol., 3 parts, 1660—1697	Eng.
Cas. Pract. K. B. ...	...	Cases of Practice, King's Bench, 1 vol., 1655—1775	Eng.
Cas. Sett.	Cases of Settlements and Removals, 1 vol., 1685—1727	Eng.
Cas. temp. Finch	Cases temp. Finch, Chancery, fol., 1 vol., 1673—1680	Eng.
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Cas. temp. Talb.	Cases in Equity temp. Talbot, fol., 1 vol., 1730—1737	Eng.
Cass. Dig.	Cassells' Digest	Can.
Ch. (preceded by date)	...	Law Reports, Chancery Division, since 1890 (e.g., [1891] 1 Ch.)	Eng.
Ch. App. ...	...	Law Reports, Chancery Appeals, 10 vols., 1865—1875	Eng.
Ch. Cas. in Ch. ...	...	Choyce Cases in Chancery, 1557—1606	Eng.
Ch. Ch. ...	...	Upper Canada Chancery Chambers Reports	Can.
Ch. D. ...	...	Law Reports, Chancery Division, 45 vols., 1875—1890	Eng.
Ch. Rob. ...	...	Christopher Robinson's Reports, Admiralty, 6 vols., 1798—1808	Eng.
Char. Cham. Cas. ...	...	Charley's Chamber Cases, 2 vols., 1875—1876	Eng.
Char. Pr. Cas. ...	...	Charley's New Practice Reports, 3 vols., 1875—1876	Eng.
Chip. ...	...	New Brunswick Reports (Chipman)	Can.

xviii REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.

Chit. ...	Chitty's Practice Reports, King's Bench, 2 vols., 1770—1822...	Eng.
Cl. & Fin. ...	Clark and Finnelly's Reports, House of Lords, 12 vols., 1831—1846 ...	Eng.
Cl. & Sc. Dr. Cas. ...	Clark and Scully's Drainage Cases ...	Can.
Clay. ...	Clayton's Reports and Pleas of Assizes at Yorke, 1 vol., 1631—1650 ...	Eng.
Clif. & Rick. ...	Clifford and Rickards' Locus Standi Reports, 3 vols., 1873—1884	Eng.
Clif. & Steph. ...	Clifford and Stephens' Locus Standi Reports, 2 vols., 1867—1872	Eng.
Co. A. ...	Cook's Lower Canada Admiralty Court Cases ...	Can.
Co. Ent. ...	Coke's Entries ...	Eng.
Co. Inst. ...	Coke's Institutes ...	Eng.
Co. L. J. ...	Colonial Law Journal ...	N.Z.
Co. Litt. ...	Coke on Littleton (1 Inst.) ...	Eng.
Co. Rep. ...	Coke's Reports, 13 parts, 1572—1616 ...	Eng.
Coch. ...	Nova Scotia Reports (Cochran) ...	Can.
Cockb. & Rowe ...	Cockburn and Rowe's Election Cases, 1 vol., 1833 ...	Eng.
Coll. ...	Collyer's Reports, Chancery, 2 vols., 1844—1846 ...	Eng.
Coll. Jurid. ...	Collectanea Juridica, 2 vols. ...	Eng.
Colles ...	Colles' Cases in Parliament, 1 vol., 1697—1713 ...	Eng.
Colt. ...	Coltman's Registration Cases, 1 vol., 1879—1885 ...	Eng.
Com. ...	Comyns' Reports, King's Bench, Common Pleas, and Exchequer, fol., 2 vols., 1695—1740 ...	Eng.
Com. Cas. ...	Commercial Cases, 1895—(current) ...	Eng.
Com. Dig. ...	Comyns' Digest ...	Eng.
Comb. ...	Comberbach's Reports, King's Bench, fol., 1 vol., 1685—1698	Eng.
Con. & Law. ...	Connor and Lawson's Reports, Chancery (Ireland), 2 vols., 1841—1843 ...	Ir.
Cong. Dig. ...	Congdon's Digest ...	Can.
Const ...	Const's edition of Bott's Poor Laws, 3 vols., 1807 ...	Eng.
Cooke & Al. ...	Cooke and Alcock's Reports, King's Bench (Ireland), 1 vol., 1833—1834 ...	Ir.
Cooke, Pr. Cas. ...	Cooke's Practice Reports, Common Pleas, 1 vol., 1706—1747	Eng.
Cooke, Pr. Reg. ...	Cooke's Practical Register of the Common Pleas, 1 vol., 1702—1742 ...	Eng.
Coop. G. ...	G. Cooper's Reports, Chancery, 1 vol., 1792—1815 ...	Eng.
Coop. Pr. Cas. ...	C. P. Cooper's Reports, Chancery Practice, 1 vol., 1837—1838	Eng.
Coop. temp. Brough. ...	C. P. Cooper's Cases temp. Brougham, Chancery, 1 vol., 1833—1834 ...	Eng.
Coop. temp. Cott. ...	C. P. Cooper's Cases temp. Cottenham, Chancery, 2 vols., 1846—1848 (and miscellaneous earlier cases) ...	Eng.
Cor. ...	Coryton's Reports ...	Ind.
Corb. & D. ...	Corbett and Daniell's Election Cases, 1 vol., 1819 ...	Eng.
Correspondances Jud. ...	Correspondances Judiciaires ...	Can.
Couper ...	Couper's Justiciary Reports (Scotland), 5 vols., 1808—1885 ...	Scot.
Cout. ...	Coutlees' Unreported Cases ...	Can.
Cout. Dig. ...	Coutlees' Digest ...	Can.
Cowp. ...	Cowper's Reports, King's Bench, 2 vols., 1774—1778 ...	Eng.
Cox & Atk. ...	Cox and Atkinson's Registration Appeal Cases, 1 vol., 1843—1846	Eng.
Cox, C. C. ...	E. W. Cox's Criminal Law Cases, 1843—(current) ...	Eng.
Cox, Eq. Cas. ...	S. C. Cox's Equity Cases, 2 vols., 1745—1797 ...	Eng.
Cox, M. & H. ...	Cox, Macrae, and Hertslet's County Courts Cases and Appeals, 1 vol., 1846—1852 ...	Eng.
Cr. & J. ...	Crompton and Jervis's Reports, Exchequer, 2 vols., 1830—1832	Eng.
Cr. & M. ...	Crompton and Meeson's Reports, Exchequer, 2 vols., 1832—1834	Eng.
Cr. & Ph. ...	Craig and Phillips' Reports, Chancery, 1 vol., 1840—1841 ...	Eng.
Cr. App. Rep. ...	Cohen's Criminal Appeal Reports, 1908—(current) ...	Eng.
Cr. M. & R. ...	Crompton, Meeson, and Roscoe's Reports, Exchequer, 2 vols., 1834—1835 ...	Eng.
Craw. & D. ...	Crawford and Dix's Circuit Cases (Ireland), 3 vols., 1838—1846	Ir.
Craw. & D. Abr. C. ...	Crawford and Dix's Abridged Cases (Ireland), 1 vol., 1837—1838	Ir.
Cress. Insolv. Cas. ...	Cresswell's Insolvency Cases, 1 vol., 1827—1829 ...	Eng.
Cripps' Church Cas. ...	Cripps' Church and Clergy Cases, 2 parts, 1847—1850 ...	Eng.
Cro. Car. ...	Croke's Reports temp. Charles I., King's Bench and Common Pleas, 1 vol., 1625—1641 ...	Eng.
Cro. Eliz. ...	Croke's Reports temp. Elizabeth, King's Bench and Common Pleas, 1 vol., 1582—1603 ...	Eng.
Cro. Jac. ...	Croke's Reports temp. James I., King's Bench and Common Pleas, 1 vol., 1603—1625 ...	Eng.
Cru. Dig. ...	Cruise's Digest of the Law of Real Property, 7 vols. ...	Eng.
Cunn. ...	Cunningham's Reports, King's Bench, fol., 1 vol., 1734—1735	Eng.
Curt. ...	Curteis' Ecclesiastical Reports, 3 vols., 1834—1844 ...	Eng.
D. ...	Duxbury's Reports of the High Court of the South African Republic ...	S. Af.
D. C. A. ...	Dorion's Queen's Bench Reports ...	Can.
D. L. R. ...	Dominion Law Reports ...	Can.

REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.

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Dal.	Dalison's Reports, Common Pleas, fol., 1 vol., 1546—1574	...	Eng.
Dalr.	Dalrymple's Decisions, Court of Session (Scotland), fol., 1 vol., 1698—1720	...	Scot.
Dan.	...	...	Daniell's Reports, Exchequer in Equity, 1 vol., 1817—1823	...	Eng.
Dan. & Ll.	...	...	Danson and Lloyd's Mercantile Cases, 1 vol., 1828—1829	...	Eng.
Dav. & Mer.	...	...	Davison and Merivale's Reports, Queen's Bench, 1 vol., 1843—1844	...	Eng.
Dav. Ir.	...	...	Davys' (or Davis' or Davy's) Reports (Ireland), 1 vol., 1604—1611	...	Ir.
Dav. Pat. Cas.	...	...	Davies' Patent Cases, 1 vol., 1785—1816	...	Eng.
Day	...	...	Day's Election Cases, 1 vol., 1892—1893	...	Eng.
Dea. & Sw.	...	...	Deane and Swabey's Ecclesiastical Reports, 1 vol., 1855—1857	...	Eng.
Deac.	...	...	Deacon's Reports, Bankruptcy, 4 vols., 1834—1840	...	Eng.
Deac. & Ch.	...	...	Deacon and Chitty's Reports, Bankruptcy, 4 vols., 1832—1835	...	Eng.
Dears. & B.	...	...	Dearsly and Bell's Crown Cases Reserved, 1 vol., 1856—1858	...	Eng.
Dears. C. C.	...	...	Dearsly's Crown Cases Reserved, 1 vol., 1852—1856	...	Eng.
Deas & And.	...	...	Deas and Anderson's Decisions (Scotland), 5 vols., 1829—1832	...	Scot.
De G.	...	...	De Gex's Reports, Bankruptcy, 2 vols., 1844—1848	...	Eng.
De G. & J.	...	...	De Gex and Jones's Reports, Chancery, 4 vols., 1857—1859	...	Eng.
De G. & Sm.	...	...	De Gex and Smale's Reports, Chancery, 5 vols., 1846—1852	...	Eng.
De G. F. & J.	...	...	De Gex, Fisher and Jones's Reports, Chancery, 4 vols., 1859—1862	...	Eng.
De G. J. & Sm.	...	...	De Gex, Jones, and Smith's Reports, Chancery, 4 vols., 1862—1865	...	Eng.
De G. M. & G.	...	...	De Gex, Macnaghten and Gordon's Reports, Chancery, 8 vols., 1851—1857	...	Eng.
Delane	...	...	Delane's Decisions, Revision Courts, 1 vol., 1832—1835	...	Eng.
Den.	...	...	Denison's Crown Cases Reserved, 2 vols., 1844—1852	...	Eng.
Dick.	...	...	Dickens' Reports, Chancery, 2 vols., 1559—1798	...	Eng.
Dirl.	...	...	Dirleton's Decisions, Court of Session (Scotland), fol., 1 vol., 1665—1677	...	Scot.
Dods.	...	...	Dodson's Reports, Admiralty, 2 vols., 1811—1822	...	Eng.
Donnelly	...	...	Donnelly's Reports, Chancery, 1 vol., 1836—1837	...	Eng.
Doug. El. Cas.	...	...	Douglas' Election Cases, 4 vols., 1774—1776	...	Eng.
Doug. K. B.	...	...	Douglas' Reports, King's Bench, 4 vols., 1778—1785	...	Eng.
Dow	...	...	Dow's Reports, House of Lords, 6 vols., 1812—1818	...	Eng.
Dow & Cl.	...	...	Dow and Clark's Reports, House of Lords, 2 vols., 1827—1832	...	Eng.
Dow. & L.	...	...	Dowling and Lowndes' Practice Reports, 7 vols., 1843—1849	...	Eng.
Dow. & Ry. K. B.	...	...	Dowling and Ryland's Reports, King's Bench, 9 vols., 1822—1827	...	Eng.
Dow. & Ry. M. C.	...	...	Dowling and Ryland's Magistrates' Cases, 4 vols., 1822—1827	...	Eng.
Dow. & Ry. N. P.	...	...	Dowling and Ryland's Reports, Nisi Prius, 1 part, 1822—1823	...	Eng.
Dowl.	...	...	Dowling's Practice Reports, 9 vols., 1830—1841	...	Eng.
Dowl. N. S.	...	...	Dowling's Practice Reports, New Series, 2 vols., 1841—1843	...	Eng.
Dr. & Wal.	...	...	Drury and Walsh's Reports, Chancery (Ireland), 2 vols., 1837—1841	...	Ir.
Dr. & War.	...	...	Drury and Warren's Reports, Chancery (Ireland), 4 vols., 1841—1843	...	Ir.
Dra.	...	...	Draper's King's Bench Reports	...	Can.
Drew.	...	...	Drewry's Reports, Chancery, 4 vols., 1852—1859	...	Eng.
Drew. & Sm.	...	...	Drewry and Smale's Reports, Chancery, 2 vols., 1859—1865	...	Eng.
Drinkwater	...	...	Drinkwater's Reports, Common Pleas, 1 vol., 1840—1841	...	Eng.
Drury temp. Nap.	...	...	Drury's Reports temp. Napier, Chancery (Ireland), 1 vol., 1858—1859	...	Ir.
Drury temp. Sug.	...	...	Drury's Reports temp. Sugden, Chancery (Ireland), 1 vol., 1841—1844	...	Ir.
Dugd. Orig.	...	...	Dugdale's Origines Juridicales	...	Eng.
Dunl. (Ct. of Sess.)	...	...	Dunlop, Court of Session Cases (Scotland), 2nd Series, 24 vols., 1838—1862	...	Scot.
Dunning	...	...	Dunning's Reports, King's Bench, 1 vol., 1753—1754	...	Eng.
Durie	...	...	Durie's Decisions, Court of Session (Scotland), fol., 1 vol., 1621—1642	...	Scot.
Dyer	...	...	Dyer's Reports, King's Bench, 3 vols., 1513—1581	...	Eng.
E. & A.	...	...	Upper Canada Error and Appeal	...	Can.
E. & B.	...	...	Ellis and Blackburn's Reports, Queen's Bench, 8 vols., 1852—1858	...	Eng.
E. & E.	...	...	Ellis and Ellis's Reports, Queen's Bench, 3 vols., 1858—1861	...	Eng.
E. B. & E.	...	...	Ellis, Blackburn, and Ellis's Reports, Queen's Bench, 1 vol., 1858—1860	...	Eng.
E. D. C.	...	...	Reports of the Eastern Districts Court (Cape) from 1880	...	S. Af
E. D. L.	...	...	South African Law Reports, Eastern Districts Local Division	...	S. Af
E. L. R.	...	...	Eastern Law Reporter	...	Can.
E. R. (or Eng. Rep.)	...	...	English Reports	...	Eng.
E. R.	...	...	Ontario Election Reports	...	Can.
Eag. & Y.	...	...	Eagle and Younge's Tithe Cases, 4 vols., 1204—1825	...	Eng.

East	...	...	East's Reports, King's Bench, 16 vols., 1800—1812	...	Eng.
East, P. C.	...	...	East's Pleas of the Crown	...	Eng.
Ecc. & Ad.	...	...	Spinks' Ecclesiastical and Admiralty Reports, 2 vols., 1853—1855	...	Eng.
Eden	...	...	Eden's Reports, Chancery, 2 vols., 1757—1766	...	Eng.
Edgar	...	...	Edgar's Decisions, Court of Session (Scotland), fol., 1724—1725	...	Scot.
Edw.	...	...	Edwards' Reports, Admiralty, 1 vol., 1808—1812	...	Eng.
Elchies	...	...	Elchies' Decisions, Court of Session (Scotland), 2 vols., 1733—1754	...	Scot.
Emden's B. C.	...	...	Emden's Building Contracts, Building Leases and Building Statutes	...	Eng.
Eng. Pr. Cas.	...	...	Roscoe's English Prize Cases, 2 vols., 1745—1858	...	Eng.
Eq. Cas. Abr.	...	...	Abridgment of Cases in Equity, fol., 2 vols., 1667—1744	...	Eng.
Eq. Rep.	...	...	Equity Reports, 3 vols., 1853—1855	...	Eng.
Esp.	...	...	Espinasse's Reports, Nisi Prius, 6 vols., 1793—1810	...	Eng.
Ex. D.	...	...	Law Reports, Exchequer Division, 5 vols., 1875—1880	...	Eng.
Exch.	...	...	Exchequer Reports (Welsby, Hurlstone, and Gordon), 11 vols., 1847—1856	...	Eng.
Exch. C. R.	...	...	Exchequer Court Reports	...	Can.
F. (Ct. of Sess.)	...	...	Fraser, Court of Session Cases (Scotland), 5th series, 1898—1906	...	Scot.
F.	...	...	Foord's Reports of the Supreme Court of the Cape of Good Hope, 1879—1880	...	S. Af.
F. & F.	...	...	Foster and Finlason's Reports, Nisi Prius, 4 vols., 1856—1867	...	Eng.
F. N. D.	...	...	Finnemore's Notes and Digest of Natal Cases, 1863—1867	...	S. Af.
Fac. Coll.	...	...	Faculty of Advocates, Collection of Decisions, Court of Session (Scotland), 38 vols., 1752—1841	...	Scot.
Falc.	...	...	Falconer's Decisions, Court of Session (Scotland), 2 vols., fol., 1744—1751	...	Scot.
Falc. & Fitz.	...	...	Falconer and Fitzherbert's Election Cases, 1 vol., 1835—1838	...	Eng.
Fenton	...	...	Fenton, Important Judgments	...	N.Z.
Ferg.	...	...	Ferguson's Consistorial Decisions (Scotland), 1 vol., 1811—1817	...	Scot.
Fitz. Nat. Brev.	...	...	Fitzherbert's Natura Brevium	...	Eng.
Fitz-G.	...	...	Fitz-Gibbons' Reports, King's Bench, fol., 1 vol., 1727—1731	...	Eng.
Fl. & K.	...	...	Flanagan and Kelly's Reports, Rolls Court (Ireland), 1 vol., 1840—1842	...	Ir.
Fonbl.	...	...	Fonblanque's Reports, Bankruptcy, 2 parts, 1849—1852	...	Eng.
For.	...	...	Forrest's Reports, Exchequer, 1 vol., 1800—1801	...	Eng.
Forb.	...	...	Forbes' Decisions, Court of Session (Scotland), fol., 1 vol., 1705—1713	...	Scot.
Fort. De Laud.	...	...	Fortesque, De Laudibus Legum Angliæ	...	Eng.
Fortes. Rep.	...	...	Fortescue's Reports, fol., 1 vol., 1692—1736	...	Eng.
Fost.	...	...	Foster's Crown Cases, 1 vol., 1708—1760	...	Eng.
Fount.	...	...	Fountainhall's Decisions, Court of Session (Scotland), fol., 2 vols., 1678—1712	...	Scot.
Fox & S. Ir.	...	...	M. C. Fox and T. B. C. Smith's Reports, King's Bench (Ireland), 2 vols., 1822—1825	...	Ir.
Fox & S. Reg.	...	...	J. S. Fox and C. L. Smith's Registration Cases, 1 vol., 1886—1895	...	Eng.
Fras.	...	...	Fraser (Simon), Election Cases, 2 vols., 1793	...	Eng.
Freem. Ch.	...	...	Freeman's Reports, Chancery, 1 vol., 1660—1706	...	Eng.
Freem. K. B.	...	...	Freeman's Reports, King's Bench and Common Pleas, 1 vol., 1670—1704	...	Eng.
G.	...	...	Gregorowski's Reports of the High Court of the Orange Free State from 1883	...	S. Af.
G. & R.	...	...	Nova Scotia Reports (Geldert & Russell)	...	Can.
G. I. Dig.	...	...	General Index Digest	...	Can.
G. W. D.	...	...	South African Law Reports, Griqualand West Local Division	...	S. Af.
G. W. L.	...	...	South African Law Reports, Griqualand West Local Division	...	S. Af.
Gal. & Dav.	...	...	Gale and Davison's Reports, Queen's Bench, 3 vols., 1841—1843	...	Eng.
Gale	...	...	Gale's Reports, Exchequer, 2 vols., 1835—1836	...	Eng.
Gaz. L. R.	...	...	New Zealand Gazette Law Reports	...	N.Z.
Geld. Dig.	...	...	Geldert's Digest	...	Can.
Gib. Cod.	...	...	Gibson's Codex Juris Ecclesiastici Anglicani	...	Eng.
Giff.	...	...	Giffard's Reports, Chancery, 5 vols., 1857—1865	...	Eng.
Gilb.	...	...	Gilbert's Cases in Law and Equity, 1 vol., 1713—1714	...	Eng.
Gilb. C. P.	...	...	Gilbert's History and Practice of the Court of Common Pleas	...	Eng.
Gilb. Ch.	...	...	Gilbert's Reports, Chancery and Exchequer, fol., 1 vol., 1706—1726	...	Eng.
Gilm. & F.	...	...	Gilmour and Falconer's Decisions, Court of Session (Scotland), 2 parts, Part I. (Gilmour) 1661—1666, Part II. (Falconer) 1681—1686	...	Scot.
Gl. & J.	...	...	Glyn and Jameson's Reports, Bankruptcy, 2 vols., 1810—1823	...	Eng.
Glanv.	...	...	Glanville, De Legibus et Consuetudinibus Regni Angliæ	...	Eng.
Glanv. El. Cas.	...	...	Glanville's Election Cases, 1 vol., 1623—1624	...	Eng.
Glascock	...	...	Glascock's Reports (Ireland), 1 vol., 1831—1832	...	Ir.

Godb.	...	...	Godbolt's Reports, King's Bench, Common Pleas, and Exchequer, 1 vol., 1574—1637	Eng.
Gouldsb.	...	...	Gouldsbrough's Reports, Queen's Bench and King's Bench, 1 vol., 1586—1601	Eng.
Gow	...	...	Gow's Reports, Nisi Prius, 1 vol., 1818—1820	Eng.
Gr.	...	...	Upper Canada Chancery (Grant)	Can.
Griffin's Patent Cases	...	...	Griffin's Patent Cases, 1884—1887	Eng.
Gwill.	...	...	Gwillim's Tithe Cases, 4 vols., 1224—1824	Eng.
H.	...	...	Hertzog's Reports of the High Court of the South African Republic, 1893	S. Af.
H. & C.	...	...	Hurlstone and Coltman's Reports, Exchequer, 4 vols., 1862—1866	Eng.
H. & N.	...	...	Hurlstone and Norman's Reports, Exchequer, 7 vols., 1856—1862	Eng.
H. & Tw.	...	...	Hall and Twells' Reports, Chancery, 2 vols., 1848—1850	Eng.
H. & W.	...	...	Hurlstone and Walmsley's Reports, Exchequer, 1 vol., 1840—1841	Eng.
H. B. R. (preceded by date)	...	...	Hansell's Reports of Bankruptcy and Companies' Winding up Cases, 3 vols., 1915—1917 (<i>e.g.</i> , [1915] H. B. R.)	Eng.
H. C.	...	...	Reports of the High Court of Griqualand West	S. Af.
H. E. C.	...	...	Hodgin's Election Reports	Can.
H. L. Cas.	...	...	Clark's Reports, House of Lords, 11 vols., 1847—1863	Eng.
Hag. Adm.	...	...	Haggard's Reports, Admiralty, 3 vols., 1822—1838	Eng.
Hag. Con.	...	...	Haggard's Consistorial Reports, 2 vols., 1789—1821	Eng.
Hag. Ecc.	...	...	Haggard's Ecclesiastical Reports, 4 vols., 1827—1833	Eng.
Hailes	...	...	Hailes's Decisions, Court of Session (Scotland), 2 vols., 1766—1791	Scot.
Hale, C. L.	...	...	Hale's Common Law	Eng.
Hale, P. C.	...	...	Hale's Pleas of the Crown, 2 vols.	Eng.
Han.	...	...	New Brunswick Reports (Hannay)	Can.
Har. & Ruth.	...	...	Harrison and Rutherford's Reports, Common Pleas, 1 vol., 1865—1866	Eng.
Har. & W.	...	...	Harrison and Wollaston's Reports, King's Bench and Bail Court, 2 vols., 1835—1836	Eng.
Harc.	...	...	Harcarse's Decisions, Court of Session (Scotland), fol., 1 vol., 1681—1691	Scot.
Hard.	...	...	Hardres' Reports, Exchequer, fol., 1 vol., 1655—1669	Eng.
Hare	...	...	Hare's Reports, Chancery, 11 vols., 1841—1853	Eng.
Hawk. P. C.	...	...	Hawkins's Pleas of the Crown, 2 vols.	Eng.
Hay	...	...	Hay's Reports	Ind.
Hay & Marr.	...	...	Hay & Marriott's Decisions, Admiralty, 1 vol., 1776—1779	Eng.
Hayes	...	...	Hayes's Reports, Exchequer (Ireland), 1 vol., 1830—1832	Ir.
Hayes & Jo.	...	...	Hayes and Jones's Reports, Exchequer (Ireland), 1 vol., 1832—1834	Ir.
Hem. & M.	...	...	Hemming and Miller's Reports, Chancery, 2 vols., 1862—1865	Eng.
Het.	...	...	Hetley's Reports, Common Pleas, fol., 1 vol., 1627—1631	Eng.
Hob.	...	...	Hobart's Reports, Common Pleas, fol., 1 vol., 1613—1625	Eng.
Hodg.	...	...	Hodges' Reports, Common Pleas, 3 vols., 1835—1837	Eng.
Hog.	...	...	Hogan's Reports, Rolls Court (Ireland), 2 vols., 1816—1834	Ir.
Holt, Adm.	...	...	W. Holt's Rule of the Road Cases, Admiralty, 1 vol., 1863—1867	Eng.
Holt, Eq.	...	...	W. Holt's Equity Reports, 2 vols., 1845	Eng.
Holt, K. B.	...	...	Sir John Holt's Reports, King's Bench, fol., 1 vol., 1688—1710	Eng.
Holt, N. P.	...	...	F. Holt's Reports, Nisi Prius, 1 vol., 1815—1817	Eng.
Home, Ct. of Sess.	...	...	Home's Decisions, Court of Session (Scotland), fol., 1 vol., 1735—1744	Scot.
Hong Kong L. R.	...	...	Hong Kong Reports	Hong Kong
Hop. & Colt.	...	...	Hopwood and Coltman's Registration Cases, 2 vols., 1868—1878	Eng.
Hop. & Ph.	...	...	Hopwood and Philbrick's Registration Cases, 1 vol., 1863—1867	Eng.
Horn & H.	...	...	Horn and Hurlstone's Reports, Exchequer, 2 vols., 1838—1839	Eng.
Hov. Supp.	...	...	Hovenden's Supplement to Vesey Jun.'s Reports, Chancery, 2 vols., 1753—1817	Eng.
How. C.	...	...	Howard's Chancery Practice	Ir.
How. C. S.	...	...	Howard's Supplement to Rules, etc., of the High Court of Chancery in Ireland	Ir.
How. E. E.	...	...	Howard's Equity Exchequer	Ir.
How. P. L.	...	...	Howard on the Popery Laws	Ir.
Hud. & B.	...	...	Hudson and Brooke's Reports, King's Bench and Exchequer (Ireland), 2 vols., 1827—1831	Ir.
Hudson's B. C.	...	...	Hudson on Building Contracts, 2 vols.	Eng.
Hume	...	...	Hume's Decisions, Court of Session (Scotland), 1 vol., 1781—1822	Scot.
Hut.	...	...	Hutton's Reports, Common Pleas, fol., 1 vol., 1617—1638	Eng.
Hy. Bl.	...	...	Henry Blackstone's Reports, Common Pleas, 2 vols., 1788—1796	Eng.
Hyde	...	...	Hyde's Reports	Ind.
I. C. L. R.	...	...	Irish Common Law Reports, 17 vols., 1849—1866	Ir.
I. Ch. R.	...	...	Irish Chancery Reports, 17 vols., 1850—1867	Ir.
I. Eq. R.	...	...	Irish Equity Reports, 13 vols., 1838—1851	Ir.

xxii REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.

I. L. R. ...	...	Irish Law Reports, 13 vols., 1838—1851	...	...	Ir.
I. L. R. (Vol.) All.	...	Indian Law Reports, Allahabad	...	...	Ind.
I. L. R. (Vol.) Bom.	...	Indian Law Reports, Bombay	...	...	Ind.
I. L. R. (Vol.) Calc.	...	Indian Law Reports, Calcutta	...	...	Ind.
I. L. R. (Vol.) Lah.	...	Indian Law Reports, Lahore	...	...	Ind.
I. L. R. (Vol.) Mad.	...	Indian Law Reports, Madras	...	...	Ind.
I. L. R. (Vol.) Pat.	...	Indian Law Reports, Patna	...	...	Ind.
I. L. R. (Vol.) Ran.	...	Indian Law Reports, Rangoon	...	...	Ind.
I. L. T. ...	...	Irish Law Times, 1867—(current)	...	...	Ir.
I. L. T. Jo.	...	Irish Law Times Journal, 1867—(current)	...	...	Ir.
I. R. (preceded by date)	...	Irish Reports, since 1893 (<i>e.g.</i> , [1894] 1 I. R.)	...	...	Ir.
I. R. (Vol.) C. L.	...	Irish Reports, Common Law, 11 vols., 1866—1877	...	...	Ir.
I. R. Eq.	...	Irish Reports, Equity, 11 vols., 1866—1877	...	...	Ir.
I. R., R. & L.	...	Irish Reports, Registry Appeals in the Court of Exchequer Chamber and Appeals in the Court for Land Cases Reserved, 1 vol., 1868—1876	...	...	Ir.
Ind. Awards	...	Industrial Awards Recommendations	...	...	N.Z.
Ind. Jur. N. S.	...	Indian Jurist, New Series	...	...	Ind.
Ind. Jur. O. S.	...	Indian Jurist, Old Series	...	...	Ind.
Ir. Cir. Rep.	...	Reports of Irish Circuit Cases, 1 vol., 1841—1843	...	...	Ir.
Ir. Jur.	...	Irish Jurist, 18 vols., 1849—1866	...	...	Ir.
Ir. L. Rec. 1st ser.	...	Law Recorder (Ireland), 1st series, 4 vols., 1827—1831	...	...	Ir.
Ir. L. Rec. N. S.	...	Law Recorder (Ireland), New Series, 6 vols., 1833—1838	...	...	Ir.
Irv.	...	Irvine's Justiciary Reports (Scotland), 5 vols., 1852—1867	...	...	Scot.
J. Bridg.	...	Sir John Bridgman's Reports, Common Pleas, fol., 1 vol., 1613—1621	...	...	Eng.
J. D. R.	...	Juta's Daily Reporter, reporting Cases in the Cape Provincial Division	...	...	S. Af.
J. P.	...	Justice of the Peace, 1837—(current)	...	...	Eng.
J. P. Jo.	...	Justice of the Peace (Weekly Notes of Cases)	...	...	Eng.
J. R.	...	Jurist Reports	...	...	N.Z.
J. R. N. S.	...	Jurist Reports, New Series	...	...	N.Z.
J. Shaw, Just.	...	J. Shaw's Justiciary Reports (Scotland), 1 vol., 1848—1852	...	...	Scot.
Jac.	...	Jacob's Reports, Chancery, 1 vol., 1821—1823	...	...	Eng.
Jac. & W.	...	Jacob and Walker's Reports, Chancery, 2 vols., 1819—1821	...	...	Eng.
James	...	Nova Scotia Reports (James)	...	...	Can.
Jebb & B.	...	Jebb and Bourke's Reports, Queen's Bench (Ireland), 1 vol., 1841—1842	...	...	Ir.
Jebb & S.	...	Jebb and Symes' Reports, Queen's Bench (Ireland), 2 vols., 1838—1841	...	...	Ir.
Jebb, C. C.	...	Jebb's Crown Cases Reserved (Ireland), 1 vol., 1822—1840	...	...	Ir.
Jebb, Cr. & Pr. Cas.	...	Jebb's Crown and Presentment Cases	...	...	Ir.
Jenk.	...	Jenkins' Reports, 1 vol., 1220—1623	...	...	Eng.
Jo. & Car.	...	Jones and Carey's Reports, Exchequer (Ireland), 1 vol., 1838—1839	...	...	Eng.
Jo. & Lat.	...	Jones and La Touche's Reports, Chancery (Ireland), 3 vols., 1844—1846	...	...	Ir.
Jo. Ex. Ir.	...	T. Jones' Reports, Exchequer (Ireland), 2 vols., 1834—1838	...	...	Ir.
John.	...	Johnson's Reports, Chancery, 1 vol., 1858—1860	...	...	Eng.
John. & H.	...	Johnson and Hemming's Reports, Chancery, 2 vols., 1859—1862	...	...	Eng.
Jur.	...	Jurist Reports, 18 vols., 1837—1854	...	...	Eng.
Jur. N. S.	...	Jurist Reports, New Series, 12 vols., 1855—1867	...	...	Eng.
K.	...	Kotze's Reports of the High Court of the Transvaal Province, 1877—1881	...	...	S. Af.
K. & G.	...	Keane and Grant's Registration Cases, 1 vol., 1854—1862	...	...	Eng.
K. & J.	...	Kay and Johnson's Reports, Chancery, 4 vols., 1854—1858	...	...	Eng.
K. B. (preceded by date)	...	Law Reports, King's Bench Division, since 1900 (<i>e.g.</i> , [1901] 2 K. B.)	...	...	Eng.
Kames, Dict. Dec.	...	Kames, Dictionary of Decisions, Court of Session (Scotland), fol., 2 vols., 1540—1741	...	...	Scot.
Kames, Rem. Dec.	...	Kames, Remarkable Decisions, Court of Session (Scotland), 2 vols., 1716—1752	...	...	Scot.
Kames, Sel. Dec.	...	Kames, Select Decisions, Court of Session (Scotland), 1 vol., 1752—1768	...	...	Scot.
Kay	...	Kay's Reports, Chancery, 1 vol., 1853—1854	...	...	Eng.
Keb.	...	Keble's Reports, fol., 3 vols., 1661—1677	...	...	Eng.
Keen	...	Keen's Reports, Rolls Court, 2 vols., 1836—1838	...	...	Eng.
Keil.	...	Keilwey's Reports, King's Bench, fol., 1 vol., 1327—1578	...	...	Eng.
Kel.	...	Sir John Kelyng's Reports, Crown Cases, fol., 1 vol., 1662—1707	...	...	Eng.
Kel. W.	...	W. Kelynge's Reports, fol., 1 vol., Chancery, 1730—1732; King's Bench, fol., 1731—1734	...	...	Eng.
Keny.	...	Kenyon's Notes of Cases, King's Bench, 2 vols., 1753—1759	...	...	Eng.
Keny. Ch.	...	Chancery Cases in Vol. II. of Kenyon's Notes of Cases, 1753—1754	...	...	Eng.
Kerr	...	New Brunswick Reports (Kerr)	...	...	Can.

Kilkerran	...	Kilkerran's Decisions, Court of Session (Scotland), fol., 1 vol., 1738—1752	Scot.
Kn. & Omb.	...	Knapp and Ombler's Election Cases, 1 vol., 1834—1835	Eng.
Knapp	...	Knapp's Reports, Privy Council, 3 vols., 1829—1836	Eng.
Knox	...	Knox's Reports	Aus.
Konst. & W. Rat. App.	...	Konstam and Ward's Reports of Rating Appeals, 1 vol., 1909—1912	Eng.
Konst. Rat. App.	...	Konstam's Reports of Rating Appeals, 2 vols., 1904—1908	Eng.
L. & G. temp. Plunk.	...	Lloyd and Goold's Reports temp. Plunkett, Chancery (Ireland), 1 vol., 1834—1839	Ir.
L. & G. temp. Sugd.	...	Lloyd and Goold's Reports temp. Sugden, Chancery (Ireland), 1 vol., 1835	Ir.
L. & Welsb.	...	Lloyd and Welsby's Commercial and Mercantile Cases, 1 vol., 1829—1830	Eng.
L. C. & M. Gaz.	...	Local Courts and Municipal Gazette	Can.
L. C. J.	...	Lower Canada Jurist	Can.
L. C. L. J.	...	Lower Canada Law Journal	Can.
L. C. R.	...	Lower Canada Reports	Can.
L. G. R.	...	Local Government Reports, 1902—(current)	Eng.
L. J. Adm.	...	Law Journal, Admiralty, 1865—1875	Eng.
L. J. Bcy.	...	Law Journal, Bankruptcy, 1832—1880	Eng.
L. J. C. C.	...	Law Journal (County Courts Reporter), 1912—(current)	Eng.
L. J. C. P.	...	Law Journal, Common Pleas, 1831—1875	Eng.
L. J. Ch.	...	Law Journal, Chancery, 1831—(current)	Eng.
L. J. Eccl.	...	Law Journal, Ecclesiastical Cases, 1866—1875	Eng.
L. J. Ex.	...	Law Journal, Exchequer, 1831—1875	Eng.
L. J. Ex. Eq.	...	Law Journal, Exchequer in Equity, 1835—1841	Eng.
L. J. K. B. or Q. B.	...	Law Journal, King's Bench or Queen's Bench, 1831—(current)	Eng.
L. J. M. C.	...	Law Journal, Magistrates' Cases, 1831—1896	Eng.
L. J. N. C.	...	Law Journal, Notes of Cases, 1866—1892 (from 1893, see Law Journal)	Eng.
L. J. O. S.	...	Law Journal, Old Series, 10 vols., 1822—1831	Eng.
L. J. P.	...	Law Journal, Probate, Divorce and Admiralty, 1875—(current)	Eng.
L. J. P. & M.	...	Law Journal, Probate and Matrimonial Cases, 1858—1859, 1866—1875	Eng.
L. J. P. C.	...	Law Journal, Privy Council, 1865—(current)	Eng.
L. J. P. M. & A.	...	Law Journal, Probate, Matrimonial and Admiralty, 1860—1865	Eng.
L. Jo.	...	Law Journal Newspaper, 1866—(current)	Eng.
L. L. R.	...	Leader Law Reports	S. Af.
L. M. & P.	...	Lowndes, Maxwell, and Pollock's Reports, Bail Court and Practice, 2 vols., 1850—1851	Eng.
L. N.	...	Legal News	Can.
L. R. A. & E.	...	Law Reports, Admiralty and Ecclesiastical Cases, 4 vols., 1865—1875	Eng.
L. R. C. C. R.	...	Law Reports, Crown Cases Reserved, 2 vols., 1865—1875	Eng.
L. R. C. P.	...	Law Reports, Common Pleas, 10 vols., 1865—1875	Eng.
L. R. Eq.	...	Law Reports, Equity Cases, 20 vols., 1865—1875	Eng.
L. R. Exch.	...	Law Reports, Exchequer, 10 vols., 1865—1875	Eng.
L. R. H. L.	...	Law Reports, English and Irish Appeals and Peerage Claims, House of Lords, 7 vols., 1866—1875	Eng.
L. R. Ind. App.	...	Law Reports, Indian Appeals, Privy Council, 1873—(current)	Eng.
L. R. Ind. App. Supp. Vol.	...	Law Reports, India Appeals Privy Council, Supplementary Volume, 1872—1873	Eng.
L. R. Ir.	...	Law Reports (Ireland), Chancery and Common Law, 32 vols., 1877—1893	Ir.
L. R. P. & D.	...	Law Reports, Probate and Divorce, 3 vols., 1865—1875	Eng.
L. R. P. C.	...	Law Reports, Privy Council, 6 vols., 1865—1875	Eng.
L. R. Q. B.	...	Law Reports, Queen's Bench, 10 vols., 1865—1875	Eng.
L. R. Q. B.	...	Quebec Reports, Queen's Bench	Can.
L. R. Sc. & Div.	...	Law Reports, Scotch and Divorce Appeals, House of Lords 2 vols., 1866—1875	Eng.
L. T.	...	Law Times Reports, 1859—(current)	Eng.
L. T. Jo.	...	Law Times Newspaper, 1843—(current)	Eng.
L. T. O. S.	...	Law Times Reports, Old Series, 34 vols., 1843—1860	Eng.
L. Th.	...	La Themis	Can.
Lane	...	Lane's Reports, Exchequer, fol., 1 vol., 1605—1611	Eng.
Lat.	...	Latch's Reports, King's Bench, fol., 1 vol., 1625—1628	Eng.
Laws. Reg. Cas.	...	Lawson's Registration Cases, 1895—(current)	Eng.
Ld. Raym.	...	Lord Raymond's Reports, King's Bench and Common Pleas, 3 vols., 1694—1732	Eng.
Le. & Ca.	...	Leigh and Cave's Crown Cases Reserved, 1 vol., 1861—1865	Eng.
Leach	...	Leach's Crown Cases, 2 vols., 1730—1814	Eng.
Lee	...	Sir G. Lee's Ecclesiastical Judgments, 2 vols., 1752—1758	Eng.
Lee temp. Hard.	...	T. Lee's Cases temp. Hardwicke, King's Bench, 1 vol., 1733—1738	Eng.

xxiv REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.

Leg. Rep.	...	...	Legal Reporter	...	...	...	...	...	Ir.
Legge	...	...	Legge's Reports	...	...	...	...	...	Aus.
Leon.	...	...	Leonard's Reports, King's Bench, Common Pleas and Exchequer, fol., 4 parts, 1552—1615	...	...	...	...	...	Eng.
Lev.	...	...	Levinz's Reports, King's Bench and Common Pleas, fol., 3 vols., 1660—1696	...	...	...	...	...	Eng.
Lew. C. C.	...	...	Lewin's Crown Cases on the Northern Circuit, 2 vols., 1822—1838	...	...	...	...	...	Eng.
Ley	...	...	Ley's Reports, King's Bench, fol., 1 vol., 1608—1629	...	...	...	...	...	Eng.
Lib. Ass.	...	...	Liber Assisarum, Year Books, 1—51 Edw. III.	...	...	...	...	...	Eng.
Lilly	...	...	Lilly's Reports and Pleadings of Cases in Assize, fol., 1 vol.	...	...	...	...	...	Eng.
Litt.	...	...	Littleton's Reports, Common Pleas, fol., 1 vol., 1627—1631	...	...	...	...	...	Eng.
Lloyd, L. R.	...	...	Lloyd's List Law Reports, 1919—(current)	...	...	...	...	...	Eng.
Lloyd, Pr. Cas.	...	...	Lloyd's Reports of Prize Cases, 5 vols., 1914—1918	...	...	...	...	...	Eng.
Lofft	...	...	Lofft's Reports, King's Bench, fol., 1 vol., 1772—1774	...	...	...	...	...	Eng.
Long. & T.	...	...	Longfield and Townsend's Reports, Exchequer (Ireland), 1 vol., 1841—1842	...	...	...	...	...	Ir.
Lords Journals	...	...	Journals of the House of Lords	...	...	...	...	...	Eng.
Lud. E. C.	...	...	Luder's Election Cases, 3 vols., 1784—1787	...	...	...	...	...	Eng.
Lumley, P. L. C.	...	...	Lumley's Poor Law Cases, 2 vols., 1834—1842	...	...	...	...	...	Eng.
Lush.	...	...	Lushington's Reports, Admiralty, 1 vol., 1859—1862	...	...	...	...	...	Eng.
Lut.	...	...	Sir E. Lutwyche's Entries and Reports, Common Pleas, 2 vols., 1682—1704	...	...	...	...	...	Eng.
Lut. Reg. Cas.	...	...	A. J. Lutwyche's Registration Cases, 2 vols., 1843—1853	...	...	...	...	...	Eng.
Lynd.	...	...	Lyndwood, Provinciale, fol., 1 vol.	...	...	...	...	...	Eng.
M.	...	...	Menzie's Reports of the Supreme Court of the Cape of Good Hope, 1828—1850	...	...	...	...	...	S. Af.
M. & S.	...	...	Maule and Selwyn's Reports, King's Bench, 6 vols., 1813—1817	...	...	...	...	...	Eng.
M. & W.	...	...	Meeson and Welsby's Reports, Exchequer, 16 vols., 1836—1847	...	...	...	...	...	Eng.
M. C. R.	...	...	Montreal Condensed Reports	...	...	...	...	...	Can.
M. H. C. R.	...	...	Madras High Court Reports	...	...	...	...	...	Ind.
M. L. R. (Vol.) K. B. or Q. B.	...	...	Montreal Law Reports, King's Bench or Queen's Bench	...	...	...	...	...	Can.
M. L. R. (Vol.) S. C.	...	...	Montreal Law Reports, Superior Court	...	...	...	...	...	Can.
M. M. Cas.	...	...	Martin's Reports of Mining Cases	...	...	...	...	...	Can.
Mac.	...	...	Macassey's New Zealand Reports	...	...	...	...	...	N.Z.
Mac. & G.	...	...	Macnaghten and Gordon's Reports, Chancery, 3 vols., 1849—1852	...	...	...	...	...	Eng.
Mac. & H.	...	...	Macrae and Hertslet's Insolvency Cases, 1 vol., 1847—1852	...	...	...	...	...	Eng.
M'Cle.	...	...	M'Clelland's Reports, Exchequer, 1 vol., 1824	...	...	...	...	...	Eng.
M'Cle. & Yo.	...	...	M'Clelland and Younge's Reports, Exchequer, 1 vol., 1824—1825	...	...	...	...	...	Eng.
Macfarlane	...	...	Macfarlane's Jury Trials, Court of Session (Scotland), 3 parts, 1838—1839	...	...	...	...	...	Scot.
Macl. & Rob.	...	...	Maclean and Robinson's Scotch Appeals (House of Lords), 1 vol., 1839	...	...	...	...	...	Scot.
Macph. (Ct. of Sess.)	...	...	Macpherson, Court of Session (Scotland), 3rd series, 11 vols., 1862—1873	...	...	...	...	...	Scot.
Macq.	...	...	Macqueen's Scotch Appeals, House of Lords, 4 vols., 1849—1865	...	...	...	...	...	Scot.
Macr.	...	...	Macrory's Patent Cases, 2 parts, 1847—1856	...	...	...	...	...	Eng.
Mad.	...	...	Madras High Court Reports	...	...	...	...	...	Ind.
Madd.	...	...	Maddock's Reports, Chancery, 6 vols., 1815—1821	...	...	...	...	...	Eng.
Madd. & G.	...	...	Maddock and Geldart's Reports, Chancery, 1 vol., 1819—1822 (Vol. VI. of Madd.)	...	...	...	...	...	Eng.
Madox	...	...	Madox's Formulæ Anglicanum	...	...	...	...	...	Eng.
Madox, Exch.	...	...	Madox's History and Antiquities of the Exchequer, 2 vols.	...	...	...	...	...	Eng.
Mag.	...	...	Magistrate and Municipal and Parochial Lawyer, London, 5 vols., 1848—1852	...	...	...	...	...	Eng.
Man. & G.	...	...	Manning and Granger's Reports, Common Pleas, 7 vols., 1840—1845	...	...	...	...	...	Eng.
Man. & Ry. K. B.	...	...	Manning and Ryland's Reports, King's Bench, 5 vols., 1827—1830	...	...	...	...	...	Eng.
Man. & Ry. M. C.	...	...	Manning and Ryland's Magistrates' Cases, 3 vols., 1827—1830	...	...	...	...	...	Eng.
Man. L. J.	...	...	Manitoba Law Journal	...	...	...	...	...	Can.
Man. L. R.	...	...	Manitoba Law Reports	...	...	...	...	...	Can.
Man. R. temp. Wood	...	...	Manitoba Reports temp. Wood	...	...	...	...	...	Can.
Mans.	...	...	Manson's Bankruptcy and Company Cases, 21 vols., 1893—1914	...	...	...	...	...	Eng.
Mar. L. C.	...	...	Maritime Law Reports (Crockford), 3 vols., 1860—1871	...	...	...	...	...	Eng.
March	...	...	March's Reports, King's Bench and Common Pleas, 1 vol., 1639—1642	...	...	...	...	...	Eng.
Marr.	...	...	Hay & Marriott's Decisions, Admiralty, 1 vol., 1776—1779	...	...	...	...	...	Eng.
Marsh.	...	...	Marshall's Reports, Common Pleas, 2 vols., 1813—1816	...	...	...	...	...	Eng.
Marsh.	...	...	Marshall's Reports	...	...	...	...	...	Ind.
Mayn.	...	...	Maynard's Reports, Exchequer Memoranda of Edw. I. and Year Books of Edw. II., Year Books, Part I., 1273—1326	...	...	...	...	...	Eng.
Meg.	...	...	Megone's Companies Acts Cases, 2 vols., 1889—1891	...	...	...	...	...	Eng.

Men.	...	...	Menzie's Reports of the Supreme Court of the Cape of Good Hope, 1828—1850	...	...	...	S. Af.
Mer.	...	...	Merivale's Reports, Chancery, 3 vols., 1815—1817	...	...	...	Eng.
Milw.	...	...	Milward's Ecclesiastical Reports (Ireland), 1 vol., 1819—1843	...	...	...	Ir.
Mod. Rep.	...	...	Modern Reports, 12 vols., 1669—1755	...	...	...	Eng.
Mol.	...	...	Molloy's Report's, Chancery (Ireland), 3 vols., 1808—1831	...	...	...	Ir.
Mont.	...	...	Montagu's Reports, Bankruptcy, 1 vol., 1829—1832	...	...	...	Eng.
Mont. & A.	...	...	Montagu and Ayrton's Reports, Bankruptcy, 3 vols., 1832—1838	...	...	...	Eng.
Mont. & B.	...	...	Montagu and Bligh's Reports, Bankruptcy, 1 vol., 1832—1833	...	...	...	Eng.
Mont. & Ch.	...	...	Montagu and Chitty's Reports, Bankruptcy, 1 vol., 1838—1840	...	...	...	Eng.
Mont. & M.	...	...	Montagu and Macarthur's Reports, Bankruptcy, 1 vol., 1826—1830	...	...	...	Eng.
Mont. D. & De G.	...	...	Montagu, Deacon, and De Gex's Reports, Bankruptcy, 3 vols., 1840—1844	...	...	...	Eng.
Moo. & P.	...	...	Moore and Payne's Reports, Common Pleas, 5 vols., 1827—1831	...	...	...	Eng.
Moo. & S.	...	...	Moore and Scott's Reports, Common Pleas, 4 vols., 1831—1834	...	...	...	Eng.
Moo. Ind. App.	...	...	Moore's Indian Appeal Cases, Privy Council, 14 vols., 1836—1872	...	...	...	Eng.
Moo. P. C. C.	...	...	Moore's Privy Council Cases, 15 vols., 1836—1863	...	...	...	Eng.
Moo. P. C. C. N. S.	...	...	Moore's Privy Council Cases, New Series, 9 vols., 1862—1873	...	...	...	Eng.
Mood. & M.	...	...	Moody and Malkin's Reports, Nisi Prius, 1 vol., 1826—1830	...	...	...	Eng.
Mood. & R.	...	...	Moody and Robinson's Reports, Nisi Prius, 2 vols., 1830—1844	...	...	...	Eng.
Mood. C. C.	...	...	Moody's Crown Cases Reserved, 2 vols., 1824—1844	...	...	...	Eng.
Moore, C. P.	...	...	J. B. Moore's Reports, Common Pleas, 12 vols., 1817—1827	...	...	...	Eng.
Moore, K. B.	...	...	Sir F. Moore's Reports, King's Bench, fol., 1 vol., 1485—1620	...	...	...	Eng.
Mor. Dict.	...	...	Morison's Dictionary of Decisions, Court of Session (Scotland), 43 vols., 1532—1808	...	...	...	Scot.
Morr.	...	...	Morrell's Reports, Bankruptcy, 10 vols., 1884—1893	...	...	...	Eng.
Mos.	...	...	Moseley's Reports, Chancery, fol., 1 vol., 1726—1730	...	...	...	Eng.
Mun. Rep.	...	...	Municipal Reports	...	...	...	Can.
Murd. Epit.	...	...	Murdoch's Epitome	...	...	...	Can.
Murp. & H.	...	...	Murphy and Hurlstone's Reports, Exchequer, 1 vol., 1837	...	...	...	Eng.
Murr.	...	...	Murray's Reports, Jury Court (Scotland), 5 vols., 1816—1830	...	...	...	Scot.
My. & Cr.	...	...	Mylne and Craig's Reports, Chancery, 5 vols., 1835—1841	...	...	...	Eng.
My. & K.	...	...	Mylne and Keen's Reports, Chancery, 3 vols., 1832—1835	...	...	...	Eng.
N. (preceded by date)	...	...	Northern Ireland Law Reports, 1925—(current) (<i>e.g.</i> , [1925] N.)	...	...	...	Ir.
N. A. C.	...	...	Native Appeal Cases	...	...	...	S. Af.
N. & S.	...	...	Nichols and Stop's Reports (Tasmania)	...	...	...	Tasmania
N. B. Dig.	...	...	New Brunswick Digest (Stevens)	...	...	...	Can.
N. B. Eq. Rep.	...	...	New Brunswick Equity Reports	...	...	...	Can.
N. B. R.	...	...	New Brunswick Reports	...	...	...	Can.
N. B. R. (All.)	...	...	New Brunswick Reports (Allen)	...	...	...	Can.
N. B. R. (Ber.)	...	...	New Brunswick Reports (Berton)	...	...	...	Can.
N. B. R. (Carl.)	...	...	New Brunswick Reports (Carleton)	...	...	...	Can.
N. B. R. (Chip.)	...	...	New Brunswick Reports (Chipman)	...	...	...	Can.
N. B. R. (Han.)	...	...	New Brunswick Reports (Hannay)	...	...	...	Can.
N. B. R. (Kerr)	...	...	New Brunswick Reports (Kerr)	...	...	...	Can.
N. B. R. (P. & B.)	...	...	New Brunswick Reports (Pugsley and Burbidge)	...	...	...	Can.
N. B. R. (P. & T.)	...	...	New Brunswick Reports (Pugsley and Trueman)	...	...	...	Can.
N. B. R. (Pug.)	...	...	New Brunswick Reports (Pugsley)	...	...	...	Can.
N. B. R. (Tru.)	...	...	New Brunswick Reports (Trueman)	...	...	...	Can.
N. L. R.	...	...	Natal Law Reports	...	...	...	S. Af.
N. P. D.	...	...	South African Law Reports, Natal Provincial Division	...	...	...	S. Af.
N. S. R.	...	...	Nova Scotia Reports	...	...	...	Can.
N. S. R. (Coch.)	...	...	Nova Scotia Reports (Cochran)	...	...	...	Can.
N. S. R. (G. & O.)	...	...	Nova Scotia Reports (Geldert and Oxley)	...	...	...	Can.
N. S. R. (G. & R.)	...	...	Nova Scotia Reports (Geldert and Russell)	...	...	...	Can.
N. S. R. (James)	...	...	Nova Scotia Reports (James)	...	...	...	Can.
N. S. R. (Old.)	...	...	Nova Scotia Reports (Oldrights)	...	...	...	Can.
N. S. R. (R. & C.)	...	...	Nova Scotia Reports (Russell and Chesley)	...	...	...	Can.
N. S. R. (R. & G.)	...	...	Nova Scotia Reports (Russell and Geldert)	...	...	...	Can.
N. S. R. (Thom.)	...	...	Nova Scotia Reports (Thomson)	...	...	...	Can.
N. S. W. Adm. or Ad.	...	...	New South Wales Reports, Admiralty	...	...	...	Aus.
N. S. W. B.	...	...	New South Wales Reports, Bankruptcy	...	...	...	Aus.
N. S. W. Bkpty. Cas.	...	...	New South Wales Bankruptcy Cases	...	...	...	Aus.
N. S. W. Eq.	...	...	New South Wales Reports, Equity	...	...	...	Aus.
N. S. W. Ind. Arbtrn. Cas.	...	...	New South Wales Industrial Arbitration Cases	...	...	...	Aus.
N. S. W. L. R.	...	...	New South Wales Law Reports	...	...	...	Aus.
N. S. W. Land App. Cts.	...	...	New South Wales Land Appeal Courts	...	...	...	Aus.
N. S. W. S. C. R. (Eq.)	...	...	New South Wales Supreme Court Reports (Equity)	...	...	...	Aus.
N. S. W. S. C. R. (L.)	...	...	New South Wales Supreme Court Reports (Law)	...	...	...	Aus.
N. S. W. S. C. R. N. S.	...	...	New South Wales Supreme Court Reports, New Series	...	...	...	Aus.
N. S. W. W. N.	...	...	New South Wales Weekly Notes	...	...	...	Aus.
N. W.	...	...	North-Western Provinces High Court Reports	...	...	...	Ind.
N. W. T. R.	...	...	North-West Territories Reports	...	...	...	Can.
N. Z. Jur.	...	...	New Zealand Jurist	...	...	...	N.Z.
N. Z. Jur. Mining Law	...	...	New Zealand Jurist Mining Law	...	...	...	N.Z.

xxvi REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.

N. Z. Jur. N. S. ...	...	New Zealand Jurist, New Series	...	...	...	N.Z.
N. Z. L. R. ...	...	New Zealand Law Reports, 1883—(current)	...	...	...	N.Z.
N. Z. L. R. C. A. ...	...	New Zealand Law Reports, Court of Appeal, 5 vols., 1883—1887	...	...	...	N.Z.
Nels. ...	...	Nelson's Reports, Chancery, 1 vol., 1625—1693	...	...	...	Eng.
Nev. & M. K. B. ...	...	Nevile and Manning's Reports, King's Bench, 6 vols., 1832—1836	...	...	...	Eng.
Nev. & M. M. C. ...	...	Nevile and Manning's Magistrates' Cases, 3 vols., 1832—1836	...	...	...	Eng.
Nev. & P. K. B. ...	...	Nevile and Perry's Reports, King's Bench, 3 vols., 1836—1838	...	...	...	Eng.
Nev. & P. M. C. ...	...	Nevile and Perry's Magistrates' Cases, 1 vol., 1836—1837	...	...	...	Eng.
New Mag. Cas. ...	...	New Magistrates' Cases (Bittleston, Wise and Parnell), 5 vols., 1844—1850	...	...	...	Eng.
New Pract. Cas. ...	...	New Practice Cases (Bittleston and others), 3 vols., 1844—1848	...	...	...	Eng.
New Rep. ...	...	New Reports, 6 vols., 1862—1865	...	...	...	Eng.
New Sess. Cas. ...	...	New Sessions Magistrates' Cases (Carrow, Hamerton, Allen, etc.), 4 vols., 1844—1851	...	...	...	Eng.
Nfld. L. R. ...	...	Newfoundland Reports	...	...	...	Nfld.
Nolan ...	...	Nolan's Magistrates' Cases, 1 vol., 1791—1793	...	...	...	Eng.
Notes of Cases ...	...	Notes of Cases in the Ecclesiastical and Maritime Courts, 7 vols., 1841—1850	...	...	...	Eng.
Noy ...	...	Noy's Reports, King's Bench, fol., 1 vol., 1558—1649	...	...	...	Eng.
O. B. & F. ...	...	Ollivier Bell and Fitzgerald's Reports	...	...	...	N.Z.
O. B. S. P. ...	...	Old Bailey Session Papers	...	...	...	Eng.
O. Bridg. ...	...	Sir Orlando Bridgman's Reports, Common Pleas, 1 vol., 1660—1666	...	...	...	Eng.
O. F. S. ...	...	Reports of the High Court of the Orange Free State, 1879—1883	...	...	...	S. Af.
O. L. R. ...	...	Ontario Law Reports	...	...	...	Can.
O'M. & H. ...	...	O'Malley and Hardcastle's Election Cases, 1869—(current)	...	...	...	Eng.
O. P. D. ...	...	South African Law Reports, Orange Free State Provincial Division	...	...	...	S. Af.
O. R. ...	...	Ontario Reports	...	...	...	Can.
O. R. ...	...	Official Reports of the South African Republic, 1894—1899	...	...	...	S. Af.
O. R. C. ...	...	Reports of the High Court of the Orange River Colony	...	...	...	S. Af.
O. S. ...	...	Upper Canada Queen's Bench, Old Series	...	...	...	Can.
O. W. N. ...	...	Ontario Weekly Notes	...	...	...	Can.
O. W. R. ...	...	Ontario Weekly Reporter	...	...	...	Can.
Old. ...	...	Nova Scotia Reports (Oldrights)	...	...	...	Can.
Ont. Dig. ...	...	Digest of Ontario Case Law, 4 vols., 1823—1900	...	...	...	Can.
Owen ...	...	Owen's Reports, King's Bench and Common Pleas, fol., 1 vol., 1557—1614	...	...	...	Eng.
P. (preceded by date) ...	...	Law Reports, Probate, Divorce, and Admiralty Division, since 1890 (<i>e.g.</i> , [1891] P.)	...	...	...	Eng.
P. & B. ...	...	New Brunswick Reports (Pugsley and Burbidge)	...	...	...	Can.
P. & T. ...	...	New Brunswick Law Reports (Pugsley and Trueman)	...	...	...	Can.
P. Cas. ...	...	Prize Cases Heard and Decided in the Prize Court During the Great War, 3 vols., 1914—1922	...	...	...	Eng. & Col.
P. D. ...	...	Law Reports, Probate, Divorce, and Admiralty Division, 15 vols., 1875—1890	...	...	...	Eng.
P. E. I. ...	...	Prince Edward Island Reports	...	...	...	Can.
P. R. ...	...	Ontario Practice	...	...	...	Can.
P. Wms. ...	...	Peere Williams' Reports, Chancery and King's Bench, 3 vols., 1695—1735	...	...	...	Eng.
Palm. ...	...	Palmer's Reports, King's Bench, fol., 1 vol., 1619—1629	...	...	...	Eng.
Park. ...	...	Parker's Reports, Exchequer, fol., 1 vol., 1743—1767; App. 1678—1717	...	...	...	Eng.
Pat. App. ...	...	Paton's Scotch Appeals, House of Lords, 6 vols., 1726—1822	...	...	...	Scot.
Pater. App. ...	...	Paterson's Scotch Appeals, House of Lords, 2 vols., 1851—1873	...	...	...	Scot.
Peake ...	...	Peake's Reports, Nisi Prius, 1 vol., 1790—1794	...	...	...	Eng.
Peake, Add. Cas. ...	...	Peake's Additional Cases, Nisi Prius, 1 vol., 1795—1812	...	...	...	Eng.
Peck. ...	...	Peckwell's Election Cases, 2 vols., 1803—1806	...	...	...	Eng.
Pelham ...	...	Pelham (S. A.) Reports	...	...	...	Aus.
Per. & Dav. ...	...	Perry and Davison's Reports, Queen's Bench, 4 vols., 1838—1841	...	...	...	Eng.
Per. & Kn. ...	...	Perry and Knapp's Election Cases, 1 vol., 1833	...	...	...	Eng.
Per. C. S. ...	...	Perrault's Conseil Supérieur	...	...	...	Can.
Per. P. ...	...	Perrault's Prévosté de Quebec, 1726—1756	...	...	...	Can.
Ph. ...	...	Phillips' Reports, Chancery, 2 vols., 1841—1849	...	...	...	Eng.
Phil. El. Cas. ...	...	Philipps' Election Cases, 1 vol., 1780	...	...	...	Eng.
Phillim. ...	...	J. Phillimore's Ecclesiastical Reports, 3 vols., 1809—1821	...	...	...	Eng.
Phillim. Eccl. Jud. ...	...	Sir R. Phillimore's Ecclesiastical Judgments, 1 vol., 1867—1875	...	...	...	Eng.
Phip. ...	...	Phipson's Digest of Natal Reports, 1858—1859	...	...	...	S. Af.
Pig. & R. ...	...	Pigott and Rodwell's Registration Cases, 1 vol., 1843—1845	...	...	...	Eng.
Pitc. ...	...	Pitcairn's Criminal Trials (Scotland), 3 vols., 1488—1624	...	...	...	Scot.
Plowd. ...	...	Plowden's Reports, fol., 2 vols., 1550—1580, and Plowden's Queries, Vol. I.	...	...	...	Eng.
Poll. ...	...	Pollexfen's Reports, King's Bench, fol., 1 vol., 1670—1682	...	...	...	Eng.
Poph. ...	...	Popham's Reports, King's Bench, fol., 1 vol., 1591—1627	...	...	...	Eng.
Pow. R. & D. ...	...	Power, Rodwell, and Dew's Election Cases, 2 vols., 1848—1856	...	...	...	Eng.

Pratt	...	...	Pratt's Supplement to Bott's Poor Laws, 1833	...	...	Eng.
Prec. Ch.	...	...	Precedents in Chancery, fol., 1 vol., 1689—1722	...	...	Eng.
Price	...	...	Price's Reports, Exchequer, 13 vols., 1814—1824	...	...	Eng.
Price	...	...	Price's Mining Commissioners' Cases	...	...	Can.
Pug.	...	...	New Brunswick Reports (Pugsley)	...	...	Can.
Py. R.	...	...	Pykes' Lower Canada Reports	...	...	Can.
Q. B.	...	...	Queen's Bench Reports (Adolphus and Ellis, New Series), 18 vols., 1841—1852	...	...	Eng.
Q. B. (preceded by date)	...	...	Law Reports, Queen's Bench Division, 1891—1901 (<i>e.g.</i> , [1891] 1 Q. B.)	...	...	Eng.
Q. B. D.	...	...	Law Reports, Queen's Bench Division, 25 vols., 1875—1890	...	...	Eng.
Q. J. P.	...	...	Queensland Justice of Peace Reports	...	...	Aus.
Q. L. J.	...	...	Queensland Law Journal and Reports, 11 vols., 1879—1901	...	...	Aus.
Q. L. R.	...	...	Quebec Law Reports	...	...	Can.
Q. L. R. (Beor)	...	...	Queensland Law Reports by Beor, 1876—1878	...	...	Aus.
Q. P. R.	...	...	Quebec Practice Reports	...	...	Can.
Q. R. (Vol.) K. B. or Q. B.	...	...	Rapports Judiciaires de Québec, Cour du Banc du Roi, 1892—(current)	...	...	Can.
Q. R. (Vol.) S. C.	...	...	Rapports Judiciaires de Québec, Cour Supérieure, 1892—(current)	...	...	Can.
Q. S. C. R.	...	...	Queensland Supreme Court Reports, 5 vols., 1860—1881	...	...	Aus.
Q. S. R.	...	...	Queensland State Reports	...	...	Aus.
Q. W. N.	...	...	Weekly Notes, Queensland	...	...	Aus.
R.	...	...	The Reports, 15 vols., 1893—1895	...	...	Eng.
R.	...	...	Roscoe's Reports of the Supreme Court of the Cape of Good Hope, 1861—1867, 1871—1872, 1877—1878	...	...	S. Af.
R. (Ct. of Sess.)	...	...	Rettie, Court of Session Cases (Scotland), 4th series, 25 vols., 1873—1898	...	...	Scot.
R. A. C.	...	...	Ramsay, Appeal Cases	...	...	Can.
R. & C.	...	...	Nova Scotia Reports (Russell & Chesley)	...	...	Can.
R. & G.	...	...	Nova Scotia Reports (Russell and Geldert)	...	...	Can.
R. C.	...	...	La Revue Critique de Législation et de Jurisprudence de Canada	...	...	Can.
R. de J.	...	...	Revue de Jurisprudence	...	...	Can.
R. de L.	...	...	Revue de Législation et de Jurisprudence, 3 vols., 1845—1848	...	...	Can.
R. E. D.	...	...	New South Wales, Reserved and Equity Decisions	...	...	Aus.
R. E. D.	...	...	Ritchie's Equity Decisions (Russell)	...	...	Can.
R. J. R. Q.	...	...	Quebec Revised Reports	...	...	Can.
R. L. N. S.	...	...	Revue Légale, New Series, 1895—(current)	...	...	Can.
R. L. O. S.	...	...	Revue Légale, Old Series, 21 vols., 1869—1892	...	...	Can.
R. P. C.	...	...	Reports of Patent Cases, 1884—(current)	...	...	Eng.
R. R.	...	...	Revised Reports	...	...	Eng.
Rast.	...	...	Rastell's Entries	...	...	Eng.
Rayn.	...	...	Rayner's Tithe Cases, 3 vols., 1575—1782	...	...	Eng.
Real Prop. Cas.	...	...	Real Property Cases, 2 vols., 1843—1847	...	...	Eng.
Rep. Ch.	...	...	Reports in Chancery, fol., 3 vols., 1615—1710	...	...	Eng.
Rep. in C. of A.	...	...	Reports in Courts of Appeal	...	...	N.Z.
Res. & Eq. Jud.	...	...	New South Wales Reserved and Equity Judgments	...	...	Aus.
Reserv. Cas.	...	...	Reserved Cases	...	...	Ir.
Rick. & M.	...	...	Rickards and Michael's Locus Standi Reports, 1 vol., 1885—1889	...	...	Eng.
Rick. & S.	...	...	Rickards and Saunders' Locus Standi Reports, 1 vol., 1890—1894	...	...	Eng.
Ridg. L. & S.	...	...	Ridgeway, Lapp, and Schoales' Reports (Ireland), 1 vol., 1793—1795	...	...	Ir.
Ridg. Parl. Rep.	...	...	Ridgeway's Parliamentary Reports (Ireland), 3 vols., 1784—1796	...	...	Ir.
Ridg. temp. H.	...	...	Ridgeway's Reports temp. Hardwicke, 1 vol., King's Bench, 1733—1736; Chancery, 1744—1746	...	...	Eng.
Ritch. Eq. Rep.	...	...	Ritchie's Equity Reports	...	...	Can.
Rob. Eccl.	...	...	Robertson's Ecclesiastical Reports, 2 vols., 1844—1853	...	...	Eng.
Rob. L. & W.	...	...	Roberts, Leeming, and Wallis' New County Court Cases, 1 vol., 1849—1851	...	...	Eng.
Robert. App.	...	...	Robertson's Scotch Appeals, House of Lords, 1 vol., 1709—1727	...	...	Scot.
Robin. App.	...	...	Robinson's Scotch Appeals, House of Lords, 2 vols., 1840—1841	...	...	Scot.
Roll. Abr.	...	...	Rolle's Abridgment of the Common Law, fol., 2 vols.	...	...	Eng.
Roll. Rep.	...	...	Rolle's Reports, King's Bench, fol., 2 vols., 1614—1625	...	...	Eng.
Rom.	...	...	Romilly's Notes of Cases in Equity, 1 part, 1772—1787	...	...	Eng.
Roscoe's B. C.	...	...	Roscoe, Digest of Building Cases	...	...	Eng.
Rose	...	...	Rose's Reports, Bankruptcy, 2 vols., 1810—1816	...	...	Eng.
Ross, L. C.	...	...	Ross's Leading Cases in Commercial Law (England and Scotland), 3 vols.	...	...	Eng.
Rowe	...	...	Rowe's Reports (England and Ireland), 1 vol., 1798—1823	...	...	Eng.
Rul. Cas.	...	...	Campbell's Ruling Cases, 25 vols.	...	...	Eng.
Russ.	...	...	Russell's Reports, Chancery, 5 vols., 1824—1829	...	...	Eng.
Russ. & M.	...	...	Russell and Mylne's Reports, Chancery, 2 vols., 1829—1833	...	...	Eng.

xxviii REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.

Russ. & Ry. ...	...	Russell and Ryan's Crown Cases Reserved, 1 vol., 1800—1823	Eng.
Rus. E. R. ...	...	Russell's Election Reports...	Can.
Ry. & Can. Cas. ...	...	Railway and Canal Cases, 7 vols., 1835—1854 ...	Eng.
Ry. & Can. Tr. Cas. ...	...	Railway and Canal Traffic Cases, 1855—(current) ...	Eng.
Ry. & M. ...	...	Ryan and Moody's Reports, Nisi Prius, 1 vol., 1823—1826 ...	Eng.
Ryde & K. Rat. App. ...	...	Ryde and Konstam's Reports of Rating Appeals, 1 vol., 1894—1904 ...	Eng.
Ryde, Rat. App. ...	...	Ryde's Rating Appeals, 3 vols., 1871—1893 ...	Eng.
S. ...	...	Searle's Reports of the Supreme Court of the Cape of Good Hope	S. Af.
S. A. L. J. ...	...	South African Law Journal ...	S. Af.
S. A. L. R. ...	...	South Australian Law Reports ...	Aus.
S. A. L. R. ...	...	South African Law Reports ...	S. Af.
S. A. R. ...	...	Reports of the High Court of the South African Republic, 1881—1892 ...	S. Af.
S. A. S. R. ...	...	South Australian State Reports, since 1921 (<i>e.g.</i> , [1921] S. A. S. R.) ...	Aus.
S. C. ...	...	Reports of the Supreme Court of the Cape of Good Hope from 1880 ...	S. Af.
S. C. (preceded by date)	...	Court of Session Cases (Scotland), since 1906 (<i>e.g.</i> , [1906] S. C.)	Scot.
S. C. (H. L.) (preceded by date)	...	Court of Session Cases (Scotland) (House of Lords), since 1906 (<i>e.g.</i> , [1906] S. C. (H. L.)) ...	Scot.
S. C. (J.) (preceded by date)	...	Court of Justiciary Cases (Scotland), since 1906 (<i>e.g.</i> , [1906] S. C. (J.)) ...	Scot.
S. C. R. ...	...	Canada, Supreme Court Reports ...	Can.
S. L. T. ...	...	Scots Law Times, 1893 (current) ...	Scot.
S. Q. R. ...	...	Queensland State Reports ...	Aus.
S. R. ...	...	Reports of the High Court of Southern Rhodesia ...	S. Af.
S. R. C. ...	...	Stuart's Lower Canada Reports ...	Can.
S. R. N. S. W. ...	...	New South Wales, State Reports ...	Aus.
S. R. Q. ...	...	Queensland Reports, Supreme Court ...	Aus.
S. V. A. R. ...	...	Stuart's Vice-Admiralty Reports ...	Can.
S. W. A. ...	...	South-West Africa Law Reports ...	S.-W. Af.
Saint ...	...	Saint's Digest of Registration Cases, 1843—1906, 1 vol. ...	Eng.
Salk. ...	...	Salkeld's Reports, King's Bench, 3 vols., 1689—1712 ...	Eng.
Sask. L. R. ...	...	Saskatchewan Law Reports ...	Can.
Sau. & Sc. ...	...	Sausee and Scully's Reports, Rolls Court (Ireland), 1 vol., 1837—1840 ...	Ir.
Saund. ...	...	Saunders's Reports, King's Bench, 2 vols., 1666—1672 ...	Eng.
Saund. & A. ...	...	Saunders and Austin's Locus Standi Reports, 2 vols., 1895—1904	Eng.
Saund. & B. ...	...	Saunders and Bidder's Locus Standi Reports, 1905—(current)	Eng.
Saund. & C. ...	...	Saunders and Cole's Reports, Bail Court, 2 vols., 1846—1848 ...	Eng.
Saund. & M. ...	...	Saunders and Macrae's County Courts and Insolvency Cases (County Courts Cases and Appeals, Vols. II. and III.), 2 vols., 1852—1858 ...	Eng.
Sav. ...	...	Savile's Reports, Common Pleas, fol., 1 vol., 1580—1591 ...	Eng.
Say. ...	...	Sayer's Reports, King's Bench, fol., 1 vol., 1751—1756 ...	Eng.
Sc. Jur. ...	...	Scottish Jurist, 46 vols., 1829—1873 ...	Scot.
Sc. L. R. ...	...	Scottish Law Reporter, 1865—1924 ...	Scot.
Sc. R. R. ...	...	Scots Revised Reports ...	Scot.
Sch. & Lef. ...	...	Schoales and Lefroy's Reports, Chancery (Ireland), 2 vols., 1802—1806 ...	Ir.
Scott ...	...	Scott's Reports, Common Pleas, 8 vols., 1834—1840 ...	Eng.
Scott, N. R. ...	...	Scott's New Reports, Common Pleas, 8 vols., 1840—1845 ...	Eng.
Sea. & Sm. ...	...	Searle and Smith's Reports, Probate and Divorce, 1 vol., 1859—1860 ...	Eng.
Sel. Cas. Ch. ...	...	Select Cases in Chancery, fol., 1 vol., 1685—1698 (Pt. III. of Cas. in Ch.) ...	Eng.
Selwyn's N. P. ...	...	Selwyn's Abridgement of the Law of Nisi Prius ...	Eng.
Sess. Cas. K. B. ...	...	Sessions Settlement Cases, King's Bench, 2 vols., 1710—1747	Eng.
Sett. & Rem. ...	...	Cases adjudged in K. B. concerning Settlements & Removals, 1 vol., 1710—1742 ...	Eng.
Sh. (Ct. of Sess.) ...	...	Shaw, Court of Session Cases (Scotland), 1st series, 16 vols., 1821—1838 ...	Scot.
Sh. & Macl. ...	...	Shaw and Maclean's Scotch Appeals, House of Lords, 3 vols., 1835—1838 ...	Scot.
Sh. Dig. ...	...	P. Shaw's Digest of Decisions (Scotland), ed. by Bell and Lamond, 3 vols., 1726—1868 ...	Scot.
Sh. Just. ...	...	P. Shaw's Justiciary Decisions (Scotland), 1 vol., 1819—1831 ...	Scot.
Sh. Sc. App. ...	...	P. Shaw's Scotch Appeals, House of Lords, 2 vols., 1821—1824	Scot.
Sh. Teind Ct. ...	...	P. Shaw's Teind Court Decisions (Scotland), 1 vol., 1821—1831	Scot.
Shep. Touch. ...	...	Sheppard's Touchstone of Common Assurances ...	Eng.
Show. ...	...	Shower's Reports, King's Bench, 2 vols., 1678—1695 ...	Eng.
Show. Parl. Cas. ...	...	Shower's Cases in Parliament, fol., 1 vol., 1694—1699 ...	Eng.
Sid.	Siderfin's Reports, King's Bench, Common Pleas and Exchequer, fol., 2 vols., 1657—1670 ...	Eng.

REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.

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Sim.	Simons' Reports, Chancery, 17 vols., 1826—1852	...	Eng.
Sim. & St.	Simons and Stuart's Reports, Chancery, 2 vols., 1822—1826	...	Eng.
Sim. N. S.	...	...	Simons' Reports, Chancery, New Series, 2 vols., 1850—1852	...	Eng.
Skin.	...	...	Skinner's Reports, King's Bench, fol., 1 vol., 1681—1697	...	Eng.
Sm. & Bat.	...	...	Smith and Batty's Reports, King's Bench (Ireland), 1 vol., 1824—1825	...	Ir.
Sm. & G.	...	...	Smale and Giffard's Reports, Chancery, 3 vols., 1852—1857	...	Eng.
Smith, K. B.	...	...	J. P. Smith's Reports, King's Bench, 3 vols., 1803—1806	...	Eng.
Smith, L. C.	...	...	Smith's Leading Cases, 2 vols.	...	Eng.
Smith, Reg. Cas.	...	...	C. L. Smith's Registration Cases, 1895—(current)	...	Eng.
Smythe	...	...	Smythe's Reports, Common Pleas (Ireland), 1 vol., 1839—1840	...	Ir.
Sol. Jo.	...	...	Solicitors' Journal, 1856—(current)	...	Eng.
Spence	...	...	Spence's Equitable Jurisdiction of the Court of Chancery	...	Eng.
Spinks	...	...	Spinks' Prize Court Cases, 2 parts, 1854—1856	...	Eng.
St. R. Qd. (preceded by date)	...	...	Queensland State Reports, since 1902 (<i>e.g.</i> , [1902] St. R. Qd.)	...	Aus.
Stair Rep.	...	...	Stair's Decisions, Court of Session (Scotland), fol., 2 vols., 1661—1681	...	Scot.
Stark.	...	...	Starkie's Reports, Nisi Prius, 3 vols., 1814—1823	...	Eng.
State Tr.	...	...	State Trials, 34 vols., 1163—1820	...	Eng.
State Tr. N. S.	...	...	State Trials, New Series, 8 vols., 1820—1858	...	Eng.
Stewart	...	...	Stewart's Nova Scotia Admiralty Reports, 1803—1813	...	Can.
Stockton	...	...	Stockton's Vice-Admiralty Report and Digest	...	Can.
Story	...	...	Story's Commentaries on Equity Jurisprudence	...	Eng.
Stra.	...	...	Strange's Reports, 2 vols., 1716—1747	...	Eng.
Stu. M. & P.	...	...	Stuart, Milne, and Peddie's Reports (Scotland), 2 vols., 1851—1853	...	Scot.
Stuart	...	...	Sessions Cases (Stuart)	...	Scot.
Stuart, Adm.	...	...	Stuart's Vice-Admiralty (Lower Canada) Cases, 1836—1856	...	Can.
Stuart, Adm. N. S.	...	...	Stuart's Vice-Admiralty (Lower Canada) Cases, 2nd series, 1859—1874	...	Can.
Stuart, K. B.	...	...	Stuart's Reports of Cases in King's Bench, etc. (Lower Canada), 1810—1835	...	Can.
Sty.	...	...	Style's Reports, King's Bench, fol., 1 vol., 1646—1655	...	Eng.
Sw.	...	...	Swabey's Report, Admiralty, 1 vol., 1855—1859	...	Eng.
Sw. & Tr.	...	...	Swabey and Tristram's Reports, Probate and Divorce, 4 vols., 1858—1865	...	Eng.
Swan.	...	...	Swanston's Reports, Chancery, 3 vols., 1818—1821	...	Eng.
Swin.	...	...	Swinton's Justiciary Reports (Scotland), 2 vols., 1835—1841	...	Scot.
Syme	...	...	Syme's Justiciary Reports (Scotland), 1 vol., 1826—1829	...	Scot.
T. & M.	...	...	Temple and Mew's Criminal Appeal Cases, 1 vol., 1848—1851	...	Eng.
T. H.	...	...	Reports of the Witwatersrand High Court (Transvaal Colony), 1902—1909	...	S. Af.
T. Jo.	...	...	Sir T. Jones's Reports, King's Bench and Common Pleas, fol., 1 vol., 1667—1685	...	Eng.
T. L.	...	...	Reports of the Witwatersrand High Court (Transvaal Colony), 1910—(current)	...	S. Af.
T. L. R.	...	...	The Times Law Reports, 1884—(current)	...	Eng.
T. P.	...	...	Reports of the Supreme Court of the Transvaal, 1910—(current)	...	S. Af.
T. P. D.	...	...	South African Law Reports, Transvaal Provincial Division	...	S. Af.
T. Raym.	...	...	Sir T. Raymond's Reports, King's Bench, fol., 1 vol., 1660—1683	...	Eng.
T. S.	...	...	Reports of the Supreme Court of the Transvaal, 1902—1909	...	S. Af.
Taml.	...	...	Tamlyn's Reports, Rolls Court, 1 vol., 1829—1830	...	Eng.
Tas. L. R.	...	...	Tasmanian Law Reports	...	Aus.
Taunt.	...	...	Taunton's Reports, Common Pleas, 8 vols., 1807—1819	...	Eng.
Tax Cas.	...	...	Tax Cases, 1875—(current)	...	Eng.
Tay.	...	...	Taylor's King's Bench Reports	...	Can.
Temp. Wood	...	...	Manitoba Reports <i>temp.</i> Wood	...	Can.
Term Rep.	...	...	Term Reports (Durnford and East), fol., 8 vols., 1785—1800	...	Eng.
Terr. L. R.	...	...	Territories Law Reports	...	Can.
Thom.	...	...	Nova Scotia Reports (Thomson)	...	Can.
Toth.	...	...	Tothill's Transactions in Chancery, 1 vol., 1559—1646	...	Eng.
Town St. Tr.	...	...	Townsend, Modern State Trials	...	Eng.
Trem. P. C.	...	...	Tremaine Pleas of the Crown, 1 vol., 1667	...	Eng.
Trist.	...	...	Tristram's Consistory Judgments, 1 vol., 1872—1890	...	Eng.
Tru.	...	...	New Brunswick Reports (Trueman)	...	Can.
Tudor, L. C. Merc. Law.	...	...	Tudor's Leading Cases on Mercantile and Maritime Law	...	Eng.
Tudor, L. C. Real Prop.	...	...	Tudor's Leading Cases on Real Property	...	Eng.
Turn. & R.	...	...	Turner and Russell's Reports, Chancery, 1 vol., 1822—1825	...	Eng.
Tyr.	...	...	Tyrwhitt's Reports, Exchequer, 5 vols., 1830—1835	...	Eng.
Tyr. & Gr.	...	...	Tyrwhitt and Granger's Reports, Exchequer, 1 vol., 1835—1836	...	Eng.
U. C. Jur.	...	...	Upper Canada Jurist	...	Can.
U. C. L. J. N. S.	...	...	Canada Law Journal, New Series, 1865—(current)	...	Can.

ABBREVIATIONS

USED IN THIS WORK.

(For Abbreviations used in citing Reports, see pp. xv—xxxi, *ante*.)

A.-G.	for Attorney-General.
Act.	„ Actiengesellschaft.
Admlty.	„ Admiralty.
Afld.	„ Affirmed.
Affg.	„ Affirming.
Akt.	„ Aktiengesellschaft ; Aktiebolaget ; Aktieselskabet.
Alta.	„ Alberta.
Anon.	„ Anonymous.
Apid.	„ Applied.
Appet.	„ Applicant.
Appln.	„ Application.
Appln.	„ Application to Register a Trade Mark.
App.t.	„ Appellant.
Apprvd.	„ Approved.
Arbn. . . .	„ Arbitration.
Archbp. . .	„ Archbishop.
Art.	„ Article.
Ass. Tax Case	„ Assessed Tax Case.
Assce. . . .	„ Assurance.
Assocn. . .	„ Association.
B. C.	„ Borough Council.
B. C.	„ British Columbia.
Bkpcy. . . .	„ Bankruptcy.
Bkpt.	„ Bankrupt.
Bldg. Soc. .	„ Building Society.
Bp.	„ Bishop.
C. A.	„ Court of Appeal.
C. & S. L. Ry. Co.	„ City & South London Railway Co.
C. C. A. . . .	„ Court of Criminal Appeal.
C. C. R. . . .	„ County Court Rules.
C. C. R. . . .	„ Court of Crown Cases Reserved.
C. L. P. Act. .	„ Common Law Procedure Act.
C. L. Ry. Co.	„ Central London Railway Co.
C. O. R. . . .	„ Crown Office Rules.
C. S. U. C. . .	„ Consolidated Statutes of Upper Canada.
Ca. sa. . . .	„ <i>Capas ad satisfaciendum</i> .
Cale. Ry. Co.	„ Caledonian Railway Co.
Ch.	„ Chancery.
Ch. Div. . . .	„ Chancery Division.
Co.	„ Company.
Co-op. Assocn.	„ Co-operative Supply Association.
Comrs.	„ Commissioners.
Consd.	„ Considered.
Corpn.	„ Corporation.
Ct.	„ Court.
Ct. of Ch. . .	„ Court of Chancery.
Ct. of Eq. . .	„ Court of Equity.
Ct. of R. . . .	„ Court of Review.
D. C.	„ Divisional Court.
Dbtd.	„ Doubted.

Deft.	for Defendant.
	„ Distinguished.
	„ Divisional Court.
Eccl. Comrs.	Ecclesiastical Commissioners.
Eccl. Ct.	Ecclesiastical Court.
Ex. Ch.	Exchequer Chamber.
<i>Ex p.</i> .	<i>Ex parte.</i>
Exch. .	Exchequer.
Exor. .	Executor.
Exorship.	Executorship.
Expld. .	Explained.
Extd. .	Extended.
Extrix. .	Executrix.
<i>Fi. fa.</i> .	<i>Fieri facias.</i>
Folld. .	„ Followed.
G. & S. W. Ry. Co.	„ Glasgow & South Western Railway Co.
G. C. Ry. Co.	„ Great Central Railway Co.
G. E. Ry. Co.	„ Great Eastern Railway Co.
G. N. of Scotland Ry. Co.	„ Great North of Scotland Railway Co.
G. N. Picc. & Brompton Ry. Co.	„ Great Northern, Piccadilly & Brompton Railway Co.
G. N. Ry. Co.	„ Great Northern Railway Co.
G. S. & W. Ry. Co. of Ireland	„ Great Southern & Western Railway Co. of Ireland.
G. W. Ry. Co.	„ Great Western Railway Co.
Govt.	„ Government.
Grdns.	„ Guardians or Guardians of the Poor.
H. C. of A.	„ High Court of Australia.
H. L.	„ House of Lords.
I. R. Comrs.	„ Inland Revenue Commissioners.
Insce.	„ Insurance.
JJ.	„ Justices.
Jud. Act	„ Judicature Act.
K. B. Div.	„ King's Bench Division.
L. & B. Ry. Co.	„ London & Brighton Railway Co.
L. & N. E. Ry. Co.	„ London & North Eastern Railway Co.
L. & N. W. Ry. Co.	„ London & North Western Railway Co.
L. & S. W. Ry. Co.	„ London & South Western Railway Co.
L. & Y. Ry. Co.	„ Lancashire & Yorkshire Railway Co.
L. B.	„ Local Board.
L. B. & S. C. Ry. Co.	„ London, Brighton & South Coast Railway Co.
L. C.	„ Lord Chancellor.
L. C. & D. Ry. Co.	„ London, Chatham & Dover Railway Co.
L. C. C.	„ London County Council.
L. Elec. Ry. Co.	„ London Electric Railway Co.
L. G. Board	„ Local Government Board.
L.J.	„ Lord Justice.
L.JJ.	„ Lords Justices.
L. M. & S. Ry. Co.	„ London, Midland & Scottish Railway Co.
L. T. & S. Ry. Co.	„ London, Tilbury & Southend Railway Co.
M. S. Act	„ Merchant Shipping Act.
M. S. & L. Ry. Co.	„ Manchester, Sheffield & Lincolnshire Railway Co.
Mags.	„ Magistrates.
Man.	„ Manitoba.
Mentd.	„ Mentioned.
Met. Dist. Ry. Co.	„ Metropolitan District Railway Co.
Met. Ry. Co.	„ Metropolitan Railway Co.
Mid. G. W. Ry. Co.	„ Midland Great Western Railway Co.
Mid. Ry. Co.	„ Midland Railway Co.
Mtge.	„ Mortgage.
Mtgee.	„ Mortgagee.
Mtgor.	„ Mortgagor.
N. B.	„ New Brunswick.
N. B. Ry. Co.	„ North British Railway Co.
N. E. Ry. Co.	„ North Eastern Railway Co.
N. F.	„ Not Followed.
N. P.	„ Nisi Prius.

N. S.	.	.	.	.	for Nova Scotia.
N. W. P.	.	.	.	.	„ North-West Provinces.
N. W. T.	.	.	.	.	„ North-West Territories.
Ont.	.	.	.	.	„ Ontario.
Ord.	.	.	.	.	„ Order.
Overd.	.	.	.	.	„ Overruled.
P. C.	.	.	.	.	„ Privy Council.
P. E. I.	.	.	.	.	„ Prince Edward Island.
Petn.	.	.	.	.	„ Petition or Election Petition.
Pltf.	.	.	.	.	„ Plaintiff.
Q. B. Div.	.	.	.	.	„ Queen's Bench Division.
Qu.	.	.	.	.	„ <i>Quære</i> .
Que.	.	.	.	.	„ Quebec.
R. C.	.	.	.	.	„ Rural Council.
R. D. C.	.	.	.	.	„ Rural District Council.
R. S. A.	.	.	.	.	„ Rural Sanitary Authority.
R. S. C.	.	.	.	.	„ Revised Statutes of Canada.
R. S. C.	.	.	.	.	„ Rules of the Supreme Court, 1883.
Refd.	.	.	.	.	„ Referred.
Regn. of Trade Mk.	.	.	.	.	„ Registration of Trade Mark.
Regr. of Trade Mks.	.	.	.	.	„ Registrar of Trade Marks.
Resp.	.	.	.	.	„ Respondent.
Restg.	.	.	.	.	„ Restoring.
Revsd.	.	.	.	.	„ Reversed.
Revsg.	.	.	.	.	„ Reversing.
Ry. Co.	.	.	.	.	„ Rail. Co. or Railway Co.
S. C.	.	.	.	.	„ Same Case.
S. C. (name of colony following)	.	.	.	.	„ Supreme Court of a Colony.
S. E.	.	.	.	.	„ Settled Estates.
S. E. & C. Ry. Co.	.	.	.	.	„ South Eastern & Chatham Railway Co.
S. E. Ry. Co.	.	.	.	.	„ South Eastern Railway Co.
S. P.	.	.	.	.	„ Same Point.
S.S.	.	.	.	.	„ Steamship.
Sask.	.	.	.	.	„ Saskatchewan.
Sched.	.	.	.	.	„ Schedule.
<i>Sci. fa.</i>	.	.	.	.	„ <i>Scire facias</i> .
Sect.	.	.	.	.	„ Section.
Set. Land Act	.	.	.	.	„ Settled Land Act.
Settlmt.	.	.	.	.	„ Settlement.
Soc.	.	.	.	.	„ Society.
Soc. Anon.	.	.	.	.	„ Société Anonyme, etc.
Solr.	.	.	.	.	„ Solicitor.
Trade Mk.	.	.	.	.	„ Trade Mark.
Tram. Co.	.	.	.	.	„ Tramways Company.
U. C.	.	.	.	.	„ Urban Council.
U. D. C.	.	.	.	.	„ Urban District Council.
U. S. A.	.	.	.	.	„ United States of America.
Union Assmt. Com.	.	.	.	.	„ Union Assessment Committee.
Urban S. A.	.	.	.	.	„ Urban Sanitary Authority.
V.-C.	.	.	.	.	„ Vice-Chancellor.
Workmen's Comp. Act	.	.	.	.	„ Workmen's Compensation Act.
Y. T.	.	.	.	.	„ Yukon Territory.

MEANING OF TERMS

USED IN CLASSIFYING ANNOTATING CASES.

THE different expressions used to describe the effect of the annotating cases have the following meanings, and the classification of the annotating cases has been done strictly in accordance with these meanings. The annotating cases, except such as are classified as "Mentioned," are grouped according to the points in the case which they annotate: within these groups they are listed chronologically, except such as are classified as "Referred to," which come at the end of the group and are arranged *inter se* in chronological order. Cases which annotate the annotated case generally are grouped together after cases which annotate specific points, similarly arranged, and are followed by cases classified as "Mentioned" arranged chronologically *inter se*. The terms used in classifying the annotating cases are as follows:—

- "APPLIED" (Apld.).—This expression is used to denote the fact that the principle of law enunciated in the annotated case has been applied to a new set of facts and circumstances in the annotating case.
- "APPROVED" (Apprvd.).—This expression is used to denote the fact that the annotated case has been considered to be good law in the annotating case where the latter is in a higher court than the former.
- "CONSIDERED" (Consd.).—This expression is used where the remarks in the annotating case are devoid of adverse criticism and merely denote the giving of more or less careful consideration to the annotated case.
- "DISTINGUISHED" (Distd.).—This expression is used where the earlier case is not necessarily doubted, but where some essential difference (either on the facts or in law) between it and the annotated case is pointed out.
- "DOUBTED" (Dbtd.).—This expression is used where the court in the annotating case without definitely going to the length of saying that the annotated case is wrong, adduces reasons which seem to show that it is not accurate.
- "EXPLAINED" (Expld.).—This expression is used where the earlier case is not necessarily doubted, but the decision arrived at is justified or accounted for by calling attention to some point of fact or of law which is usually, but not necessarily, one not obvious on the face of the report.
- "EXTENDED" (Extd.).—Compare "APPLIED," *supra*.
- "FOLLOWED" (Folld.).—This expression is used to denote that the same principles of law are applied in the two cases. It does not necessarily imply that the facts are substantially identical in the two cases.
- "NOT FOLLOWED" (N.F.).—Compare "FOLLOWED," *supra*, to which it is the adverse.
- "OVERRULED" (Overd.).—This expression is used where the annotating case is on substantially identical facts with the annotated case and in a higher court and the rule in the latter case is held to be wrong.
- "REFERRED" (Refd.).—This expression is used only where the annotating case deals with the point of the Digest paragraph and is without comment of any definite character on the case annotated, and where there is no delicate shade of approval or disapproval which would justify the use of any of the foregoing words.
- "MENTIONED" (Mentd.).—This expression is used only where none of the foregoing terms apply. In other words, it is used only where the case annotated is cited on a point having nothing to do with the point in the Digest paragraph.

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Action See ACTION.

Limitation of Actions „ LIMITATION OF
ACTIONS; PUBLIC
AUTHORITIES.

Married Women „ HUSBAND AND WIFE.

Practice and Procedure. See COURTS; JUDG-
MENTS; PLEADING;
PRACTICE.

Trade Marks „ TRADE MARKS.

Trade Unions „ TRADE AND TRADE
UNIONS.

Part I.—In General.

SECT. 1.—DEFINITIONS.

1. **Definition of libel.**—Scandalous matter is not necessary to make a libel; it is enough if deft. induces an ill opinion to be had of pltf., or to make him contemptible & ridiculous (HOLT, C.J.).—CROPP v. TILNEY (1693), Holt, K. B. 422; 3 Salk. 225; 90 E. R. 1132.

Annotation:—**Reid**. Clement v. Chivis (1829), 9 B. & C. 172.

2. —.]—PARMITER v. COUPLAND, No. 1019, *post*.

3. —.]—O'BRIEN v. CLEMENT, No. 2280, *post*.

4. —.]—The publication holds [ptf.] up in the most ridiculous light, & it has been frequently & long held that when such is the case the party has been libelled (BEST, C.J.).—LEVI v. MILNE (1827), 4 Bing. 195; 12 Moore, C. P. 418; 5 L. J. O. S. C. P. 153; 130 E. R. 743.

Annotations:—**Mentd.** Hakewell v. Ingram (1854), 2 C. L. R. 1397; Poole v. Whitcomb (1862), 12 C. B. N. S. 770.

5. —.]—(1) A publication without lawful excuse, which tends to hold an individual up to hatred, ridicule or contempt, is a libel. Whether the publication held up ptf. to hatred, ridicule or contempt, is a question for the jury. Whether there is an excuse or not is, in the first instance, a question of law. It is allowable to discuss matters of public interest in the columns of the newspapers, but it must be done *bond fide* & without malice, or anything beyond what is necessary for public discussion.

The mere publishing in the columns of a newspaper something as to the character of another is a self-imposed duty, & does not constitute a lawful excuse in law. Any self-constituted body, which sets itself up for the reform of the public, whether in religious, in commercial or in political points of view, must be extremely cautious in all their publications & writings concerning private individuals not to reflect on private character. If they publish that which reflects on the private character of individuals, they should be very careful of the contents of what they put forth.

The publication by a Reform Committee of a report imputing to ptf. that he had been guilty of bribery:—**Held**: not privileged, within the rule of law allowing discussion of matters of public interest, the privilege not extending to imputations upon personal character, going in the opinion of the jury, beyond the necessity for discussion of the public question.

(2) The jury must define the amount of damages, & the costs are not an element to enter into consideration, & the ct. will refuse to tell them what is the smallest amount that will carry costs.—WILSON v. REED (1860), 2 F. & F. 149, N. P.

6. —.]—CAPITAL & COUNTIES BANK v. HENTY, No. 121, *post*.

7. —.]—The publication, by sale by deft., had been proved. A libel was in law, according

to the well-known definition, defamatory matter falsely & maliciously written or printed & published, calculated to bring the person of whom it was written into hatred, ridicule or contempt. Deft. denied the libel was false or malicious, & said it was a fair & *bond fide* comment on ptf.'s conduct in a matter of public importance & justified these comments. These two last were the two substantial defences, & the onus of proving them fell on deft., & on these a jury should pronounce (GROVE, J.).—BRENON v. RIDGWAY (1887), 3 T. L. R. 592, N. P.

8. —.]—HULTON (E.) & Co. v. JONES, No. 77, *post*.

SECT. 2.—DISTINCTION BETWEEN LIBEL AND SLANDER.

9. **General rule.**—The writing & publishing anything which renders a man ridiculous is actionable (BATHURST, J.).

There is a distinction between libels & words: a libel is punishable both criminally, & by action, when speaking the words would not be punishable in either way; for speaking the words rogue & rascal of any one, an action will not lie; but if those words were written & published of any one, I doubt not an action would lie; if one man should say of another that he has the itch, without more, an action would not lie; but if he should write those words of another, & publish them maliciously, as in the present case, I have no doubt at all but the action well lies. What is the reason why saying a man has the leprosy or plague is actionable? It is because the having of either cuts a man off from society; so the writing & publishing maliciously that a man has the itch & stinks of brimstone, cuts him off from society. I think the publishing anything of a man that renders him ridiculous is a libel & actionable (GOULD, J.).—VILLERS v. MONSLEY (1769), 2 Wils. 403; 95 E. R. 486.

Annotations:—**Reid**. Levi v. Milne (1827), 4 Bing. 195; Clement v. Chivis (1829), 9 B. & C. 172.

SECT. 3.—FORMS OF LIBEL AND SLANDER.

SUB-SECT. 1.—LIBEL.

10. **General rule**—Any permanent form.]—MONSON v. TUSSAIDS, LTD., MONSON v. TUSSAUD (LOUIS), No. 23, *post*.

11. **Picture.**—CASE DE LIBELLIS FAMOSIS (1605), 5 Co. Rep. 125 a; 77 E. R. 250.

Annotations:—**Reid**. Harman v. Delany (1731), 2 Stra. 898; R. v. Ensor (1887), 3 T. L. R. 366. **Mentd.** Townsend v. Hughes (1677), 2 Mod. Rep. 150; R. v. Topham (1791), 4 Term Rep. 126; R. v. Labouchere (1884), 12 Q. B. D. 320; Forrester v. Tyrrell (1893), 57 J. P. 532.

12. —.]—It was said, that to say of anybody that he is a dishonest man is not actionable,

upon him pain in consequence of such belief.—HARAKH CHAND v. GANGA PRASAD RAI (1924), 1. L. R. 47 All. 391.—IND.

PART I. SECT. 1.

a. "Defamatory matter."—The definition of defamatory matter in the defamation law of Queensland, has not extended the meaning of "defamatory matter" so as to make it include statements the publication of which would, prior to that enactment, have given only a right of action for damages on the case.—HALL-GIBBS

PART I. SECT. 2.

91. **General rule.**—The true test of the actionable nature of spoken as opposed to written words is their tendency to excite against ptf. feelings of hatred, contempt, ridicule, fear, dislike or disesteem, due regard being had to the time at, & the circumstances in which, such language was used, & to cause ptf. to have a reasonable apprehension that his reputation had been injured & to inflict

PART I. SECT. 3, SUB-SECT. 1.

b. *Charivari.*—When ptf., a married woman whose husband was overseas, was returning to her home in company with M., they were met by who fired off guns, rang bells,

but to publish so, or put it up upon posts, is actionable.—*AUSTIN v. CULPEPER* (1683), *Skin.* 128; 90 E. R. 57.

Annotation:—*Reid*. *Harman v. Delany* (1731), 2 *Stra.* 898.

13. —.]—An action for a libel, stating that the deft. dispersed a paper writing, accusing pltf. with having said that the war would not end "until the little gentleman, innuendo the Prince of Wales, was restored," is sufficiently certain.

In case upon a libel it is sufficient to paint a man playing at cudgels with his wife (*HOLT, C.J.*).—*ANON.* (1706), 11 *Mod. Rep.* 99; 88 E. R. 921.

Annotation:—*Reid*. *Clement v. Chivis* (1829), 7 L. J. O. S. K. B. 189.

.]—*Qu.*: if to trespass for destroying a picture, deft. may plead, that it was a scandalous libel upon individuals, & that being publicly exhibited, he cut it to pieces by way of abating a nuisance? The owner of such a libel picture so destroyed is at most only entitled to recover the value of the paint & canvas, which formed its component parts.—*DU BOST v. BERESFORD* (1810), 2 *Camp.* 511, N. P.

Annotations:—*Reid*. *Dobree v. Napier* (1836), 3 *Scott*, 201; *Austria (Emperor) v. Day & Kossuth* (1861), 3 *De G. F. & J.* 217; *Mulkern v. Ward* (1872), L. R. 13 *Eq.* 619; *Prudential Life Insce. Assn. v. Knott* (1875), 23 *W. R.* 249.

15. —.]—*SMITH v. WOOD*, No. 1059, *post*.

16. —.]—*CORELLI v. WALL*, No. 2263, *post*.

17. —.]—*MONSON v. TUSSAUDS, LTD., MONSON v. TUSSAUD (LOUIS)*, No. 23, *post*.

18. *Doggerel*.]—*LEVI v. MILNE* (1827), 4 *Bing.* 195; 12 *Moore, C. P.* 418; 5 L. J. O. S. C. P. 153; 130 E. R. 743.

Annotations:—*Mentd.* *Hakewell v. Ingram* (1854), 2 C. L. R. 1397; *Poole v. Whitcomb* (1862), 12 C. B. N. S. 770.

19. *Sign*.]—*CASE DE LIBELLIS FAMOSIS* (1605), 5 *Co. Rep.* 125 a; 77 E. R. 250.

Annotations:—*Reid*. *Harman v. Delany* (1731), 2 *Stra.* 898; *R. v. Ensor* (1887), 3 T. L. R. 366. *Mentd.* *Townsend v. Hughes* (1677), 2 *Mod. Rep.* 150; *R. v. Topham* (1791), 4 *Term Rep.* 126; *R. v. Labouchere* (1884), 12 Q. B. D. 320; *Forrester v. Tyrrell* (1893), 57 J. P. 532.

20. —.]—An action on the case for setting up a certain mark in front of the pltf.'s dwelling-house, in order to defame him as the keeper of a bawdy house, is not local in its nature; & if the declaration, after describing the house as situate, in a certain street called A. street in the parish of O. A., there being no such parish, afterwards state the nuisance to be erected & placed in the parish aforesaid; it will be ascribed to venue, & not to local description, & therefore the place is not material to be proved as laid.—*JEFFERIES v. DUNCOMBE* (1809), 11 *East*, 226; 2 *Camp.* 3; 103 E. R. 991.

Annotation:—*Mentd.* *Doane v. Clayton* (1817), 1 *Moore, C. P.* 203.

21. —.]—In an action on the case for exhibiting an inscription opposite to pltf.'s house, insinuating that it was a house of ill-fame, a pre-fatory allegation that pltf. carried on the business of a retailer of wines there, may be rejected as surplusage, there being no allegation that the publication was of & concerning pltf. as such retailer of wines.—*SPALL v. MASSEY* (1819), 2 *Stark.* 559, N. P.

22. —.]—*MONSON v. TUSSAUDS, LTD., MONSON v. TUSSAUD (LOUIS)*, No. 23, *post*.

23. *Effigy*.]—Before the ct. will grant an interlocutory injunction restraining publication of an

alleged libel, it must be satisfied that the case is so clear that a verdict for deft. would be set aside.

Pltf. had been tried for murder in Scotland & a verdict of not proven had been found. Defts. exhibited an effigy of pltf. in London, & L. did the same at Birmingham, in both cases in close proximity to the "chamber of horrors," & connected by reference to the scene of the murder. Some evidence of pltf.'s consent was produced:—*Held*: (1) the case was not clear enough to entitle pltf. to an injunction; (2) an injunction should only issue in cases where a verdict for deft. would be set aside as unreasonable; & (3) the jurisdiction to issue injunctions in cases of libel is not confined to trade libels.

Libels are generally in writing or printing, but this is not necessary; the defamatory matter may be conveyed in some other permanent form. For instance, a statue, a caricature, an effigy, chalk marks on a wall, signs, or pictures may constitute a libel (*LOPES, L.J.*).—*MONSON v. TUSSAUDS, LTD., MONSON v. TUSSAUD (LOUIS)*, [1894] 1 Q. B. 671; 63 L. J. Q. B. 454; 70 L. T. 335; 58 J. P. 524; 10 T. L. R. 227; 9 R. 177, C. A.

Annotations:—As to (1) *Reid*. *Trollope v. London Building Trades Federation* (1895), 72 L. T. 342; *Oppenheim v. Mackenzie* (1898), 42 *Sol. Jo.* 748; *Ellis v. National Union of Conservative & Constitutional Assn.*, *Middleton & Southall* (1900), 44 *Sol. Jo.* 750; *Corelli v. Wall* (1906), 22 T. L. R. 532. As to (2) *Reid*. *Newton v. Amalgamated Musicians' Union* (1896), 12 T. L. R. 623; *Oppenheim v. Mackenzie* (1898), 42 *Sol. Jo.* 748. *Generally, Mentd.* *Kitts v. Moore*, [1895] 1 Q. B. 253.

24. —.]—*CORELLI v. WALL*, No. 2263, *post*.

SUB-SECT. 2.—SLANDER.

25. *Method of uttering*.]—*PENFOLD v. WESTCOTE*, No. 798, *post*.

26. —.]—*COOK v. COX*, No. 966, *post*.

SECT. 4.—REMEDIES.

27. *Civil action or criminal prosecution*.]—An application to the Ct. of Q. B., for a criminal information against a party for the publication of a libel, which application has been refused, is no bar to an action on the case in the other cts. for the same ground of complaint.—*WAKLEY v. COOKE* (1847), 16 M. & W. 822; 4 *Dow. & L.* 702; 16 L. J. Ex. 225; 11 J. P. 506; 11 *Jur.* 377; 153 E. R. 1424; *subsequent proceedings* (1849), 4 *Exch.* 511.

28. —.]—*R. v. HOLBROOK*, No. 1135, *post*.

29. —.]—Libel on an individual is, & has always been, regarded as both a civil injury & a criminal offence. The person libelled may pursue his remedy for damages or prefer an indictment; he may both sue for damages & indict (*SMITH, J.*).—*R. v. LONDON (LORD MAYOR)* (1886), 16 Q. B. D. 772; 55 L. J. M. C. 118; 54 L. T. 761; 50 J. P. 614; 34 *W. R.* 544; 2 T. L. R. 482; 16 *Cox, C. C.* 81, D. C.

Annotations:—*Mentd.* *Wennhak v. Morgan* (1888), 57 L. J. Q. B. 241; *Public Prosecutions Director v. Blady* (1912), 106 L. T. 302.

Libel on deceased persons.]—See Part XI., Sect. 1, sub-sect. 1, E., *post*.

shouted & acted in a disorderly manner, the intention being to reflect upon pltf.'s moral character & to impute to her improper relations with M. The

evidence disclosed that pltf. had acted imprudently but there was no proof of immoral conduct on her part with M.:—*Held*: defts.' acts were of the

nature of libel & were actionable without proof of special damage.—*VARNER v. MO* (1919), 52 N. S. R. 180.—*CAN.*

Part II.—Parties.

SECT. 1.—WHO MAY SUE.

SUB-SECT. 1.—ALIENS.

Aliens generally.—See ALIENS, Vol. II., pp. 121 *et seq.*
Alien friends.—See ALIENS, Vol. II., p. Nos. 66-69; CONFLICT OF LAWS, Vol. XI., p. Nos. 784-786.
Alien enemy.—See ALIENS, Vol. II., p. 150, No. 259.

SUB-SECT. 2.—BANKRUPTS AND THEIR TRUSTEES.

Bankruptcy generally.—See BANKRUPTCY, Vols. IV. & V.

Right of trustee to sue.—See BANKRUPTCY, Vol. V., p. 972, No. 7962.

Right of trustee to damages obtained.—See BANKRUPTCY, Vol. V., p. 675, Nos. 5966, 5968.

SUB-SECT. 3.—COMPANIES.

Companies generally.—See COMPANIES, Vols. K. & X.

Right of company to sue.—See COMPANIES, Vol. X., p. 648, Nos. 4285-4288; Vol. X., p. 1220, No. 8628.

SUB-SECT. 4.—CORPORATIONS.

Corporations generally.—See CORPORATIONS, Vol. XIII., pp. 270 *et seq.*

Right of corporation to sue.—See CORPORATIONS, Vol. XIII., p. 408, Nos. 1282-1285.

SUB-SECT. 5.—EXECUTORS AND ADMINISTRATORS.

Execution generally.—See EXECUTORS, Vols. XIII. & XXIV.

Right of executor to sue.—See EXECUTION, Vol. XIII., p. 296, No. 3622.

SUB-SECT. 6.—INFANTS.

Infants generally.—See INFANTS, Vol. XXVIII., p. 131 *et seq.*

Right of infant to sue.—See INFANTS, Vol. XXVIII., p. 296, No. 1518.

SUB-SECT. 7.—MARRIED WOMEN.

Actions by married woman alone.—See, now, Married Women's Property Act, 1882 (c. 75), s. 1; HUSBAND & WIFE, Vol. XXVII., pp. 248 *et seq.*

Action by wife against husband—Civil pro-

ceedings.—See HUSBAND & WIFE, Vol. XXVII., pp. 260, 560, Nos. 2293, 6159

Criminal proceedings.—See HUSBAND & WIFE, Vol. XXVII., p. 261, Nos. 2309-2311.

SUB-SECT. 8.—PARTNERS.

Partnership generally, see PARTNERSHIP.

30. Joint action—Defamation in respect of partnership—Slander.—JANUARY *v.* SPIRES (*circa* 1800), cited in 3 Bos. & P. at p. 151; 127 E. R. 83.

Annotation :—Folld. Cook *v.* Batchellor (1802), 3 Bos. & P. 150.

31. — — — — —.—If defamatory words be spoken of two partners respecting their trade, they may maintain a joint action for the slander, averring special damage.—COOK *v.* BATCHELLOR (1802), 3 Bos. & P. 150; 127 E. R. 83.

Annotation :—Appld. Forster *v.* Lawson (1826), 3 Bing. 452.

32. — — — — —.—To an action by A. for words imputing insolvency in the way of his trade, which he carried on in partnership with B. & C. the declaration stating, by way of special damage, that one C. had withdrawn his account from pltf. & his co-partners, a plea that pltf. carried on his said trade jointly with B. & C. & not otherwise & that all the damage accrued to B. & C. jointly with pltf. & not to pltf. alone:—*Held*: ill.—ROBINSON *v.* MARCHANT (1845), 7 Q. B. 918; 15 L. J. Q. B. 135; 10 Jur. 156; 115 E. R. 733.

33. — — — Libel.—Two or more partners may join in an action for libel imputing insolvency to them in the way of their trade as bankers, whereby they have sustained a special damage; as, where the interest is joint, all may join in the action.—FORSTER *v.* LAWSON (1826), 3 Bing. 452; 11 Moore, C. P. 360; 130 E. R. 587; *sub nom.* FOSTER *v.* LAWSON, 4 L. J. O. S. C. P. 148.

Annotations :—*Reid*. Russell *v.* Webster (1874), 23 W. R. 59; Hannay *v.* Smurthwaite (1893), 69 L. T. 677.

34. — — — — —.—(1) Though defamatory matter may appear only to apply to a class of individuals, yet if the descriptions in such matter are capable of being, by innuendo, shown to be directly applicable to any one individual of that class, an action may be maintained by such individual in respect of the publication of such matter. In such a case the innuendo does not extend the sense of the defamatory matter, but merely points out the particular individual to whom matter, in itself defamatory, does in fact apply.

After verdict, a declaration which recited that pltf. was owner of a factory in Ireland, & charged that deft. published of him & of the said factory a libel, imputing that “in some of the Irish factories,” meaning thereby pltf.’s factory,” cruelties were practised, though there was no allegation otherwise connecting the libel with pltf.:—*Held*: good.

PART II. SECT. 1, SUB-SECT. 8.

30 i. Joint action—Defamation in respect of partnership—Slander.—CAMPBELL (1891), 21 O. R. 14.—CAN.

c. — — — Necessity for.—In a suit for libel defamatory of a firm all the

partners should join as pltf.s.—MATI LAL RAHA *v.* INDRA NATH BANERJEE (1909), I. L. R. 36 Calc. 907.—IND.

d. Action by individual partner—Imputation of forgery to firm.—One count for slander stated a cause of action accruing to pltf.s. as partners, by reason of its being an injury to

them in their joint business; other counts in the same declaration charged deft. with imputing forgery to pltf.s. as partners, etc.:—*Held*: the imputation of forgery not being a partnership imputation, the declaration was bad for misjoinder of counts.—MORLEY *v.* NICHOLS (1844), 1 U. C. R. 235.—CAN.

Where a class is described it may very well be that the slander refers to a particular individual. That is a matter of which evidence is to be laid before the jury, & the jurors are to determine when a class is referred to that the individual who complains that the slander applied to him is in point of fact justified in making such complaint (LORD CAMPBELL).

(2) A. & B. may join in an action for a libel containing imputations injurious to a trade carried on by them jointly as partners.—*LE FANU v. MALCOMSON* (1848), 1 H. L. Cas. 637; 13 L. T. O. S. 61; 9 E. R. 910, H. L.

Annotations:—As to (1) *Apld.* *Merywether v. Turner* (1849), 19 L. J. C. P. 10. *Consd.* *Jones v. Hulton*, [1909] 2 K. B. 444. As to (2) *Consd.* *South Hetton Coal Co. v. North Eastern News Assocn.*, [1894] 1 Q. B. 133. *Reid.* *Russell v. Webster* (1874), 23 W. R. 59.

35. ———— What damages may be given.]—In a joint action for a libel by two partners, damages cannot be given for any injury to their private feelings, but only for such injury as they may have sustained in their joint trade or business.

In an action for false imprisonment brought by two persons jointly, it was held that the action would lie for money which they had jointly paid in order to procure their enlargement; but that damages could not be given for the particular injury & inconvenience which they had personally suffered in their individual capacity (*GASELEE, J.*).—*HAYTHORN v. LAWSON* (1827), 3 C. & P. 196, N. P.

Annotation:—*Reid.* *Russell v. Webster* (1874), 23 W. R. 59.

36. ———— .]—*GREGORY v. WILLIAMS*, No. 2005, *post*.

37. ———— .]—Certain words were found by the jury to be defamatory of plffs. as co-proprietors of a newspaper:—*Held*: the action could be brought by the two co-proprietors; no special damage need be alleged; & the jury might give general damages for the libel.—*RUSSELL v. WEBSTER* (1874), 23 W. R. 59.

Annotation:—*Consd.* *South Hetton Coal Co. v. North Eastern News Assocn.*, [1894] 1 Q. B. 133.

38. Action by individual partner—Imputation of insolvency.]—(1) Where words, imputing insolvency in trade, are spoken of one of the partners in a firm, such individual partner may maintain an action of slander & recover damages for the injury done to him; & it is not necessarily to be considered as an injury to the partnership, for which a joint action only can be maintained.

(2) In an action of slander the witnesses must prove the words used, & cannot be allowed to state the impression produced upon their minds by the whole of the conversation.—*HARRISON v. BEVINGTON* (1838), 8 C. & P. 708, N. P.

SUB-SECT. 9.—PERSONS CLAIMING JOINTLY, SEVERALLY OR IN THE ALTERNATIVE.

See R. S. C., Ord. 16, r. 1.

Actions by partners.]—See Sub-sect. 8, *ante*.

39. Joint action by several plaintiffs—Damages not separately assessed.]—Under R. S. C., Ord. 16, r. 1, an action of libel may be brought by two or more persons jointly, although they are not in the partnership or otherwise jointly interested; & in such a joint action a single verdict of 40s. having been returned for plffs., the Ct. of Appeal

refused on the motion of deft., to disturb the verdict.—*BOOTH v. BRISCOE* (1877), 2 Q. B. D. 496; 25 W. R. 838, C. A.

Annotations:—*Distd.* *Sandes v. Wildsmith*, [1893] 1 Q. B. 771. *Consd.* *Smurthwaite v. Hannay*, [1894] A. C. 494. *Reid.* *Gort v. Rowney* (1886), 17 Q. B. D. 625; *Alabaster v. Harness*, [1894] 2 Q. B. 897; *Sadler v. G. W. Ry.*, [1895] 2 Q. B. 688; *Carter v. Rugby*, [1896] 2 Q. B. 113. *Mentd.* *Arnison v. Smith* (1889), 40 Ch. D. 567; *Bennetts v. Mcllwraith*, [1896] 2 Q. B. 464.

40. ———— Separate slanders of each plaintiff.]—Two plffs. sued jointly for slander & delivered a statement of claim alleging several slanders, some of one plff., some of the other:—*Held*: they were improperly joined, they must elect which would proceed, & the other must be struck out of the action.—*SANDES v. WILDSMITH*, [1893] 1 Q. B. 771; 62 L. J. Q. B. 404; 69 L. T. 387.

Annotations:—*Reid.* *Hannay v. Smurthwaite*, [1893] 2 Q. B. 412; *Bedford v. Ellis*, [1901] A. C. 1.

41. ———— Members of trade union.]—Plffs. were eight members of a trade union called the National Union of Railwaymen. One was the president of the union, another was the general secretary, three were assistant secretaries, & three were members of the executive committee. The general secretary & the assistant secretaries received salaries from the union, & the other four received no salary, but were paid a fixed sum per day for expenses when engaged on the work of the union. Defts. were six members of a trade union called the Associated Society of Locomotive Engineers & Firemen. In June, 1915, at a meeting at which representatives of the railway cos. & plffs. & defts. as representatives of their respective unions were present, a request was made for a war bonus of 5s. a week to railwaymen, but this request was not granted. At a meeting in Oct. 1915, a war bonus of 5s. a week was granted to the men. In Oct. 1915, defts. made speeches at meetings of railwaymen in various places reflecting on the conduct of plffs. at the meeting in June & stating that but for their conduct at that meeting the men would have got the bonus then. Plffs. brought an action in respect of those statements. The statement of claim alleged that defts. conspired together to injure plffs. by publishing defamatory matter, & that in pursuance thereof they spoke & published of plffs. & each of them in respect of their offices as officials of the union certain defamatory statements, & they claimed damages against defts. No special damage was alleged or proved. The jury found that four of defts. had conspired to slander plffs., that all defts. slandered plffs. & they assessed the damages for the separate slanders published by each of defts., but did not assess any damages on the conspiracy claim. Judgment was entered for plffs. for the respective amounts awarded to them by the jury, & for a declaration that four defts. had conspired to injure plffs. by publishing oral defamatory statements of them:—*Held*: (1) the causes of action for conspiracy & for the separate slanders by each of defts. were not improperly joined in one action, subject to the power of the judge to order separate trials of the different causes of action if in his opinion it would be embarrassing to try them all in one action; (2) each of plffs. held an office of profit or of honour, and that, as the slander imputed to each misconduct in his office, the action was maintainable without proof of special damage; & (3) as damage was the gist of the cause of action for conspiracy, the declaration was wrongly made.—

42. ———— Imputation of dishonesty to firm.]—Where a firm is called dishonourable or disreputable, dishonour-

able conduct or character is imputed to each member of the firm & any one of them is entitled to sue personally

for damages for defamation.—*PIENAAR v. PRETORIA PRINTING WORKS, LTD.* (1906), T. S. 805.—S. AF.

Sect. 1.—In general. Sects. 2 & 3. Part IV. Sect. 1: Sub-sect. 1, A. & B.]

12 L. T. O. S. 474; 13 Jur. 683; 137 E. R. 101; *affd. sub nom. MERYWETHER v. TURNER*, 19 L. J. C. P. 10, Ex. Ch.

64. —.]—If words charged to be libellous may, in their ordinary acceptation & without the aid of extrinsic circumstances, be reasonably understood as derogatory to the character of pltf., judgment cannot be arrested. So where the words used are in terms general, & the innuendoes apply them to pltf., & the jury so find, the judgment cannot be arrested.

Thus a passage in a newspaper warning certain persons to avoid the traps laid for them by desperate adventurers, innuendo meaning pltf. amongst others, was after verdict held to be libellous.

A declaration in libel, after an inducement, inserted before the first count, that pltf. was a barrister & the editor & proprietor of a weekly publication, etc., charged, in the second count, that deft., in a certain publication, etc., published, etc., omitting the words "of & concerning pltf. as the editor of the said weekly publication." It then set out the libel, in which the following words were complained of as libellous: "A body which has disgusted the government, & which other persons, not belonging to the profession, thereby meaning pltf. as such barrister as aforesaid, & whose weekly vocation it is to bring everything belonging to the profession into disrepute & contempt, thereby meaning that pltf. was in the habit, as editor of the said weekly publication as aforesaid, of bringing the medical profession into disrepute and contempt":—*Held*: on writ of error, the words themselves were actionable, the jury having found that they were derogatory to pltf., & the innuendo might be rejected as surplusage.—*WAKLEY v. HEALEY* (1849), 7 C. B. 591; 18 L. J. C. P. 241; 13 L. T. O. S. 259; 137 E. R. 235.

Annotations:—*Refd. Gregory v. R.* (1850), 15 Jur. 74; *Barrett v. Long* (1851), 3 H. L. Cas. 395.

65. —.]—The libel, on the face of it, did not expressly refer to pltf. It referred to a dead man, whereas pltf. was alive. It therefore required some outside evidence in order to connect it with pltf. No such evidence was given, & it followed that pltf. had failed to prove the innuendo (*SMITH, L.J.*).—*FOURNET v. PEARSON, LTD.* (1897), 14 T. L. R. 82, C. A.

The innuendo, *see* Part IV., Sect. 5, *post*.

SECT. 2.—WORDS APPLICABLE TO SEVERAL PERSONS.

66. Words spoken of ascertainable class—Reflecting on each—Action lies to each member.]—*FOXCROFT v. LACY* (1613), Hob. 89; Jenk. 297; 80 E. R. 239.

67. —.]—When words are spoken in the plural number all may bring actions, but when they are in the singular number as "your son is a thief," it hath been a doubt long controverted for the uncertainty, but they must have several actions & cannot join (*per CUR.*).—

with pltf. to believe that he was the person referred to?—*SYME v. CANAVAN*, [1918] V. L. R. 540.—AUS.

1. —.]—*TAYLOR v. MASSEY* (1891), 20 O. R. 429.—CAN.

PART III. SECT. 2.

66 i. Words spoken of ascertainable class—Reflecting on each—Action lies

to each member.]—The writer of matter defamatory of a class of persons, personally unknown to him, but so described that their identity is apparent to everybody who knows them & is familiar with the circumstances, is liable in an action for libel brought by any member of the class.

HENACRE & BETS v. — (1663), 1 Keb. 525; 83 E. R. 1091, N. P.

68. —.]—In an action for words pltf. declared, that W. made his will in writing bearing date on such a day, & that A., B. & pltf. were the three subscribing witnesses, which will they proved in the Prerogative Ct.; & in discoursing concerning the said will, deft. spoke certain scandalous words of pltf., which were set forth in the first & second count; & in the third count pltf. declared, that deft. spoke the words following; they, meaning pltf. & A. & B., or some of them forged the will; & they are perjured, & I'll prove them so. To the two first of these counts deft. pleaded not guilty, & to this last demurred. Argued in support of the demurrer that the words were not actionable, by reason that it was uncertain which of the three persons the words were spoken of:—*Held*: the first words were only introductive to the second, & the second contained a positive charge of perjury against them all; & judgment for pltf.—*HUGHES v. WINTER* (1733), 2 Barn. K. B. 267; 94 E. R. 492.

69. —.]—Uncertainty as to which reflected on —No action lies.]—By the ancient law, he who reports false news of another, ought to bring in the party who spoke it, or else he himself to have the same punishment that was to be given to such a reporter of false news. . . . It is plain that if he speaks of the prince that the action has, notwithstanding this be of the hearsay of others. But . . . if scandalous words be spoken of a man, who is not fully designed by the words themselves, but by an innuendo, in this case the action will not lie; as, if a man hath four sons, & one saith, that one of the sons of S., he having four sons, did commit a robbery, innuendo such a one of them, for these words thus spoken no action lies; but if it be denoted in certain, as if one doth say unto a *feme covert*, that her husband is a thief, an action upon the case well lies, because the person defamed is certainly designed (*HOUGHTON, J.*).

An innuendo shall not supply defects, that which is doubtful it will make plain, but that which is wanting cannot be supplied (*MOUNTAGUE, C.J.*).—*LEWES v. WALTER* (1617), as reported in 3 Bulst. 225; 81 E. R. 189.

70. —.]—*SYMM'S CASE* Godb. 391; 78 E. R. 230.

71. —.]—*ANON.* (1732), 2 Barn. K. B. 138; 94 E. R. 406.

72. —.]—An article in a newspaper describing leaden figures "reported to have been found in the Thames," & sold as antiquities, as being of recent fabrication, & stigmatizing their sale as an attempt at deception & extortion:—*Held*: not actionable; the alleged libel being aimed not at any particular individual but of a class, & being privileged in the absence of evidence of malice, as pertaining to fair description or criticism on a matter of public interest.—*EASTWOOD v. HOLMES* (1858), 1 F. & F. 347, N. P.

Annotations:—*Refd. Campbell v. Spottiswoode* (1863), 3 B. & S. 769. *Mentd. Merivale v. Carson* (1887), 4 T. L. R. 125.

73. —.]—Question for jury whether plaintiff intended.]—*LE FANU v. MALCOMSON*, No. 34, *ante*.

66 ii. —.]—*MARSDEN v. HENDERSON* (1863), 22 U. C. R. 585.—CAN.

66 iii. —.]—*BROWNE v. THOMSON & Co.*, [1912] S. C. 359; 49 Sc. L. R. 285; 1 S. L. T. 123.—SCOT.

73 i. —.]—Uncertainty as to reflected on—Question for jury

SECT. 3.—WHAT IS SUFFICIENT DESCRIPTION OF PLAINTIFF.

74. **Initial letters.**—*Re* READ & HUGGONSON, No. 1115, *post*.

75. **Asterisks.**—(1) If, in a libel, asterisks be put instead of the name of the party libelled, to make it actionable, it is sufficient that the party should be so designated, that those who know *pltf.* may understand that he is the person meant; & it is not necessary that all the world should understand it. But if witnesses, who state that they understand that *pltf.* is the person, also say that they were enabled so to understand by the perusal of another libel, with which *deft.* had no concern, their evidence ought to be laid out of the case.

(2) If a letter, set out as inducement, be alleged to contain "the words & matter following"; & when the letter is read in evidence, it is found to contain all that is stated in the declaration, & something more, this is no variance.—BOURKE v. WARREN (1826), 2 C. & P. 307, N. P.

Annotation:—*As to* (1) *Reid*. Hulton v. Jones, [1910] A. C. 20.

76. **Fictitious name—Intention of defendant immaterial.**—A writer furnished to a magazine an article based partly on fact & partly on fiction, which contained, amongst other matter, certain anecdotes told him six years ago when he was in Spain, by a friend whom he called Don R. One of these anecdotes related to a General Plantagenet Harrison, who was spoken of in the article as a notorious English swindler, who had forged & cashed circular notes, usually issued by English bankers, whose names were paraphrased. The article mentioned various towns at which General Plantagenet Harrison was said to have done various disreputable things. The writer of the article, however, was not aware that any person bearing the name of General Plantagenet Harrison existed, but believed, from its incongruous nature, that it had been assumed for temporary purposes.

The article having been published, an action was brought by General Plantagenet Harrison for libel, he having been at the various places mentioned in the article at the times referred to:—*Held*: the action would lie, as the writer intended to portray the character of some one, & it was no defence that he did not believe that the name he used was the name of any living person. *Secus*: if the character portrayed had been merely a creation of the brain to which a name had been given which was borne by some living person.—HARRISON v. SMITH (1869), 20 L. T. 713, N. P.

Annotation:—*Consd.* Jones v. Hulton, [1909] 2 K. B. 444.

77. ———.—*In* an action for libel it is no defence to show that *deft.* did not intend to defame *pltf.*, if reasonable people would think the language to be defamatory of *pltf.*

Appls., owners & publishers of a newspaper, published in an article defamatory statements of a named person believed by the author of the article & the editor of the paper to be a fictitious personage with an unusual name. The name was that of *resp.*, who was unknown to the author & the editor. In an action for libel against *appls.* it was admitted that neither the writer nor the editor nor *appls.* intended to defame *resp.*, but evidence was given by his friends that they thought the article referred to him:—*Held*: *pltf.* was entitled to maintain the action.

Libel is a tortious act. What does the tort consist in? It consists in using language which others knowing the circumstances would reasonably think to be defamatory of the person complaining of & injured by it (LOREBURN, L.C.).—HULTON (E.) & Co. v. JONES, [1910] A. C. 20; 79 L. J. K. B. 198; 191 L. T. 831; 26 T. L. R. 128; *sub nom.* JONES v. HULTON (E.) & Co., LTD., 54 Sol. Jo. 116, H. L.

Annotations:—*Expld.* Adam v. Ward, [1917] A. C. 309. *Refd.* Spiers & Pond v. John Bull (1916), 85 L. J. K. B. 992; Pratt v. British Medical Assn. (1918), 120 L. T. 41; Shaw v. London Express Newspaper (1925), 41 T. L. R. 475.

Part IV.—The Statement.

SECT. 1.—WHAT ARE DEFAMATORY STATEMENTS.

SUB-SECT. 1.—LIBELLOUS STATEMENTS.

A. Statements Actionable *per se*.

See Sect. 2, *post*.

B. Statements Holding up to Ridicule, Hatred or Contempt.

78. **General rule.**—CROPP v. TILNEY, No. 1, *ante*.

79. ———.—WILSON v. REED, No. 5, *ante*.

80. ———.—"It [libel] is writing which has a tendency to hold up a man to hatred, or contempt, or ridicule" (STEPHEN, J.).—DOLBY v. NEWNES (1887), 3 T. L. R. 393, N. P.

81. ———.—BRENON v. RIDGWAY, No. 7, *ante*.

plaintiff intended.—Where slanderous words were spoken under such circumstances as that the person to whom they were spoken did not know to which of a class of two persons they were intended to be applied:—*Held*: either of the two members of the class was entitled to sue, but it was necessary for her to prove that the words were untrue of the other member, otherwise she could not recover.—ALBRECHT v. BURKHOLDER (1889), 18 O. R. 287.—CAN.

m. ———.—*Foolish & intemperate language.*—WARDLAW v. DRYSDALE (1898), 25 R. (Ct. of Sess.) 879; 35 Sc. L. R. 693.—SCOT.

n. *Words spoken of two persons—Impartial reference to either.*—Where defamatory words are spoken impartially in relation to either of two persons, neither of them can sue in respect of them.—CHOMLEY v. WATSON, [1907] V. L. R. 502.—AUS.

82. ———.—MYROFT v. SLEIGHT, No. 346, *post*.

83. **Words imputing unfitness for society—Imputation of contagious disease.**—VILLERS v. MONSLEY, No. 9, *ante*.

84. ———.—**Particular society.**—These words: "The Rev. J. R. & Mr. J. R., inhabitants of this town, not being persons that the proprietors & annual subscribers think it proper to associate with, are excluded this room." Published by posting a paper on which they were written, purporting to be a regulation of a particular society, are not a libel.—ROBINSON v. JERMYN (1814), 1 Price, 11; 145 E. R. 1314.

Annotation:—*Expld. & Distd.* Hoare v. Silverlock (1848), 12 Q. B. 624.

85. ———.—*R. v. HART* (1762), 1 Wm. Bl. 386; 96 E. R. 218.

PART IV. SECT. 1, SUB-SECT. 1.—B.

78 i. **General rule.**—A writing which tends to vilify & degrade a person is actionable, although no crime be imputed.—CONNICK v. WILSON (1845), 4 N. B. R. (2 Kerr) 617.—CAN.

78 ii. ———.—PATERSON v. WELCH (1893), 20 R. (Ct. of Sess.) 744; 30 Sc. L. R. 668; 1 S. L. T. 55.—SCOT.

Sect. 1.—What are defamatory statements: Subsect. 1, B.]

86. —.—[GREGORY v. R., No. 2460, *post*.

87. Words throwing contumely—Rogue & rascal.]—VILLERS v. MONSLEY, No. 9, *ante*.

88. — Swindler.]—To print of any person that he is a swindler is a libel, & actionable. A justification of such a charge must state the particular instances of fraud, by which deft. means to support it.—J'ANSON v. STUART (1787), 1 Term Rep. 748; 90 E. R. 1357.

Annotations:—*Refd.* Clement v. Chivis (1829), 4 Man. & Ry. K. B. 127; Young v. Murphy (1836), 3 Bing. N. C. 54; Zierenberg v. Labouchere, [1893] 2 Q. B. 183. *Mentd.* Holmes v. Catesby (1809), 1 Taunt. 543; Jones v. Stevens (1822), 11 Price, 235; R. v. Hepper (1825), 1 C. & P. 608; Hickinbotham v. Leach (1842), 10 M. & W. 361; Burgess v. Beaumont (1844), 9 Jur. 14; O'Brien v. Clement (1846), 16 M. & W. 159; Behrens v. Allen (1862), 8 Jur. N. S. 118; Gourley v. Plimsoll (1873), 28 L. T. 598; Ratcliffe v. Evans, [1892] 2 Q. B. 524.

89. — Villain.]—A letter written to a third person calling pltf. "a villain":—*Held*: actionable, without proof of special damage.—BELL v. STONE (1798), 1 Bos. & P. 331; 126 E. R. 933.

Annotation:—*Refd.* Clement v. Chivis (1829), 9 B. & C. 172.

90. — Hypocrite.]—THORLEY v. KERRY (LORD) (1812), 4 Taunt. 355; 3 Camp. 214, n.; 128 E. R. 367.

Annotations:—*Refd.* Robinson v. Jermyn (1814), 1 Price, 11; McGregor v. Thwaites (1824), 4 Dow. & Ry. K. B. 695; Tuam (Archbp.) v. Robeson (1828), 5 Bing. 17; Clement v. Chivis (1829), 9 B. & C. 172. *Mentd.* Huth v. Huth, [1915] 3 K. B. 32.

91. — Accusation of degradation & subserviency.]—A count, in an action for libel, charging that deft. wrote of pltf. that he was "a man Friday" to another:—*Held*: bad for want of an averment to show that by the term "Friday," as applied to pltf., degradation & subserviency were intended to be imputed to him.

To write of a man that he has been engaged in a gambling fracas arising out of a dispute at play is not libellous, without an averment that illegal gambling & play were intended by the libel.—FORBES v. KING (1833), as reported in 1 Dowl. 672; 2 L. J. Ex. 109.

Annotations:—*Refd.* Hoare v. Silverlock (1848), 12 Q. B. 624; Lumley v. Gye (1853), 22 L. J. Q. B. 463.

92. Words holding up to ridicule.]—VILLERS v. MONSLEY, No. 9, *ante*.

93. —.—[Pltf., who lived at Grimsby, had arranged to be married on the afternoon of a certain date, & on the day before the wedding a full account of the ceremony appeared in defts.' local newspaper together with the statement, "The honeymoon is being spent in the South of England." In an action for libel pltf. alleged that on the morning following the publication he went before the ceremony to work as usual, but was

unable to do his work because of the ridicule to which he was subjected:—*Held*: the statement of claim must be struck out on the ground that the action was frivolous & vexatious.—EMERSON v. GRIMSBY TIMES & TELEGRAPH CO., LTD. (1926), 42 T. L. R. 238, C. A.

94. —.—[COOK v. WARD, No. 1159, *post*.

95. Accusation of defrauding or oppressing the poor.]—M'GREGOR v. THWAITES, No. 1668, *post*.

96. —.—[Written slander tending to bring pltf. into public hatred & contempt is actionable; as when an overseer is charged with oppressive conduct towards paupers, in compelling them to receive payment of their weekly parish allowance in orders for flour upon a particular tradesman.—WOODARD v. DOWSING (1828), 2 Man. & Ry. K. B. 74; 6 L. J. O. S. K. B. 225.

97. —.—[Pltf. declared upon a letter written by deft., in which it was alleged that the former had for years, without cause, systematically done everything to annoy the latter, & had unnecessarily dragged him into the ct. of Chancery & put him to great expense:—*Held*: the ct. could not so clearly see that the latter could not be libellous, as to justify them in withdrawing the case from a jury.—FRAY v. FRAY (1864), 17 C. B. N. S. 603; 34 L. J. C. P. 45; 10 Jur. N. S. 1153; 144 E. R. 241.

Annotation:—*Mentd.* R. v. Bradlaugh & Besant (1878), 48 L. J. M. C. 5.

98. Accusation of misconduct in matters arising out of illegal transaction.]—(1) Deft. having published imputations against pltf. as envoy of the state of Chili, & pltf. in a declaration for libel having stated as matter of inducement, that he was envoy of that state:—*Held*: upon motion for a new trial, the admission of these two facts upon the face of the alleged libel was sufficient proof of them to enable pltf. to sustain his action.

(2) An action of libel does not lie for any thing written against a party touching his conduct in an illegal transaction; but for misconduct imputed to him in any matter independent of the illegal transaction, though arising out of it, an action lies.

The following passage, "Pltf. lost no time in transferring himself, together with £200,000 sterling of John Bull's money, to Paris, where he now outtops princes in his style of living":—*Held*: not to impute to pltf. having committed a fraud on the English nation.—YRISARRI v. CLEMENT (1826), 3 Bing. 432; 2 C. & P. 223; 2 State Tr. N. S. App. 986; 11 Moore, C. P. 308; 4 L. J. O. S. C. P. 128; 130 E. R. 579.

Annotations:—*Generally, Mentd.* Thompson v. Barclay (1831), 9 L. J. O. S. Ch. 215; British South African Co. v. Companhia de Mocambique (1893), 69 L. T. 604; Duff Development Co. v. Kelantan Government, [1924] A. C. 797.

86 i. Words imputing unfitness for society.]—Deft. said of pltf. that he was a person of disreputable character & not a fit & proper person for respectable persons to associate with:—*Held*: these words were defamatory.—VANDER MEOWE v. SLABBERT, [1921] App. D. 88.—S. AF.

86 ii. —.—[MEJAUL v. COSSIE, [1923] E. D. L. 299.—S. AF.

88 i. Words throwing contumely—Swindler.]—The speaking & publishing of a person that he is a "swindler" is not actionable, in the absence of an allegation that the word was spoken in relation to an office, trade, profession, or business.—BLACK v. HUNT (1878), 2 L. R. Ir. 10.—IR.

90 i. — Hypocrite.]—GRIFFEN v. DIVERS, [1922] S. C. 605.—SCOT.

91 i. — Accusation of degradation & subserviency.]—To say of a white

man that he lives like a Kaffir & is worse than a Kaffir when used in context that denotes a low & degraded standard of comparison is defamatory.—DE VILLIERS v. OELS, [1921] O. P. D. 55.—S. AF.

o. — Liar.]—In an action of damages for slander:—*Held*: a statement that defender had called pursuer, in Gaelic, "a liar, & the greatest liar in the country," was relevant to entitle the pursuer to an issue.—M'LAREN v. ROBERTSON (1859), 21 Dunl. (Ct. of Sess.) 183; 31 Sc. Jur. 111.—SCOT.

p. — Coward.]—Though the word "coward" standing by itself may well be a defamatory expression, the surrounding circumstances may be such that a reasonable man would not seriously treat it as having been used in a defamatory sense.—BRILL v. DYKMAN (1920), O. P. D. 252.—S. AF.

q. — Coward & scoundrel.]—

In an action of damages for written defamation, by posting pursuer as a coward & scoundrel:—*Held*: pursuer was entitled to damages.—MENZIES v. GOODLET (1835), 13 Sh. (Ct. of Sess.) 1136; 10 Fac. Coll. 83.—SCOT.

r. — Cheat at cards.]—PATERSON v. SHAW (1830), 8 Sh. (Ct. of Sess.) 573; 5 Fac. Coll. 451.—SCOT.

t. — Blackguard.]—In an action of damages for defamation:—*Held*: the term blackguard was actionable without any innuendo.—BROWNLIE v. THOMSON (1859), 21 Dunl. (Ct. of Sess.) 480; 31 Sc. Jur. 260.—SCOT.

u. — Blackleg.]—The epithet blackleg is libellous.—HUGO v. TODD (1889), 1 B. C. R. pt. 2, 369.—CAN.

92 i. Words holding up to ridicule.]—WESTGARTH v. MURNIN (1873), 12 N. S. W. S. C. R. L. 1.—AUS.

99. Accusation of sharp practice.]—Pltf. having advertised for sale a bond, executed to him by deft., the payment of which had been resisted in a long course of litigation in which the validity of the bond had been disputed, deft. published, among the persons assembled to bid for the bond at an auction, a statement of all the circumstances under which the bond was given, & alluding to pltf., concluded: "His object is either to extract money from the pocket of an unwary purchaser, or, what is more likely, by this threat of publication to extort money from me":—*Held*: this exceeded the latitude allowed for privileged communications, or observations on titles by a party interested; & it was a libel, although no express malice was proved.—**ROBERTSON v. M'DOUGALL** (1828), 4 Bing. 670; 3 C. & P. 259; 1 Moo. & P. 692; 6 L. J. O. S. C. P. 171; 130 E. R. 927; *previous proceedings, sub nom. M'DOUGAL v. ROBERTSON* (1827), 4 Bing. 435.

Annotation:—**Reid**. *Clement v. Chivis* (1829), 9 B. & C. 172.

100. —.]—A writing in which a party is spoken of in language usually applied to the keeper of a gaming-house, is libellous whether the words are capable of being applied by an innuendo to specific charges of unfair practices or not.—**DIGBY v. THOMPSON** (1833), 4 B. & Ad. 821; 1 Nev. & M. K. B. 485; 2 L. J. K. B. 140; 110 E. R. 665.

Annotation:—**Reid**. *Wheeler v. Haynes* (1838), 8 L. J. Q. B. 3.

101. —.]—**HELSHAM v. BLACKWOOD**, No. 1224, *post*.

102. Accusation of insulting behaviour.]—It is libellous & actionable to publish of a man that he has been guilty of gross misconduct, & insulted females in a barefaced manner.—**CLEMENT v. CHIVIS** (1829), 9 B. & C. 172; 4 Man. & Ry. K. B. 127; 7 L. J. O. S. K. B. 189; 109 E. R. 64.

103. —.]—Action for libel, consisting of the following sentence in a newspaper: "Mr. R., pltf., is an old man, being, as we hear, upwards of sixty years of age. He also exercises great power, necessarily delegated to him by Lord G., & ought therefore, both on account of his years & of his influential station, to be the man to protect the wives & daughters of his neighbours from the ruffian's insult, rather than to violate in their persons, not only the decencies of society, but the modesty of nature. We should be sorry to hear, that any man, who had lived to Mr. R.'s years, had been pronounced guilty of such an offence as is alleged against him; yet the respect we bear our neighbours, & the feeble protection which it is our

duty to throw over the modest & virtuous of the gentler sex, compel us to express a hope that Lord G. will see the propriety of instituting some inquiry." After verdict for pltf.:—*Held*: on motion in arrest of judgment, the sentence was libellous on pltf.—**RICHARDS v. COHEN** (1832), 1 L. J. K. B. 210.

104. Charge of ingratitude.]—A libel that "the friends of pltf. had realised the fable of the frozen snake":—*Held*: no inducement was necessary to show that the charge imputed malignity & mischievous ingratitude.

To write of a candidate for the benevolence of a benevolent society that "he is unworthy" & that he "has squandered money obtained from the benevolence of the society in printing circulars abusive of the secretary" is libellous.—**HOARE v. SILVERLOCK** (1848), 12 Q. B. 624; 17 L. J. Q. B. 306; 11 L. T. O. S. 328; 12 Jur. 695; 116 E. R. 1004.

Annotation:—**Mentd**. *Lumley v. Gye* (1853), 22 L. J. Q. B. 463.

105. —.]—**COX v. LEE**, No. 1008, *post*.

106. Accusation of insanity.]—A statement in writing that a person's mind is affected is *prima facie* a libel. Such a publication is malicious unless made in discharge of a public or private duty arising out of a matter in which the person making it is concerned, & then made without malice. But, if fairly warranted by any reasonable exigency, & honestly made, it is privileged. Where the libel was charged to be in relation to pltf.'s character as governess, the jury must be satisfied that the expressions were used in reference to that character.

A plea of justification is necessary only when the publication is malicious.—**MORGAN v. LINGEN** (1863), 8 L. T. 800, N. P.

Annotation:—**Reid**. *Weldon v. Neal* (1885), 1 T. L. R. 322.

107. Accusation of being alien enemy.]—**HAMBOURG v. LONDON MAIL, LTD.** (1914), *Times*, Oct. 29.

108. —.]—**BRUNNER v. PALMER, MOND v. SAME** (1914), *Times*, Dec. 9, p. 5, col. 2.

109. —.]—Defts. wrote a post-card stating that pltf., being a German firm, would probably be closed down. Pltfs. were a limited co. incorporated under the Companies Act, 1908 (c. 69), all the directors being British & practically all the shares being held by British subjects residing in England, & were manufacturers of articles used in sports:—*Held*: in the circumstances of the present time the statement was defamatory,

107 i. Accusation of being alien enemy.]—**FICHARDT (G. A.), LTD. v. FRIEND NEWSPAPERS, LTD.**, [1916] App. D. 1.—**S. AF.**

b. Words imputing indelicacy in woman.]—**A. B. v. BLACKWOOD & SONS** (1902), 5 F. (Ct. of Sess.) 25; 40 Sc. L. R. 20; 10 S. L. T. 311.—**SCOT.**

c. Words imputing dishonesty in servant.]—Damages awarded for imputations against a servant's honesty.—**GRIEVE v. SMITH** (1808), Hume, 637.—**SCOT.**

d. Words imputing ungentlemanliness.]—**MACKAY v. CAMPBELL** (1833), 11 Sh. (Ct. of Sess.) 1031.—**SCOT.**

e. Imputing unbrotherliness in a brother.]—It is libellous to say of any one that his conduct towards his brother has been unbrotherly.—**CAMPBELL v. PAYTON** (1898), 17 N. Z. L. R. 91.—**N.Z.**

f. Words imputing political corruption.]—**SYDNEY POST PUB. CO. v. KENDALL** (1910), 30 C. L. T. 688; 43 S. C. R. 461.—**CAN.**

g. —.]—To charge a newspaper with selling its influence to any political party or group & thereby binding itself to deceive the public & its readers by publishing what may be contrary to the honest opinions or convictions of its management, tends to bring such newspaper into contempt with the public to its damage & is, therefore, actionable.—**ALBERTAN PUBLISHING CO., LTD. v. MUNNS**, [1918] 2 W. W. R. 761; 13 Alta. L. R. 533; 41 D. L. R. 422.—**CAN.**

h. —.]—**GODFREY v. THOMSON** (1890), 17 R. (Ct. of Sess.) 1108; 27 Sc. L. R. 865.—**SCOT.**

k. Words imputing dishonest dealing with public subscriptions.]—**BOAL v. SCOTTISH CATHOLIC PRINTING CO., LTD.**, [1907] S. C. 1120; 44 Sc. L. R. 836; 15 S. L. T. 220.—**SCOT.**

l. Accusation of being an informer.]—**KENNEDY v. ALLAN** (1848), 10 Dunl. (Ct. of Sess.) 1293; 20 Sc. Jur. 473.—**SCOT.**

m. —.]—The propagation of a report, that a party had given information to the officers of excise against a

distiller, for the purpose of obtaining the half of the penalties, afforded a relevant ground for a claim of damages.—**GRAHAM v. ROY** (1851), 13 Dunl. (Ct. of Sess.) 634; 23 Sc. Jur. 124.—**SCOT.**

n. —.]—**WINN v. QUILLAN** (1899), 2 F. (Ct. of Sess.) 322; 37 Sc. L. R. 234; 7 S. L. T. 183.—**SCOT.**

o. Accusation of falsehood.]—**MILNE v. WALKER** (1893), 21 R. (Ct. of Sess.) 155; 31 Sc. L. R. 149; 1 S. L. T. 332.—**SCOT.**

p. Words defaming regiment — Action by commanding officer.]—Damages found due to the commanding officer of a regiment for defamatory expressions used against the regiment.—**SHEARLOCK v. BEARDSWORTH** (1816), 1 Murr. 196.—**SCOT.**

q. Advertisement of debt.]—Two of debts. placed in the hands of the other deft., a collector of debts, an account against pltf. for collection, well knowing the method of collection adopted by the collector, who caused to be posted up conspicuously in

LIBEL AND SLANDER.

Sect. 1.—What are defamatory statements: Subsect. 1, B. & C. (a).]

& plffs., though a limited Co., cannot maintain an action in respect of it, since it was made of them in respect of their business.—**SLAZENGERS, LTD. v. GIBBS (C.) & Co.** (1916), 33 T. L. R. 35.

C. Statements Reflecting on Plaintiff in the Way of his Trade, Profession or Calling.

(a) *Traders.*

110. General rule.]—(1) If deft. had gone no farther he would not have been chargeable; they might advertise that they make as good as he, but they ought not to say he is no artist; which they plainly do by saying he dares not engage with any artist (*per Cur.*).

(2) The law has always been very tender of the reputation of tradesmen, & therefore words spoken of them in the way of their trade will bear an action, that will not be actionable in the case of another person; & if bare words are so, it will be stronger in the case of a libel in a public newspaper, which is so diffusive (*per Cur.*).—**HARMAN v. DELANY** (1731), 2 Stra. 898; 1 Barn. K. B. 438; Fitz.-G. 253; 93 E. R. 925.

Annotations:—As to (1) **Consd.** **Evans v. Harlow** (1844), 5 Q. B. 624. As to (2) **Consd.** **Linotype Co. v. British Empire Typesetting Machine Co.** (1899), 81 L. T. 331; **Bendle v. United Kingdom Alliance** (1915), 31 T. L. R. 403. **Generally, Refd.** **Thorley v. Kerry** (1812), 4 Taunt. 355.

111. —.]—**RIDING v. SMITH**, No. 2094, *post*.

112. —.]—**SOUTH HETTON COAL CO. v. NORTH-EASTERN NEWS ASSOCN.**, No. 1795, *post*.

113. —.]—(1) If the only meaning which can be reasonably attached to a writing is that it is a criticism upon the goods or manufacture of a trader it cannot be the subject of an action for libel, but an imputation upon a man in the way of his trade is properly the subject of an action without proof of special damage.

(2) Whether in any particular case the words complained of are susceptible of a defamatory meaning, or are simply a disparagement of goods, is for the jury.—**LINOTYPE CO., LTD. v. BRITISH EMPIRE TYPE-SETTING MACHINE CO., LTD.** (1899), 81 L. T. 331; 15 T. L. R. 524. H. L.; *affg.* S. C. *sub nom.* **EMPIRE TYPESETTING MACHINE CO. OF NEW YORK v. LINOTYPE CO., LTD.**, 79 L. T. 8, C. A.

Annotations:—As to (1) **Refd.** **Hubbuck v. Wilkinson, Heywood & Clark**, [1899] 1 Q. B. 86; **Griffiths v. Benn** (1911), 27 T. L. R. 346.

114. Business must be lawful — Publication of immoral book.]—(1) In an action for a libel upon pltf. in his business of a bookseller accusing him of being in the habit of publishing immoral & foolish books, deft. under the plea of not guilty may adduce evidence to show that the supposed libel is a fair stricture upon the general run of pltf.'s publications.

(2) In an action for a libel, if separate passages of the libel are to be set out, in one count of the declaration they ought to be described as separate & distinct from each other.

(3) Although it is lawful for an author to animadvert upon the conduct of a bookseller in publishing books of an improper tendency, it is actionable falsely to impute to him the publication of any immoral or absurd literary publication.—**TABART v. TIPPER** (1808), 1 Camp. 350, N. P.

Annotations:—As to (1) **Refd.** **Pearson v. Lemaitre** (1843),

several parts of the city where pltf. lived, a poster advertising a number of accounts for sale, among them being one against pltf. for \$59.35. Pltf.

owed \$24.33 only:—**Held:** the publication was libellous & could only be justified by showing its truth, & as defts. had failed to show that she was

5 Man. & G. 700. As to (2) **Fold.** **R. v. Sully** (1848), 12 J. P. 536. **Refd.** **Cartwright v. Wright** (1822), 5 B. & Ald. 615; **R. v. Crowe** (1848), 12 J. P. 599. As to (3) **Consd.**

Annotations:—As to (1) **Refd.** **Paris v. Levy** (1808), 1 Camp. 355, n.; **McQuinn v. News Co.**, [1903] 2 K. B. 100.

115. — Prize fighting.]—In an action for libelling pltf. in his vocation as an exhibitor of sparring matches, the jury were directed to consider whether pltf.'s exhibitions were not illegal, as tending to form prize-fighters, the judge declaring such to be his opinion, but recommending the jury to find a verdict for pltf., in order that the question might be fully discussed on a motion to set aside such verdict; a verdict having been found for deft., the ct. refused to grant a new trial. **Semble:** public exhibitions of sparring matches are illegal. A party who pursues an illegal vocation has no remedy by action for a libel regarding his conduct in such vocation.—**HUNT v. BELL** (1822), 1 Bing. 1; 7 Moore, C. P.

Annotations:—As to (1) **Refd.** **Greenville v. Chapman** (1844), 5 Q. B. 731; **Newcomb** (1867), L. R. 2 Exch. 327.

116. — Horse racing—Imputation of misconduct in matters arising thereout.]—Declaration for libel alleged that a horse race was run for stakes raised by subscription, to wit £0,100 by one hundred & eighty-two subscribers, at which a horse C. had been entered, & the owner was entitled either to let such horse run or to withdraw him; that pltf., after C. was entered & before & at the time of the race, became owner of C.; that C. became lame & unfit to run, & pltf. withdrew him; that defts. published a libel, which was set out, & which imputed that pltf. had betted against C., remarked on the time at which the lameness appeared, & stated that the withdrawing him was an infernal robbery. Defts. pleaded not guilty, & several pleas in justification, some alleging in substance the truth of the above imputations: but all the issues were found for pltf.; & it did not otherwise appear on the record that pltf. had in fact betted:—**Held:** pltf. was entitled to recover, for that there was no illegality in a horse race run without fraud; & even if there were, pltf. was entitled to protection of his character in respect of other matters connected with the transaction.—**GREVILLE v. CHAPMAN** (1844), 5 Q. B. 731; **Dav. & Mer.** 553; 13 L. J. Q. B. 172; 2 L. T. O. S. 187, 419; 8 Jur. 189; 114 E. R. 1425.

Annotation:—Refd. **Helsham v. Blackwood** (1851), 17 L. T. O. S. 166.

117. —.]—Pltf. alleged that he carried on in an honest & lawful manner the trade of a manufacturer of bitters, & that deft. libelled him in his trade by publishing that the bitters were made to adulterate porter: *per quod* pltf. was ruined:—**Held:** under the general issue deft. might give in evidence that pltf.'s trade was illegal, & that his bitters had been condemned in the Ct. of Exchequer.—**MANNING v. CLEMENT** (1831), 7 Bing. 362; 5 Moo. & P. 211; 9 L. J. O. S. C. P.

Annotations:—As to (1) **Refd.** **Willis v. Bernard** (1832), 8

118. Imputation of insolvency.]—**FORSTER v. LAWSON**, No. 33, *ante*.

119. — Extract from register of judgments.]—**FLEMING v. NEWTON**, No. 1584, *post*.

indebted in the sum mentioned in the poster, they were liable in damages.—**GREEN v. MINNES** (1891), 22 O. R. 177.—**CAN.**

120. — “Meetings under Bankruptcy Act.”—In a periodical publication circulating amongst booksellers & stationers, the proprietor, by a mistake in the arrangement of the London Gazette announcements, inserted the names of pltf.’s firm, who were stationers, under the head “First Meetings under Bkpcy. Act,” instead of under “Dissolutions of Partnerships.” In a count for libel, the innuendo was “meaning thereby that pltf. had been bkpt. or had taken proceedings in liquidation or for composition.” The jury having found the publication libellous, & having assessed the damages at £50, the ct. refused to arrest the judgment or to interfere with the finding.—*SHEPHEARD v. WHITAKER* (1875), L. R. 10 C. P. 502 ; 32 L. T. 402.

Annotation :—*Consd.* *Jones v. Hulton*, [1909] 2 K. B. 411.

121. — Refusal to receive cheques of bank.—(1) H. & Sons were in the habit of receiving, in payment from their customers, cheques on various branches of a bank, which the bank cashed for the convenience of H. & Sons at a particular branch. Having had a squabble with the manager of that branch, H. & Sons sent a printed circular to a large number of their customers, who knew nothing of the squabble, “H. & Sons hereby give notice that they will not receive in payment cheques drawn on any of the branches of the” bank. The circular became known to other persons; there was a run on the bank & loss inflicted. The bank having brought an action against H. & Sons for libel, with an innuendo that the circular imputed insolvency :—*Held* : in their natural meaning the words were not libellous; the inference suggested by the innuendo was not the inference which reasonable persons would draw; the *onus* lay on the bank to show that the circular had a libellous tendency; the evidence, consisting of the circumstances attending the publication, failed to show it; & there was no case to go to the jury; & defts. were entitled to judgment.

(2) I do not understand any of the learned judges in the *cts.* below to have been of opinion that the question of libel or no libel must always, & necessarily, be left to a jury as to words not in themselves, *i.e.* in their proper & natural meaning, according to the ordinary rules for the interpretation of written instruments, libellous, without some evidence either of a libellous purpose on the part of the writer, or of some other extrinsic facts calculated to lead reasonable men to understand them in a libellous sense. I should myself be very sorry if such were the law. . . . If the judge, taking into account the manner & the occasion of the publication & all other facts which are properly in evidence, is not satisfied that the words are capable of the meaning ascribed to them, then it is not his duty to leave the question raised by the innuendo to the jury (LORD SELBORNE, C.).

(3) In deciding on the question whether the words are capable of that meaning he ought not, in my opinion, to take into account any mere conjectures which a person reading the document might possibly form, as to some out of various motives or reasons which might have actuated the writer, unless there is something in the document itself, or in other facts properly in evidence, which to a reasonable mind would suggest, as implied in the publication, those particular motives or reasons (LORD SELBORNE, C.).

(4) The test, according to the authorities, is whether under the circumstances in which the

writing was published, reasonable men, to whom the publication was made, would be likely to understand it in a libellous sense (LORD SELBORNE, C.).

The manner of the publication, & the things relative to which the words are published, & which the person publishing knew, or ought to have known, would influence those to whom it was published in putting a meaning on the words. are all material in determining whether the writing is calculated to convey a libellous imputation (LORD BLACKBURN).

(5) A libel for which an action will lie, is defined to be a written statement published without lawful justification, or excuse, calculated to convey to those to whom it is published an imputation on pltf.s, injurious to them in their trade, or holding them up to hatred, contempt, or ridicule. . . .

(6) Pltf. was, by the old rules of pleading, required to place all those materials, on which he relied, upon the record. The words themselves must have been set out in the declaration or indictment, in order that the ct. might be able to judge whether they were a libel or not. This still remains the law (LORD BLACKBURN).

(7) In construing the words to see whether they are a libel the ct. is, where nothing is alleged to give them an extended sense, to put that meaning on them which the words would be understood by ordinary persons to bear, & say whether the words so understood are calculated to convey an injurious imputation. The question is not whether deft. intended to convey that imputation; for if he, without excuse or justification, did what he knew or ought to have known was calculated to injure pltf., he must, at least civilly, be responsible for the consequences, though his object might have been to injure another person than pltf. or though he may have written in levity only (LORD BLACKBURN).

(8) The *onus* always was on the prosecutor or pltf. to show that the words conveyed the libellous imputation, & if he failed to satisfy that *onus*, whether he had done so or not being a question for the ct., deft. always was entitled to go free. Since Fox’s Act [32 Geo. 3, c. 60] at least, however the law may have been before, the prosecutor or pltf. must also satisfy a jury that the words are such, & so published, as to convey the libellous imputation. If deft. can get either the ct. or the jury to be in his favour, he succeeds. The prosecutor or pltf. cannot succeed unless he gets both the ct. & the jury to decide for him (LORD BLACKBURN).—*CAPITAL & COUNTIES BANK v. HENTY* (1882), 7 App. Cas. 741 ; 52 L. J. Q. B. 232 ; 47 L. T. 662 ; 47 J. P. 214 ; 31 W. R. 157, H. L.

Annotations :—*As to* (1) *Refd.* *New Chile Mining Co. v. Lee*, *New Chile Mining Co. v. Venezuelan Austin Gold Mining Co.* (1888), 4 T. L. R. 444. *As to* (2) *Apld.* *Kimber v. Press Assocn.*, [1893] 1 Q. B. 65. *Consd.* *Stubbs v. Russell*, [1913] A. C. 386 ; *Leng v. Langlands* (1916), 114 L. T. 665. *Refd.* *O’Brien v. Salisbury* (1889), 54 J. P. 215. *As to* (3) *Apld.* *Ruel v. Tatnell* (1880), 43 L. T. 507. *Consd.* *Ware & De Freville v. Motor Trade Assocn.*, [1921] 3 K. B. 40. *As to* (4) *Consd.* *Monson v. Tussauds*, *Monson v. Tussaud*, [1891] 1 Q. B. 671. *Distd.* *Nevill v. Fine Art & General Insce.*, [1897] A. C. 68. *Consd.* *Frost v. London Joint Stock Bank* (1906), 22 T. L. R. 760. *Apld.* *Bendle v. United Kingdom Alliance* (1915), 31 T. L. R. 403. *Refd.* *Barber v. Deutsche Bank (Berlin) London Agency* (1917), 33 T. L. R. 543. *As to* (7) *Consd.* *Jones v. Hulton*, [1909] 2 K. B. 411. *Refd.* *Baird v. Wallace-James* (1916), 85 L. J. P. C. 193. *As to* (8) *Consd.* *Empire Typesetting Machine Co. of New York v. Linotype Co.* (1898), 79 L. T. 8. *Generally, Mntd.* *Mogul S.S. Co. v. McGregor, Gow* (1889), 23 Q. B. D. 598 ; *Allen v. Flood*, [1898] A. C. 1.

122. Accusation of dishonest trading.—*PRIOR v. WILSON*, No. 1290, *post*.

PART IV. SECT. 1, SUB-SECT. 1.—
C. (a).

122 l. *Accusation of dishonest trading.*

—Pltf. alleged that he was a commission merchant buying wheat, & that deft. spoke of him, in relation to

his said trade, “I sold wheat to M., & he cheated me out of two bushels of wheat, & when I went to try the

Sect. 1.—What are defamatory statements: Subsect. 1, C. (a) & (b), i. & ii.]

123. —.]—BARNARD v. SALTER, [1872] W. N. O.

124. —.]—KERR v. GANDY (1886), 3 T. L. R.

125. —.]—Pltf., who traded as R. H. & Co. & defts., who traded as R. H. & Sons, were rival manufacturers of sail cloth. Pltf. had formerly been a partner in defts.' firm. In 1885 defts. brought an action against pltf. claiming, *inter alia*, an injunction to restrain him from representing his firm to be the original firm of R. H. & Sons. At the trial of the action NORTH, J., dismissed it, without costs as to that issue, & with costs as to the other issues. In 1886 the present defts. distributed a printed circular, which stated that they were the original firm, & after giving the title of the former action headed by the word "Caution," proceeded, "By the judgment deft. was ordered to undertake not to represent that his firm is, or that pltf.'s firm is not the original firm of R. H. & Sons. Messrs. R. H. & Sons, finding that serious misrepresentations were in circulation to their prejudice, felt themselves compelled to bring the above action":—*Held*: the circular contained an untrue statement of the effect of the judgment in the former action; it was a libel injurious to pltf.'s trade; it was not privileged; defts. had published it maliciously; & pltf. was entitled to an injunction, with the costs of the action.—HAYWARD & CO. v. HAYWARD & SONS (1886), 34 Ch. D. 198; 56 L. J. Ch. 287; 55 L. T. 729; 35 W. R. 392; 3 T. L. R. 102.

Annotation:—Refd. South Hetton Coal Co. v. North-Eastern News Assocn., [1894] 1 Q. B. 133.

126. —.]—An action was brought by a business firm against a trade union, & the secretary, president, vice-president, & treasurer of the union, for an injunction to restrain them from publishing a circular in which pltf. were accused of boycotting some lightermen. The circular was signed by the secretary. It was admitted that the vice-president did not belong to the union, & was joined as deft. by mistake. The names of the president & treasurer were printed upon the paper upon which the circular was written, but they gave evidence that the circular was issued without their knowledge & authority, & that they disapproved of it. Pltf. in their statement of claim stated that the statements in the circular were untrue & "had been made maliciously & unjustifiably on the part of defts." An *interim* injunction had been granted:—*Held*: (1) the injunction must be made perpetual against the society, the secretary, & other officers, servants or agents of the society, with costs; & (2) pltf. were justified in joining the president & treasurer as defts.; the ct. therefore gave them no costs.

I am freed now from the embarrassment which I suffered from on the former occasion, as to

whether I could grant an injunction on locutory application, where a libel was complained of before defts. had had the advantage of having the question tried whether there was a libel or not. I thought it right to grant an interlocutory injunction to restrain a libel where the libel was one of a gross character calculated to do great injury to a person connected with trade (KEKEWICH, J.).—PINK v. FEDERATION OF TRADES & LABOUR UNIONS CONNECTED WITH SHIPPING, CARRYING & OTHER INDUSTRIES (1892), 67 L. T. 258; 8 T. L. R. 711; *previous proceedings*, 8 T. L. R. 216.

Annotation:—Refd. Lee v. Gibbings (1892), 67 L. T. 263.

127. —.]—Pltf. were the proprietors of a wine & defts. published a statement which in substance was that the wine, though it was advertised as a really genuine nutritive meat-wine, did not contain highly nutritive properties. In an action by pltf. against defts. for libel defts. pleaded justification. The judge found that pltf.' advertisement, if fairly read, was substantially true, & he awarded pltf. damages:—*Held*: the words would be understood by reasonable men as imputing to pltf. dishonesty or fraudulent incapacity in the way of conducting their business, & the judge's decision must be affirmed.—BENDLE v. UNITED KINGDOM ALLIANCE (1915), 31 T. L. R. 403, C. A.

128. — *Improper use of imprint.*—Pltf., who were printers, on the instructions of the local conservative agent, printed & published an election poster, containing the words, "have you recorded what labour has done for you? If not, see record below," followed by a large blank space & then pltf.' imprint. Defts. who were also printers, on the instructions of the agent of the Labour party, reproduced pltf.' poster, including pltf.' imprint, & filled up the blank space with what purported to be the political achievements of Labour. Pltf. claimed damages for libel, alleging that the use of their imprint meant that they were committing a breach of their duty to their customers, & for wrongfully using their name & description:—*Held*: the printing & publishing of pltf.' imprint constituted a libel & pltf. were also entitled to succeed on the ground of the improper use of their name.—PRYCE & SON, LTD. v. PIONEER PRESS, LTD. (1925), 42 T. L. R. 29.

129. *Breach of licensing laws.*—The declaration alleged that, pltf. being the proprietor of certain rooms adapted for a dancing academy, deft. falsely & maliciously published of the building & rooms, & of pltf. as proprietor thereof, that "the magistrates in quarter sessions having refused to renew a music & dancing licence to the proprietor, all such entertainments there carried on are illegal, & the proprietor renders himself thereby indictable for keeping a disorderly house, & every person found on the premises will be apprehended & dealt with according to law," by means of which premises pltf. was prevented from letting the rooms:—*Held*: the declaration was good.—BIGNELL v. BUZZARD (1858), 3 H. & N. 217; 29 L. J. Ex. 355; 157 E. R. 451.

scales, he finger-rigged some screw about the scales, & threw on some weight at the same time, & I will not patronise him any more":—*Held*: clearly a slander of pltf. in his business.—MARSDEN v. HENDERSON (1863), 22 U. C. R. 585.—CAN.

122 II. —.]—COUSINS v. MERRILL (1865), 16 C. P. 114.—CAN.

122 III. —.]—In an action of damages for slander at the instance

of one of the grocers proceeded against, pursuer averred that an advertisement was of & concerning him, & represented that he acted dishonestly in the conduct of his business:—*Held*: the advertisement, read as a whole, was capable of bearing this innuendo, & an issue allowed.—WEBSTER v. PATERSON & SONS, [1910] S. C. 459.—SCOT.

r. Words not clearly referable to plaintiff's trade—Reflection on plaintiff's credit—Plaintiff engaged in trade.

Where, in an action for slandering pltf. in his trade or business, the words used do not of themselves show with sufficient clearness that they were spoken of & concerning pltf. in his trade or business, an averment that the words complained of were spoken of & concerning pltf.'s credit, coupled with an averment that pltf. was in trade, & in good credit in such trade, is sufficient to avoid demurrer.—BROOKMAN v. SKINNER (circa 1870), Mac. 402.—N.Z.

(b) *Profession or Calling.*i. *Actors, Singers, etc.*

130. Allegation that actor had formerly been a waiter.]—*DUPLANY v. DAVIS* (1886), 3 T. L. R. 184.

131. Advertisement of name on bills—In secondary position.]—The jury having found for pltf., a public singer, in an action for libel because her name appeared in the middle of a list of the names of other singers in an advertisement of a concert:—*Held*: the advertisement was capable of a defamatory meaning, there being evidence that the first & last places in a notice were signs of superior reputation to the middle places.—*RUSSELL v. NOTCUTT* (1896), 12 T. L. R. 195, C. A.

132. — In small type.]—*ELEN v. LONDON MUSIC-HALL, LTD.* (1906), *Times*, June 1.

133. — When plaintiff not in fact appearing.]—*RENARD v. CARL ROSA OPERA CO.* (1906), *Times*, Feb. 15.

134. — — —.]—Pltf., a professional singer, claimed from defts., the proprietors of a music hall in London, damages for alleged injurious falsehood, or, alternatively, for libel. Pltf. alleged that defts. had maliciously stated in placards, leaflets, & programmes, that pltf. would assist a certain singer, B., during the week beginning on Jan. 8, 1923, whereas she had not agreed to assist & did not assist B. at the performances referred to in the placards, leaflets, & programmes complained of. Pltf. further alleged that in consequence of the announcements complained of, she had lost an engagement for her orchestra in the week mentioned in defts.' announcements. The publication of the leaflets, placards, & programmes was admitted, but defts. pleaded that the publication was without malice, & was made in the *bonâ fide* belief that pltf. had agreed to assist as announced in the leaflets, placards, & programmes. They also pleaded that the statement of claim disclosed no cause of action. The jury found that defts. had no intention to injure pltf., but that their manager ought to have known that such an announcement would be likely to injure pltf. The question of law on the effect of the jury's answers was argued on further consideration:—*Held*: the only damage proved did not flow from the alleged malicious acts, but resulted from the incorrect announcements appearing in the week preceding that commencing Jan. 8 at which time the statements, which were incorrect, & in that sense false, were made perfectly *bonâ fide* by defts.' manager under the mistaken but justifiable belief that they were true.—*SHAPIRO v. LA MORTA* (1923), 130 L. T. 622; 40 T. L. R. 201; 68 Sol. Jo. 522, C. A.

ii. *Authors.*

135. Publication of inaccurate edition.]—An author may maintain an action for injury to his reputation, against the publisher of an inaccurate edition of his work falsely purporting to be executed by him, though the publisher be the owner of the copyright.—*ARCHBOLD v. SWEET* (1832), 5 C. & P. 219; 1 Mood. & R. 162, N. P.

136. —.]—Motion on behalf of pltf., an author, to restrain deft., a publisher, from publishing or selling a certain book otherwise than in the form in which it was prepared by the author, or from representing that pltf. was the author of the book published by deft. The book was

originally published in its complete form in 1886. In 1892 the publisher issued an edition of the book omitting the preface, table of contents, introduction, bibliographical notice & index. The ground of the motion was that the publication of the book in a mutilated form caused an injury to pltf.'s reputation as an author:—*Held*: pltf.'s remedy in law was libel; with the exception of a case of trade libel, the ct. will not grant an injunction to restrain a libel before the case has been submitted to a jury.—*LEE v. GIBBINGS* (1892), 67 L. T. 263; 8 T. L. R. 773; 36 Sol. Jo. 713.

Annotation:—*Refd.* *Monson v. Madame Tussaud, Monson v. Tussaud* (1894), 63 L. J. Q. B. 454.

137. Imputation of dishonest criticism.]—*RYAN v. WOOD*, No. 1817, *post*.

138. Charge of plagiarism.]—I find that defts.' play, *A Lucky Dog*, was finished completely & type-written early in Nov. 1890, whereas pltf.'s play, *The Picture Dealer*, was not finished before Mar. 1892. Pltf.'s play, however, was first publicly acted on June 30, 1892, whilst defts.' was not so acted until a few days afterwards. Finding as I have done that *A Lucky Dog* was an original play composed, though not printed or published, by defts. & of which they were joint authors, & that it was completely finished some fifteen months or so before *The Picture Dealer* was completed & that no part of *The Picture Dealer* was used or taken directly or indirectly in the formation & composition of *A Lucky Dog*, however similar the two plays may be in many respects, I can see nothing to deprive defts. of their right to claim the sole liberty of representation of their play under 3 & 4 Will. 4, c. 15, s. 1, & if that right was vested in them it seems to me logically to follow that, in allowing it to be represented as they did at the Strand & other theatres, they were acting within their rights, & if so, no action can be maintained against them for so doing. I think defts. are entitled to my judgment. As to the second & third actions, for libel, I think they do impute discreditable conduct to defts., in suggesting that defts. dishonestly used pltf.'s play for the purpose of constructing their own. The plea of justification having been abandoned pltf. in each of the actions must succeed (*HAWKINS, J.*).—*REICHARDT v. SAPTE*, [1893] 2 Q. B. 308; *sub nom.* *REICHARDT v. ALPORT & SAPTE, ALPORT v. REICHARDT, SAPTE v. REICHARDT*, 9 T. L. R. 604.

139. Alteration of author's work—By purchaser of serial rights.]—*HUMPHREYS v. THOMSON (D. C.) & Co.* (1908), *Times*, May 1.

140. Attribution of inferior work to plaintiff.]—Pltf., a writer of reputation, sued defts. for damages for publishing* in their magazine under pltf.'s name a story of which he was not the writer. Pltf. alleged that the story was of inferior quality, & being published as by him, was damaging to his reputation. In summing up the judge directed the jury that if they came to the conclusion that any one reading the story would think pltf. a mere commonplace scribbler they could give him damages for libel, & further, that on the claim for passing off, if they thought the facts proved & that damage must certainly ensue, though it was not capable of present proof, they could find for pltf. with damages.—*RIDGE v. ENGLISH ILLUSTRATED MAGAZINE, LTD.* (1913), 29 T. L. R. 592.

Annotation:—*Refd.* *Pryce v. Pioneer Press* (1925), 42 T. L. R. 29.

Sect. 1.—*What are defamatory statements: Sub-sect. 1, C. (b) iii., iv., v. & vi.]*

iii. *Clergymen.*

141. Archbishop—Attempting to obtain converts by bribery.]—It is a libel to publish of a Protestant Archbishop, that he attempts to convert Catholic priests by offers of money & preferment.—TUAM (ARCHBP.) v. ROBESON (1828), 5 Bing. 17; 2 Moc. & P. 32; 6 L. J. O. S. C. P. 199; 130 E. R. 965.

142. Improper conduct at divine service—“In towering passion.”]—WALKER v. BROGDEN, No. 1267, *post*.

iv. *Physicians and Surgeons.*

143. “Quack.”]—The declaration in an action for libel alleged that pltf. was a good & faithful subject, etc., & that he was a medical practitioner, & stated the libel to have been published of & concerning him, & of & concerning him in his said practice. No evidence was given of any licence or authority to practise, nor was pltf. mentioned in the libel as a regular medical man, but merely as “Physician extraordinary to several ladies of distinction,” & “doctor, or rather quack.”—*Held*: this did not withdraw the claim to damages in the medical capacity from the consideration of the jury, but they might give such damages as they thought right, both for that & the libel on pltf.’s private character.

Fair & candid criticism is not a libel but a malevolent attack on an individual is (TINDAL, C.J.).—LONG v. CHUBB (1831), 5 C. & P. 55, N. P.

144. —.]—DAKHYL v. LABOUCHERE, No. 1823, *post*.

145. Unprofessional conduct—Consultation with homœopathist.]—Pltf., a physician, sued deft. for an alleged libel in having printed & published in a medical journal certain letters, etc., which imputed to pltf. that he was in the habit of meeting, & had met, in consultation, homœopathic practitioners. The declaration alleged that, according to the opinion & etiquette prevailing amongst the general body & great majority of physicians, it was considered improper & disgraceful for any of them to hold medical consultations with practitioners of homœopathy, & would be injurious to the professional character, reputation, & practice of any physician not following the homœopathic system of medicine. The plea was a traverse only of the allegation that it was dis-

graceful, etc., for a physician, etc., to meet a homœopathist in consultation:—*Held*: the plea was an answer to the declaration.—CLAY v. ROBERTS (1863), 2 New Rep. 203; 8 L. T. 397; 9 Jur. N. S. 580; 11 W. R. 649.

Annotation:—*Refd.* Myroft v. Sleight (1921), 90 L. J. K. B. 883.

146. Use of name in advertisement.]—A doctor, whose name has been used without his authority in an advertisement to puff the sale of a medicine, has no cause of action either for damages or for an injunction unless the publication is defamatory or injures him in his property, business or profession.—DOCKRELL v. DOUGALL (1899), 80 L. T. 556; 15 T. L. R. 333, C. A.

v. *Solicitors.*

147. Accusation of professional misconduct.]—Deft. having written a letter, blaming the person to whom it was addressed for employing pltf. to sue, added, “If you will be misled by an attorney, who only considers his own interest, you will have to repent it. You may think, when you have ordered your attorney to write to Mr. B., he would not do any more without your further orders; but if you once set him about it, he will go to any length without further orders.”—*Held*: in an action for defamation, the jury were properly directed to consider whether these expressions were meant of the profession in general, or of pltf. in particular; & it was not necessary to leave it to them to consider whether this was a confidential communication, or a malicious attack on pltf.’s character.—GODSON v. HOME (1819), 1 Brod. & Bing. 7; 3 Moore, C. P. 223; 129 E. R. 625.

Annotation:—*Apld.* Robertson v. McDougall (1828), 4 Bing. 670.

—.]—Where an account of certain proceedings in a ct. of law was headed in a newspaper, “Shameful conduct of an attorney,” pleas to a declaration in libel, that the alleged libel contained a faithful & true account of proceedings in a ct. of law, were held ill.—CLEMENT v. LEWIS (1822), 3 Brod. & Bing. 297; 10 Price, 181; 7 Moore, C. P. 200; 129 E. R. 1299, Ex. Ch.; *affg.* S. C. *sub nom.* LEWIS v. CLEMENT (1820), 3 B. & Ald. 702.

Annotations:—*Refd.* Delegal v. Highley (1837), 3 Bing. N. C. 950; Cook v. Wildes (1855), 21 L. J. Q. B. 367; Ryalls v. Leader (1866), 4 H. & C. 555. *Mentd.* Corner v. Shew (1838), 4 M. & W. 163; Gwynne v. Burnell (1810), 6 Bing. N. C. 453; Gregory v. Brunswick & Vallance (1813), 13 L. J. C. P. 31; Warwick v. Cox (1814), 13 L. J. Ex. 314; Campbell v. R. (1817), 11 Q. B. 814.

this justifies a writer to a newspaper in accusing him of falsely giving himself forth as possessing these qualifications. r. MACKAY (1891),

E. D. C. 20.—S. AF.

f. Allegation of unskilful treatment.]—SMITH v. MCINTOSH 14 U. C. R. 592.—CAN.

g. Attributing death to negligence.]—To say of a man that the death of another was due to his callous negligence is defamatory.—STRIDDOM v. HANMANN, [1918] C. P. D. 49.—S. AF.

h. Licence to practice must be produced.]—HAMILTON v. BURWELL (1832), 2 O. S. 339.—CAN.

PART IV. SECT. 1, SUB-SECT. 1.—C. (b) v.

147 i. Accusation of professional conduct.]—A written paper pltf., an attorney, with being entirely by a craving after his own gains, without regard to the interest of his clients, & reckless of bringing them to ruin, is libellous.—ANDREWS v. WILSON (1845), 5 N. B. R. (3 Kerr) 86.—CAN.

PART IV. SECT. 1, SUB-SECT. 1.
C. (b) iii.

a. Publication of sentence of censure—Nonconformity.]—DUNBAR v. SKINNER (1827), 10 Dml. (Ct. of Sess.) 1217; 23 Sc. Jur. 573.—SCOT.

b. Allegation of drunkenness.]—

c. Allegation of sexual immorality.]—Saying of a Methodist preacher that he kept company with a prostitute, & deft. could prove it:—*Held*: not actionable, at all events without special damages.—SAILS (1863), 23

action against deft. for slandering him in his profession by stating that he was a quack:—*Held*: the action was not maintainable.—SKIRVING v. ROSS (1880), 31 C. P. 423.—CAN.

143 ii. —.]—GRANT v. CHISHOLM, [1914] S. C. 239; 51 Sc. L. R. 203; 1 S. L. T. 63.—SCOT.

d. Unprofessional conduct.]—*Held*: the plain inference from the words published of pltf. was, that he had not lived up to the standard of conduct adhered to generally by the medical profession, that he had no respect for himself or his profession, & that his conduct brought disgrace & shame upon the profession; the words complained of imputed to the pltf. discreditable conduct in his profession, and were, therefore, libellous. WITH v. COWPER & GARRIOCH (1911), 17 W. L. R. 1; 4 Sask. L. R. 12.—CAN.

e. Qualifications wrongly attributed by newspaper—Acquiescence in publication of false claim.]—Where a medical man allows a laudatory paragraph about himself to appear uncontradicted in a newspaper, attributing to him higher qualifications than he

PART IV. SECT. 1, SUB-SECT. 1.—C. (b) iv.

143 i. “Quack.”]—A medical practitioner registered in Great Britain, to entitle him to practice in Ontario, must be registered under R. S. C. 1877, c. 142, s. 21. In this case pltf., practitioner, was brought an

entitled to practice here, brought an

149. —.—.]—Declaration in libel stated that pltf. was an attorney, & that certain orders had been made by the Ct. of Q. B., for setting aside proceedings with costs, in an action in which pltf. was the attorney of the then deft., & deft. was the attorney of the then pltf., & that the costs had been ascertained & taxed by one of the Masters; that sharp practice in the profession of an attorney, is & is considered to be, disreputable practice, & discreditable to the attorney adopting it; yet that deft., intending to cause it to be believed that pltf. had been guilty of such sharp practice as aforesaid in the said action, & had been reprimanded for it by the Master, published of him the following false, ironical, & libellous matter:—“An Honest Lawyer,” thereby meaning pltf., & meaning to represent that he was not an honest lawyer, “A person of the name of C. B., etc., was severely reprimanded the other day by one of the Masters of the Queen’s Bench for what is called sharp practice in his profession,” meaning & alluding to pltf.’s practice with respect to the said orders, & that such practice was sharp practice as aforesaid:—*Held*: that part of the statement which imputed to pltf. sharp practice was sufficiently explained by the introductory matter to show that it was libellous. *Semble*: the allegation that the libel was ironical was sufficient, coupled with the innuendo, to show that the phrase “an honest lawyer” was used in a libellous sense.—*BOYDELL v. JONES* (1838), 4 M. & W. 446; 7 Dowl. 210; 1 Horn. & H. 408; 150 E. R. 1504.

Annotations:—*Refd.* Turner v. Meryweather (1849), 7 C. B. 251. *Mentd.* S. E. Ry. v. Railway Comrs. (1881), 6 Q. B. D. 586.

150. —.—.]—(1) It is not libellous to write of an attorney, that he did not present his bill for fifteen years, & having made his client’s will, presented it after his death to the representatives. (2) 32 Geo. 3, c. 60, has not taken from the ct. the power of pronouncing a paper to be a libel, when it is such on the face of it.—*REEVES v. TEMPLAR* (1838), 2 Jur. 137.

151. —.—.]—The words “How lawyer Bishop treats his clients,” heading a report of a case in one of the cts., are libellous. Although prefixed to the particular case, the words, being general, are a charge of treatment, in the manner asserted, not of this client only, but of all clients, & therefore is not met by proof that the charge was justifiable in this particular instance.—*BISHOP v. LATIMER* (1861), 4 L. T. 775, N. P.

152. Misstatement as to date of admission.—*RAVEN v. STEVENS & SONS* (1886), 3 T. L. R. 67.

153. Proof of practice as solicitor—Plaintiff not practising at time of libel.—*JONES v. STEVENS*, No. 1236, *post*.

154. —.—.]—Pltf., in his declaration for a libel, alleged that he was an attorney, & that the libel was published of & concerning him & of & concerning him in his profession. He proved, that he had been admitted an attorney; but he did not prove, that at the time the libel was published he had taken out his certificate or that he was practising as an attorney:—*Held*: it was sufficient to prove that he had been admitted an attorney.—*LEWIS v. WALTER* (1824), 3 B. & C.

138, n.; 4 Dow. & Ry. K. B. 810; 2 L. J. O. S. K. B. 219; 107 E. R. 686, n.

Annotations:—*Distd.* Sellers v. Killew (1825), 7 Dow. & Ry. K. B. 121. *Refd.* May v. Brown (1824), 3 B. & C. 113; Noden v. Johnson (1850), 16 Q. B. 218.

155. —.— **Stamp office certificate.**—In an action by an attorney for libelling him in his profession generally, the stamp office certificate, countersigned by a master of the Ct. of K. B., to denote that the name of the party has been entered upon the roll of the ct. is *prima facie*, sufficient evidence to support an allegation in the declaration that pltf. is an attorney of that ct.—*SPARLING v. HADDON* (1832), 9 Bing. 11; 2 Moo. & S. 14; 1 L. J. C. P. 142; 131 E. R. 518.

Annotation:—*Refd.* Graham v. Ingleby (1818), 2 Exch. 442.

156. —.— **Law list.**—*RAVEN v. STEVENS & SONS* (1886), 3 T. L. R. 67.

vi. Other Professions or Callings.

157. Overseer of common field—Untrustworthiness.—It is not necessary to give evidence to prove the truth of averments, in a declaration in an action for libel, according with statements in the publication.

In an action for a libel on pltf., who alleged in his declaration that he held an office of trust & confidence, to wit, the office of overseer of a common field, & that deft. composed, etc., of & concerning pltf., & of & concerning his conduct in his said office of, etc., a libel, part of which was that the committee, for managing the concerns of the said field, think proper to satisfy the inhabitants, etc., respecting the different charges laid against pltf. the late overseer, etc., for embezzlement, or not giving a proper account of the public property; pltf. put in the libel, & proved publication, etc., & that he was overseer. It appeared from the testimony of his own witnesses that he was not intrusted by the committee, as such overseer, with the receipt of money, or that any particular confidence was necessarily reposed in him in virtue of his employment, which appeared to be a somewhat humble one. It was objected that he should have proved that it was an office of trust & confidence as alleged, & that therefore the action could not be supported:—*Held*: as the libel in its terms imported that it was an office of trust & confidence, & charged a fraudulent abuse of it, it was therefore not necessary to give any proof of it in support of the allegation in the declaration.—*BAGNALL v. UNDERWOOD* (1823), 11 Price, 621; 147 E. R. 583.

158. Overseer of the poor—Untrustworthiness.—Deft. published a placard stating of pltf., who was an overseer of the poor, “that when out of office he had advocated low rates, & when in office had advocated high rates, & that he, deft., would not trust him with £5 of his property”:—*Held*: these words were actionable *per se* without any innuendo.—*CHEESE v. SCALES* (1842), 10 M. & W. 488; 12 L. J. Ex. 13; 6 J. P. 732; 6 Jur. 955; 152 E. R. 563; *subsequent proceedings, sub nom.* *SCALES v. CHEESE* (1844), 12 M. & W. 685, Ex. Ch. *Annotation*:—*Mentd.* Wood v. Peyton (1844), 14 L. J. Ex. 28.

PART IV. SECT. 1, SUB-SECT. 1.— C. (b) vi.

k. Trader in land—Allegation of fraud.—*FELLOWS v. HUNTER* (1861), 20 U. C. R. 382.—*CAN.*

l. Registrar of deeds—Misconduct in office.—*McLAY v. BRUCE CORPN.* (1887), 14 O. R. 398.—*CAN.*

m. Municipal officer—Summary dismissal—By libellous resolution.—*DAVIS*

539.—*CAN.*

n. Member of legislature.—In an action for libel against a newspaper co., the words in the published letter complained of charged in effect that pltf. used his position as a member of the Provincial Legislature to increase the business carried on by pltf. & his brother as partners, by requiring persons

), 27 S. C. R.

on
at

such employment:—*Held*: the charge upon its face is defamatory & constitutes a libel.—*CULLIGAN v. GRAPHIC, LTD.* (1917), 41 N. B. R. 48; 37 D. L. R. 131.—*CAN.*

o. Telegraphist—Betrayal of confidence.—*RICHARDS v. CHISHOLME &*

Sect. 1.—What are defamatory statements: Subsect. 1, C. (b) vi., & D.]

159. Chairman of finance committee—False auditing of accounts.]—It is actionable, without the aid of prefatory averment in the declaration, to write of a magistrate, that, "as chairman of a finance committee, he audited accounts containing items of upwards of £12,000 for the nominal purpose of furnishing, lodgings, plate, etc., for the judges; but which expenditure was in reality to find accommodation for the magistrates, as the sheriff always found the judges suitable lodgings, without putting the county to any expense."

ADAMS v. MEREDUE (1829), 3 Y. & J. 219; 148 E. R. 1159, Ex. Ch.

Annotation:—*Reid*. Hughes v. Rees (1838), 7 L. J. Ex. 268.

160. Secretary of railway company—Imputation of cacoethes scribendi.]—An article in a magazine, expressing the writer's sorrow at seeing the correspondence between the secretary of a railway co. & another person published, & observing, that had invention been taxed to blast the character & throw a shade over the honour of the co., it could have devised nothing more effective than this stupid correspondence, & still more stupid publication; & also imputing trickery & deception, & the *cacoethes scribendi*, & scribbling propensities, to the secretary; &, in reference to an answer he was about to put in Chancery, reminding him, that shuffling & low cunning would not do in that ct.:—*Held*: libellous after verdict, in an action by the secretary, where the declaration merely alleged the object & intention of deft. to be to injure him in his character of secretary to the co., but did not contain any special averments or innuendoes.—ROBERTSON v. WYLDE (1838), 7 L. J. C. P. 196.

161. Master mariner & shipowner—Unseaworthiness of ship.]—(1) To publish of a master mariner & shipowner that his vessel, which is advertised for the conveyance of goods on freight & passengers to Calcutta, is unseaworthy & has been sold for a convict ship, is a personal libel on him in the way of his business, for which he may maintain an action without alleging special damage or proving malice.

(2) In an action for a libel imputing to a vessel advertising for passengers & freights for the East Indies, & to her master & owner, pltf., that she is unseaworthy & in other respects unfit for the purpose:—*Held*: evidence of the ordinary profits of such a voyage was receivable, & the jury were properly told that they might take such evidence into their consideration in estimating the probable amount of damage sustained by pltf. from the publication of the libel, although the action was brought before the commencement of the intended voyage.—INGRAM v. LAWSON (1840), 6 Bing. N. C. 212; 8 Scott. 471; 9 L. J. C. P. 145; 7 L. T. 134; 4 Jur. 151; 133 E. R. 84.

Annotations:—As to (1) *Apld.* Russell v. Webster (1874), 23 W. R. 59. *Consd.* South Hetton Coal Co. v. North Eastern News Assocn., [1894] 1 Q. B. 133. *Reid.* Hoey v. Felton (1861), 11 C. B. N. S. 142; Young v. Macrae (1862), 32 L. J. Q. B. 6; Ratcliffe v. Evans, [1892] 2 Q. B. 524. As to (2) *Reid.* Hadley v. Baxendale (1854), 23 L. J. Ex. 179.

162. Stockbroker—Threat to bring action.]

Warning. J. C. & Co., sharebrokers, meaning pltf., are informed that the two hundred Manchester & Southampton Ry. shares bought by

J. C., under a false representation of the market, at £8 per share, or £1,625, & sanctioned by C. J., meaning deft., & paid for at the time of purchase, that he forthwith sends them to the Manchester & Southampton committee, with instructions to return the deposit balance to him, meaning deft., unless C. & Co., meaning pltf., claim it, or elect to proceed; &, unless C. & Co., meaning pltf., within the present year, arrange to return the £1,625 to him, meaning deft., also the £7 expenses incurred for advertisement & solr. to procure proof of having paid C. & Co., meaning pltf., £1,600 & £25 commission, C. J., meaning pltf., will adopt legal measures. The amount will be taken by instalments, on security being deposited with any bankers but those who recommended C. & Co.:—*Held*: in the absence of a colloquium pointing the above, or an averment of special damage, the publication was not actionable.

If by any reasonable intendment a jury could infer that the publication complained of reflects upon the moral conduct or the professional reputation of pltf., it is the duty of the ct. to send the matter before them. But the instances are by no means rare, of judgment being arrested when the ct. has thought that, by no reasonable intendment, could the libel bear the construction put upon it by the innuendoes (WILDE, C.J.).—CAPEL v. JONES (1847), 4 C. B. 259; 9 L. T. O. S. 78; 11 Jur. 396; 136 E. R. 505.

Annotations:—*Consd.* Capital & Counties Bank v. Henty (1882), 7 App. Cas. 741. *Reid.* Bignell v. Buzzard (1858), 3 H. & N. 217.

163. Architect—Lack of professional experience.]—To impute a person actually employed to execute certain work, that he has no experience in the work in which he is so employed, is a libel upon that person in the way of his profession or calling; & it is no justification to say that such person cannot show any experience in work of the kind which, in the opinion of the person making the imputation, was requisite.

B., an architect, had been employed by a certain committee to superintend & carry out the restoration of S. church; thereupon W., who had no manner of interest in the question of the employment of B. to execute the work, wrote a letter to a member of the committee saying, "I see that the restoration of S. church has fallen into the hands of an architect who is a Wesleyan & can have no experience in church work. Can you not do something to avert the irreparable loss which must be caused if any of the masonry of this ancient gem of art be ignorantly tampered with?" In an action for libel W., by way of justification alleged "that the facts contained in the letter are true, & the opinions expressed in it, whether right or wrong, were honestly held & expressed by W.," & "that B. cannot show experience in church work," i.e. of the kind which in the opinion of W. was requisite:—*Held*: the latter was a libel on B. in the way of his profession or calling; the justification set up was no justification at all, because the letter obviously meant that B. could show no experience in the work in which he had been employed by the committee to execute; & even if the occasion was privileged, there was evidence of express malice. *Qu.*: whether under the circumstances of the case the publication of the letter was privileged.

LEITHHEAD (1859), 22 Dunl. (Ct. of Sess.) 215; 32 Sc. Jur. 87.—SCOT.

on

*q. Professor—Undisciplined class.]—*Action sustained & damages awarded for publishing in a newspaper that pursuer, a professor, was unfit for the discharge of, & neglected his duty,

& that his class was in a state of insubordination.—ALEXANDER v. MAC DONALD (1826), 4 Murr. 94.—SCOT.

*r. Barrister—Place-hunter.]—*To say of an ordinary barrister that he is

A man who receives information which, if true, is injurious to the character of another, is not justified in publishing that information to the prejudice of that other merely because he believes it to be true.—*BOTTERILL v. WHYTEHEAD* (1879), 41 L. T. 588.

Annotations:—*Reid. Waller v. Loch* (1881), 7 Q. B. D. 619; *British Ry. Traffic & Electric Co. v. C. R. C. Co. & L. C. Co.*, [1922] 2 K. B. 260.

164. — Failure to append name of plaintiff to joint design with defendant.—*GREEN v. ARCHER* (1891), 7 T. L. R. 542.

165. Inventor — Denying reputation as inventor.—*W.*, who had in 1865 made a valuable invention of the machine subsequently designated the "Dynamo-electric machine" or "Dynamo," commenced an action against *T.* & others, alleging that *T.* had in certain works of which he was the author falsely & maliciously written & published certain passages depriving *pltf.* of the credit of being the first inventor of the invention, & also alleging that *pltf.* was & would be injured in his reputation of a discoverer & inventor in the field of electrical science & engineering; it was further alleged that *deft.* had on complaint by *pltf.* agreed to alter certain passages in his work & had not done so. *Pltf.* claimed no right in the word "Dynamo," but he set up that *deft.* used the word to describe something other than *pltf.*'s invention. *Deft.* applied to strike out the statement of claim on the ground that it disclosed no cause of action:—*Held*: the passages complained of were not libellous & no contract was alleged, & the statement of claim disclosed no cause of action.—*WILDE v. THOMPSON* (1903), 20 R. P. C. 775, C. A.

166. Consulting engineer—Unauthorised use of name.—*CLERK v. MOTOR CAR Co.* (1905), LTD. & *FORD* (1905), 49 Sol. Jo. 418.

167. Commercial traveller—Statement of his leaving employment.—*Pltf.* was employed as commercial traveller by *deft.*, & *deft.* signed & circulated among his customers cards in unfastened envelopes with these words upon them: "B. is no longer in our employ. Please give him no order or pay him any money on our account." In an action of libel the jury found that the words were libellous, & that *deft.* acted maliciously in circulating them:—*Held*: the words were not capable of a defamatory meaning, & *deft.* was entitled to the judgment.—*BESWICK v. SMITH* (1907), 24 T. L. R. 169, C. A.

D. Imputation of Insolvency to Non-Traders.

168. Charge of insolvency.—*EATON v. JOHNS*, No. 939, *post*.

169. Leaving neighbourhood with debts unpaid.—*O'BRIEN v. BRYANT*, No. 1223, *post*.

170. Statement of indebtedness for large sum—Offer of debt for sale.—The publication of a placard, stating that the prosecutor is indebted in a large sum, & offering the debt for sale, is not necessarily libellous; &, at all events, the judge cannot withdraw it from the jury on the general issue, but must leave it to them, reserving for a motion in arrest of judgment, the question whether the words could possibly be libellous.

The placards ran thus: "W. G., solr., Bishop Stortford . . . to be sold by auction, if not previously disposed of by private contract, a debt of the above, amounting to £3,197 due upon partnership & mtge. transactions":—*Held*: the matter was

not libellous, as it was a mere offer, on the face of it, to sell an alleged debt, which it did not necessarily imply inability to pay it; & it did not appear to be false, & there was no evidence of an intent to extort money.—*R. v. COGHLAN* (1865), 4 F. & F. 316.

171. Charge of past pecuniary difficulties.—*COX v. LEE*, No. 1008, *post*.

172. Cheque drawn on bankers—Marked refer to drawer.—*Pltf.*, who was a newsagent, had an account with *deft. bank*, & on Aug. 5, 1914, she drew a cheque for £4 5s. in favour of the co. from whom she was in the habit of buying newspapers. On Aug. 6, a moratorium proclamation was issued, providing that all payments of not less than £5 due & payable before Aug. 6, or on any day before Sept. 4, in respect of any cheque drawn before Aug. 4, "or in respect of any contract made before that time" should be deemed due & payable one month after the original due date or on Sept. 4. The cheque was presented on Aug. 10, & returned with the words "refer to drawer" upon it. On Aug. 10, *pltf.* had £6 16s. 5d. to her credit on the premoratorium account & £3 9s. 3d. on the postmoratorium account. In an action by *pltf.* against *defts.* for breach of contract & libel:—*Held*: *defts.* were protected by the moratorium, as the case was one of a payment in respect of a contract made before Aug. 4, & in the circumstances the words "refer to drawer" were not capable of a libellous meaning, & therefore *pltf.* was not entitled to recover.—*FLACH v. LONDON & SOUTH WESTERN BANK, LTD.* (1915), 31 T. L. R. 334.

173. — — — — ——*Defts.* on Feb. 11, 1914, agreed to allow *pltf.*, who was a customer of the bank, an overdraft for a period of six months. On Aug. 6, 1914, when *pltf.*'s account was overdrawn, a moratorium was proclaimed. On Aug. 28, *pltf.*, without making any express appropriation, paid a sum of money into his account, & *defts.* applied a part of it in discharge of the overdraft. On the following day *pltf.* drew a cheque upon the bank, but in consequence of the discharge of the overdraft his balance was not sufficient to meet it. The cheque was dishonoured & returned to the holder marked "R. D." In an action brought by *pltf.* against the bank for damages for breach of contract & for libel:—*Held*: the effect of the moratorium was to postpone the date of payment of the overdraft for a month, & *defts.* were not entitled under the circumstances to refuse payment of *pltf.*'s cheque, & *pltf.* was entitled to recover.—*ALLEN v. LONDON COUNTY & WESTMINSTER BANK, LTD.* (1915), 84 L. J. K. B. 1286; 112 L. T. 989; 31 T. L. R. 210.

174. — Paid for collection to defendants—Accidental return unpaid.—*Pltf.* drew a cheque upon his bank in favour of a customer, who paid it into *deft. bank*, where he kept an account, for collection. *Deft. bank* by some mistake did not present it for payment to the bank upon which it was drawn, & later on it was found at *deft. bank* in the box in which returned cheques from *pltf.*'s bank were usually left. *Pltf.* had ample assets at his bank to meet the cheque. A clerk of *deft.*'s thinking that the cheque had been returned unpaid & not knowing for what reason, attached a slip to it on which the words "Reason assigned" were printed, & against those words he wrote "Not stated." The cheque with the slip attached was sent to the person in whose favour it was drawn,

a place-hunter may be only an unkind way of saying that he is ambitious. The remark applied to any one in the Irish Benchers would be a cruel offence.—

NORTH LOUTH CASE (1910), 6 O'M. & H. 103.—*IR.*

t. Engineer fitter—Unskilful work-

man.—To say of an engineer fitter that he is a grossly unskilful workman is actionable.—*SLACK v. BARR* (1918), 82 J. P. 91.—*SCOT.*

Sect. 1.—What are defamatory statements : Sub-sect. 1, *D., E. & F.*; sub-sect. 2, *A. & B. (a), (b), (c), (d) & (e).*]

who communicated with pltf., & the cheque was paid. Pltf. brought an action of libel, alleging that the words meant that the cheque had been dishonoured through want of assets:—*Held*: the words on the slip, coupled with the return of the cheque, were not in their natural meaning libellous, & it lay upon pltf. to prove facts & circumstances leading to the conclusion that they would naturally be understood by reasonable persons as conveying the libellous imputation alleged; & pltf. not having proved this, there was no case to go to the jury.—*FROST v. LONDON JOINT STOCK BANK, LTD.* (1906), 22 T. L. R. 760, C. A.

E. Slander of Title.

See Part XII., *post*.

F. Slander of Goods.

See Part XIII., *post*.

SUB-SECT. 2.—SLANDEROUS STATEMENTS.

A. In General.

175. Fact imputed to plaintiff need not have happened.—In slander it is not necessary that the fact imputed to pltf. should actually have happened.—*WEB v. POOR* (1597), Cro. Eliz. 569; 78 E. R. 813.

B. When Actionable.

(a) In General.

176. General rule.—Words *contra bonos mores*, if they do not charge an offence pregnant with temporal damage, are not actionable.—*POLLARD v. ARMSHAW* (1597), Cro. Eliz. 582; 78 E. R. 825.

177. ——(1) An action of slander will not lie for words imputing adultery to a schoolmaster, in the absence of proof of special damage, unless the words are spoken of him touching or in the way of his calling.

(2) Defamation, spoken or written, is always actionable if damage is proved, & even if it is not, the law will infer the damage needed to found the action (a) when the words are written or printed; (b) when the words spoken impute a crime punishable with imprisonment; (c) when they impute certain diseases . . . (d) when words are spoken of a person following a calling, & spoken of him in that calling, which impute to him unfitness for or misconduct in that calling (*LORD SUMNER*).

(3) Slander is actionable only if either (a) special damage is proved, or (b) the imputation is such & the state of facts proved is such as that the law presumes or infers damage, or (c) the case falls within the Slander of Women Act, 1891 (c. 51) (*LORD WRENBURY*).—*JONES v. JONES*, [1916] 2 A. C. 481; 85 L. J. K. B. 1519; 115 L. T. 432; 32 T. L. R. 705; 61 Sol. Jo. 8, H. L.

Annotations:—As to (1) *Consd.* *Myroft v. Sleight* (1921), 90 L. J. K. B. 883. *Reid.* *Wakeford v. Wright* (1922), 39 T. L. R. 107. As to (2) *Reid.* *Heddon v. Evans* (1919), 35 T. L. R. 642. As to (3) *Reid.* *Myroft v. Sleight* (1921), 90 L. J. K. B. 883.

178. Words of uncertain import.—Words of uncertain import are not actionable.—*SMITH'S CASE* (1584), Cro. Eliz. 31; 78 E. R. 297.

179. ——Words of too general an import will not support an action of slander.—*BUTLER v. PAYNTER* (1593), Cro. Eliz. 297; 78 E. R. 550.

ns:—*Reid.* *Fleetwood v. Curle* (1619), Palm. 69. *Boldroe v. Porter* (1602), Yelv. 22.

180. ——Words not importing certain slander are not actionable.—*STIRLEY v. HILL* (1632), Cro. Car. 283; 79 E. R. 848; *sub nom.* *CHURLEY v. HILL*, W. Jo. 308.

181. Words not actionable severally—Actionable when joined.—Convert the words here, if he had said so, you made this deed under a hedge, & forged it, these words are well actionable; so here these words severed & disjoined are not actionable, but conjoin them together, then there is an apparent scandal, & for this cause well actionable (*DODDERIDGE, J.*).—*REYNILL v. SACKFIELD* (1613), 2 Bulst. 132; 80 E. R. 1010.

182. ——*TINDALL v. MOORE* (1760), 2 Wils. 114; 95 E. R. 716.

183. Statement part actionable part not—Action lies for actionable part.—When any part of the slander is actionable, pltf. shall have judgment.—*THAXBIE v. SMITH* (1600), Cro. Eliz. 788; 78 E. R. 1017.

184. ——If an action be brought for words, & part of them be actionable & part are not, yet an action lies for them which are actionable (*ROLL, J.*).—*SMITH v. HOBSON* (1648), Sty. 112; 82 E. R. 571.

185. ——Words spoken in one conversation at one time.]—Declaration for slander recited that pltf. carried on the trade of buying & selling, & was a dealer in, an article of fishing tackle called a winch; & that deft. used the trade of making & selling winches; & it charged that deft., contriving to injure pltf. in his trade, & to cause his customers to believe that he was guilty of unlawfully buying goods well knowing them to have been stolen & dishonestly come by, in a discourse which he had with pltf., of & concerning him with reference to his trade, & of & concerning the premises, in the presence & hearing of J., etc., falsely & maliciously spoke, to & of & concerning pltf., & of & concerning him with reference to his trade & the premises, the words, etc.: "I" (meaning deft.) "have been robbed of about three dozen winches" (meaning such articles, etc.): "a person has been buying things at my shop, & has taken them; you" (meaning pltf.) "have bought two, one at 3s., & one at 2s.; you" (meaning pltf.) "knew well, when you bought them" (meaning the winches), "that they cost me" (meaning deft.) "three times as much making as you" (meaning pltf.) "gave for them, & that they could not have been come honestly by." The declaration then proceeded: "Whereupon pltf. then, in the presence & hearing of the aforesaid persons, said to deft.," etc., setting forth further words of pltf. respecting winches, & alleging that deft., further contriving, etc., thereupon, in the presence & hearing of the said persons, replied, etc. (setting out other words). "Thereby meaning," etc., "that pltf. had been & was guilty of buying winches, well knowing same to have been dishonestly come by & to have been feloniously stolen by the person of & from whom pltf. had so bought them." After verdict for general damages:—*Held*: (1) the words first set out imputed that pltf. had received stolen goods knowing them to have been stolen; (2) the words following appeared to be spoken at the same time with the others, & formed with them a continued discourse; the declaration, therefore, contained only a single count; & consequently, pltf. was entitled to judgment, even on the assumption that the words last set out gave no cause of action.—*ALFRED v. FARLOW* (1846), 8 Q. B. 854; 15 L. J. Q. B. 258; 7 L. T. O. S. 178; 10 Jur. 714; 115 E. R. 1096.

186. Imputation of natural infirmity—Insanity.]

—SALOP (COUNTESS) CASE (1025), Benl. 155; 73 E. R. 1021.

187. — Immorality—“Reputed father of bastard child.”—To say of a man that “he is the reputed father of a bastard child,” is not actionable, unless some special damage ensue.—SALTER v. BROWNE (1636), Cro. Car. 436; 79 E. R. 978.

Annotation:—**Refd.** Anon. (1696), 2 Salk. 694.

188. Statement not defamatory per se—Although false & malicious—& causing damage.—A statement false & malicious, but not in itself defamatory, made by one person in regard to another, whereby that other may probably under some circumstances, & at the hands of some persons suffer damage, will not, even though damage has resulted in fact, support an action, for defamation.

A declaration alleged that deft. falsely & maliciously spoke of pltf., a working stonemason, “He was the ringleader of the nine hours system.” & “He has ruined the town by bringing about the nine hours system,” & “He has stopped several good jobs from being carried out, by being the ringleader of the system at L.,” whereby pltf. was prevented from obtaining employment in his trade at L.:—**Held**: the words not being in themselves defamatory, nor connected by averment or by implication with pltf.’s trade, & the alleged damage not being the natural or reasonable consequence of the speaking of them, the action could not be sustained.—MILLER v. DAVID (1874), L. R. 9 C. P. 118; 43 L. J. C. P. 84; 30 L. T. 58; 22 W. R. 332.

Annotations:—**Consd.** Myroft v. Sleight (1921), 90 L. J. K. B. 883; Shapiro v. La Morta (1923), 130 L. T. 622. **Refd.** Leatham v. Rank (No. 1) (1912), 57 Sol. Jo. 111; Jones v. Jones, [1916] 2 A. C. 481.

(b) *On Proof of Special Damage.*

See Part VIII., Sect. 1, sub-sect. 4, *post*.

(c) *Statements Actionable per se.*

See Sect. 2, *post*.

(d) *Indirect Statements.*

189. General rule.—Words may be actionable, though they contain no direct & positive assertion.—ANON. (1706), 11 Mod. Rep. 60; 88 E. R. 886.

190. Incidental allusion to plaintiff.—Action for words: “Mr. Wingfield, you never thought well of me since Graves did steal my lamb”:—**Held**: actionable; although it was alleged in arrest of judgment, that it was not a direct affirmation that Graves did steal it.—GRAVES’ CASE (1592), Cro. Eliz. 289; 78 E. R. 543.

191. ——BLAND’S CASE (1618), Hut. 18; 123 E. R. 1070.

192. Words used subjunctively.—Slandorous words, though subjunctively expressed, are actionable.—ROYAL v. PECKHAM (1600), Cro. Eliz. 786; 78 E. R. 1015.

193. Words used disjunctively.—Words in the disjunctive are not actionable.—GRIFFITH’S CASE (1600), Cro. Eliz. 780; 78 E. R. 1011.

194. Words used adjectively.—(1) If one says to another “Thou art a cunning thief,” these words are actionable, an adjective word proceeding of (cunning) will not aid same (*per* CUR.).

(2) If one speaks these words to another, “Thou

art an outputter,” these words will bear an action in Westmoreland, being there taken & commonly known to be a horse stealer (CROKE, J.).—STEENE-MAN v. RICHARDSON (1613), 2 Bulst. 145; 80 E. R. 1021.

195. ——Words adjectively spoken, as, “Thou perjured beast,” are actionable, unless the context shows they were not used in a positive sense.—BENSON v. HALL (1621), Cro. Jac. 613; 79 E. R. 523.

196. ——BOOTH v. SEELE (1663), 1 Sid. 103; 82 E. R. 997.

197. ——Scandalous words used adjectively, if they import an act done, are actionable.—OSBORN v. POOLE (1698), 1 Ld. Raym. 236; 2 Lut. 1053; 91 E. R. 1054.

Annotation:—**Refd.** Collins v. Harvey (1713), Gilb. 98.

198. Words used potentially—Importing act done.—Words in the potential mood may qualify an indicative context, & render them not actionable.—STONER v. AUDELY (1591), Cro. Eliz. 250; 78 E. R. 506.

199. ——Potential words may be actionable, if they import an act done. ’Tis actionable to charge a man with coining money.—SPEED v. PARRY (1705), 2 Ld. Raym. 1185; 2 Salk. 697; 92 E. R. 283.

Annotation:—**Apld.** Clegg v. Laffer (1833), 3 L. J. C. P. 56.

200. ——(1) The words “she secreted 1s. 6d. under the till,” at the same time stating “these are not times to be robbed,” are not actionable *per se*; therefore, when pltf. obtained a verdict, with 1s. damages:—**Held**: she was entitled to increased costs.

(2) No action will lie for words spoken, with special damage alleged, unless the words themselves bear an injurious meaning; therefore:—**Held**: these words were not actionable with special damage, as they rather imported praise than blame to the party of whom they were spoken.—KELLY v. PARTINGTON (1834), 5 B. & Ad. 645; 2 Nev. & M. K. B. 460; 3 Nev. & M. K. B. 116; 3 L. J. K. B. 104; 110 E. R. 929.

Annotations:—**As to** (2) **Consd.** Miller v. David (1874), 30 L. T. 58. **Apld.** Shapiro v. La Morta (1923), 130 L. T. 622.

201. Words expressing speaker’s conviction—“I am thoroughly convinced.”—“I am thoroughly convinced” is a sufficient assertion in slander. “You are guilty of the death of A.” may be explained by innuendo to mean murder, though the *colloquim* be only of the death.—OLDHAM v. PEAKE (1774), 2 Wm. Bl. 959; 96 E. R. 566; *affd. sub nom.* PEAKE v. OLDHAM (1775), 1 Cowp. 275.

Annotations:—**Consd.** Roberts v. Camden (1807), 9 East. 93. **Distd.** Goldstein v. Foss (1827), 6 B. & C. 154. **Refd.** Woolnoth v. Meadows (1804), 5 East. 463; Sweetapple v. Jesse (1833), 2 Nev. & M. K. B. 36. **Mentd.** O’Connell v. R. (1844), 11 Cl. & Fin. 155.

Statements imputing crime.—See Part IV., Sect. 2, sub-sect. 2, C. (a), *post*.

(e) *Vulgar Abuse.*

202. General rule.—For mere general abuse spoken no action lies (LORD MANSFIELD, C.J.).—THORLEY v. KERRY (LORD) (1812), 4 Taunt. 355; 3 Camp. 214, n.; 128 E. R. 367.

Annotations:—Robinson v. Jermyn (1814), 1 Price, 11. **Refd.** McGregor v. Thwaites (1824), 4 Dow. & Ry.

PART IV. SECT. 1, SUB-SECT. 2.—
B. (e).

202 i. General rule.—DAWAN SINGH v. MAHIP SINGH (1888), L. L. R. 10 All. 425.—**IND.**

202 ii. ——GIRISH CHUNDER MITTAR v. JATADHARI SADUKHAN

(1899), L. L. R. 26 Calc. 653; 3 C. W. N. 551.—**IND.**

202 iii. ——CAMPBELL v. WHITE (1856), 27 L. T. O. S. 48.—**IR.**

202 iv. ——Abusive language, without any specific accusation, affords ground for an action of damages.—

MILLER v. MACKAY (1811), 16 Fac. Coll. 360.—**SCOT.**

202 v. ——MANN v. BOOKER (1902), 19 S. C. 419.—**S. AF.**

a. Hasty words uttered under provocation.—An inspector of water-meters accused a mill owner of taking

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K. B. 695; Tuam (Archbp.) v. Robeson (1828), 5 17; Clement v. Chivis (1829), 9 B. & C. 172. *Mentd.* Huth v. Huth, [1915] 3 K. B. 32.

203. "Cosening."—(GORGES CASE (1588), Moore, K. B. 261; 72 E. R. 568; *sub nom.* GEORGE'S CASE, Cro. Eliz. 95.

204. —.]—Richard Somerstalles brought an action upon the case for slanderous words, that is to say, S. is a very bad fellow, for he made J. drunken in the night, & cosened him of an hundred marks; & upon not guilty pleaded it was found for pltf., & judgment was stayed, for the words are not sufficient to maintain an action.—SOMERSTALLES' CASE (1601), Gouldsb. 125; 75 E. R. 1039.

205. —.]—Where an action upon the case was brought for words by a merchant pltf. for scandalous words spoken to him, which words were these, "Thou art an errant knave, for you have cosened all Coventry" & . . . it was adjudged by the whole ct. here that these words were not actionable (WILLIAMS, J.).—ANON. (prior to 1611), cited in 1 Bulst. at p. 173; 80 E. R. 863.

Annotation:—Folld. Tut v. Kerton (1611), 1 Bulst. 172.

206. —.]—TUT v. KERTON (1611), 1 Bulst. 172; 80 E. R. 863.

207. —.]—If one speaks these words of another, "you bought land, when you cosened the town in your account, these words not actionable clearly (COKE, J.).—HOPTON v. BAKER (1614), 2 Bulst. 228; 80 E. R. 1082.

208. —.]—Sir William Bronker brought an action upon the case for slanderous words: & he showed in his declaration how that he was a knight, & one of the gentlemen of His Majesties Privy Chamber; & that deft. spoke of him these scandalous words, viz. Sir William Bronker is a cosening knave, & lives by cosenage. Which was found for pltf. In arrest of judgment it was moved that the words were not actionable, & so it was adjudged.—BRONKER'S CASE (1617), Godb. 284; 78 E. R. 166.

209. —.]—"Thou hast no more but what thou hast got by cosening & cheating;" not averring that he was of any trade, or that he had anything; is not actionable (*per* CUR.).—BROMFIELD v. SNOKE (1699), 12 Mod. Rep. 307; 88 E. R. 1339.

210. Knave, rogue, rascal, etc.]—Action for these words: "Thou art a bkpt. knave, a vagabond, & rogue." After verdict for pltf., it was moved in arrest of judgment, that an action lies not for these words, & it was held clearly by all the ct., that none of them were actionable, but only the words "bkpt. knave"; & of those they doubted.—ROBINSON v. MELLOR (1601), Cro. Eliz. 843; 78 E. R. 1069.

211. —.]—To say of a cooper, that he is a varlet & a knave, is not actionable.—COTES v. KETLE (1608), Cro. Jac. 204; 79 E. R. 179.

water from the town supply, & on another occasion accused him of diverting a stream. On both occasions the mill owner called the inspector a liar:—*Held:* no action of slander would lie at the instance of the inspector, since the words were uttered under provocation.—WATSON v. DUNCAN (1890), 17 R. (Ct. of Sess.) 404; 27 Sc. L. R. 319.—SCOT.

b. —.]—COCKBURN v. REEKIE (1890), 17 R. (Ct. of Sess.) 568; 27 Sc. L. R. 454.—SCOT.

c. —.]—MACDONALD v. RUP- (1894), 21 R. (Ct. of S.) 317; 1 S. L. T.

d. —.]—CHRISTIE v. ROBERTSON (1899), 1 F. (Ct. of Sess.) 1155; 36 Sc. L. R. 899; 7 S. L. T. 143.—SCOT.

e. —.]—POWELL v. PRICE (1830), 1 Men. 500.—S. AF.

f. Liar & fraud.]—Since to call a man a fraud does not in ordinary language mean that he has committed a fraud, the words "liar & fraud" verbally uttered, are not slanderous.—AGNEW v. BRITISH LEGAL LIFE ASSURANCE CO., LTD. (1906), 8 F. (Ct. of Sess.) 442; 43 Sc. L. R. 284; 13 S. L. T. 742.—SCOT.

212. —.]—APTHORP v. COCKERELL (1615), 1 Roll. Rep. 287; 3 Bulst. 150; 81 E. R. 489.

Annotation:—Refd. R. v. Gripe (1697), 12 Mod. Rep. 139.

213. —.]—TREVILLIAN & BETTIES CASE (1620), Palm. 10; 81 E. R. 953.

214. —.]—STAMPE v. HYDE (1621), Palm. 126; 2 Roll. Rep. 199, 227; 81 E. R. 1010; *nom.* STAMPE v. JENKIN & HYDE, 2 Roll. Rep. 273.

Annotation:—Refd. Haylock v. Sparke (1853), 1 E. & B. 471.

215. —.]—DAUBNY v. MARTIN (1627), Palm. 441; 81 E. R. 1161.

216. —.]—WILNER v. HOLD, No. 687, *post*.

217. —.]—WELDEN v. JOHNSON (1661), 1 Sid. 48; 82 E. R. 962.

Annotation:—Refd. Holt v. Scholefield (1796), 6 Term Rep. 691.

218. —.]—Prohibition to a suit for calling H. knave.—HAWKIN'S CASE (1697), 2 Salk. 548; 91 E. R. 464.

219. —.]—BELLAMY v. BARKER (1720), 1 Stra. 304; 93 E. R. 536.

220. —.]—"He has defrauded a meal-man of a roan horse" are not actionable words without special damage.—RICHARDSON v. ALLEN (1774), 2 Chit. 657.

221. —.]—The simply saying to another "you are a swindler," is not actionable. Where in an action for slander, some of the counts in the declaration are for actionable words, & others for words not actionable, & special damage is laid referring to all the counts, & pltf. has a verdict on the whole declaration; though the damages recovered be less than 40s. he is entitled to full costs.—SAVILE v. JARDINE (1795), 2 Hy. Bl. 531; 126 E. R. 686.

Annotation:—Refd. Kelly v. Partington (1833), 2 Nev. & M. K. B. 460.

222. —.]—MARTIN v. LOEI (1861), 2 F. & F. 654.

Spoken in way of trade, profession, calling, etc.—Solicitors.]—See Nos. 387–396, *post*.

—Clergymen.]—See Nos. 424–426, *post*.

(f) Words Spoken in Foreign Tongue or Dialect.

223. Must be understood by those present.]—

(1) Slander spoken in a language unintelligible to the auditors is not actionable.

(2) In slander it must be averred that the words were spoken of pltf., & that the auditors so understood them.—JONES v. DAVERS (1596), Cro. Eliz. 496; 78 E. R. 747.

224. —.]—Slander spoken in a language not understood by those who hear it, is not actionable.—PRICE v. JENKINGS (1601), Cro. Eliz. 865; 78 E. R. 1091.

Annotation:—Refd. Amann v. Damm (1860), 8 C. B. N. S. 597.

225. —.]—Parole mainsworn. Note that though the word be not understood in all places, yet it is in English, & therefore needs not the averment as the Welsh does.—SLATER v. FRANKS (1616), Hob. 126; 80 E. R. 275.

PART IV. SECT. 1, SUB-SECT. 2.—B. (f).

223 i. Must be understood by

*nt.]—*A declaration claiming damages for slander, or otherwise, alleged that the words complained of were addressed in the native language to the natives. It did not allege that such words were understood:—*Held:* an allegation that the words were understood was not necessary.—WILLIAMSON v. MACPHERSON (1922), 43 N. L. R. 200.—S. AF.

g. Necessity for proof of meaning in English.]—In an action for slander in a foreign language pltf. must allege & prove the actual foreign words used

226. —.]—In the Exchequer an action of the case was brought by A. against B. for calling him *Idoner* in the Welsh tongue, & did aver that it was in the presence of divers that understood the Welsh tongue, but did not aver what the word did import, & yet judgment was given for pltf., & the ct. took information by Welshmen, what the word meant in English wherein they were satisfied that it was as much as perjured in English.—ANON. (1616), Hob. 126; 80 E. R. 275.
Annotation:—*Reid*. *McGregor v. Gregory* (1843), 11 M. & W. 287.

227. —.]—*FLEETWOOD v. CURLE*, No. 451, *post*.

228. —.]—*WYNNIFFE v. COOK* (1623), Benl. 134; 73 E. R. 992.

229. —.]—(1) Deft., *bonâ fide* believing that pltf., who was a clerk to one M., a customer of deft.'s, & who had been sent to deft.'s shop by M., had while there stolen a box from an inner room, went to M., & after telling him of his loss, intimated his suspicion of pltf., saying, "There was no one else in the room, & he must have taken it":—*Held*: the communication was privileged by the occasion.

(2) Where slanderous words are uttered in a foreign language, the declaration should aver that the persons in whose presence they were spoken understood the language.—*AMANN v. DAMM* (1860), 8 C. B. N. S. 597; 29 L. J. C. P. 313; 2 L. T. 322; 7 Jur. N. S. 47; 8 W. R. 470; 141 E. R. 1300.
Annotation:—*As to* (1) *Reid*. *Stuart v. Bell*, [1891] 2 Q. B. 341.

230. Translation must be actionable.]—*GIBBS v. JENKINS* (1631), Het. 175; 124 E. R. 433; *sub nom.* *GIBBS v. JENKINS*, Hob. 191.

231. —.]—*ROSS v. LAWRENCE* (1651), Sty. 263; 82 E. R. 696.

232. Meaning of words—Court may inform itself—From native acquainted with tongue.]—ANON. (1616), No. 226, *ante*.

(g) Slander of Title.

See Part XII., *post*.

(h) Slander of Goods.

See Part XIII., *post*.

SECT. 2.—STATEMENTS ACTIONABLE PER SE.

SUB-SECT. 1.—STATEMENTS REFLECTING ON PLAINTIFF "IN WAY OF TRADE, PROFESSION, CALLING OR OFFICE."

A. Words Must be Spoken of Plaintiff in Way of his Trade, Profession, etc.

Traders.]—See Sub-sect. 1, C. (a), *post*.

Profession or calling.]—See Sub-sect. 1, D. (a), *post*.

Office.]—See Sub-sect. 1, E. (a), *post*.

B. Trade, Profession, etc., Must be Carried on at Time of Publication.

Traders.]—See Sub-sect. 1, C. (a), *post*.

Profession or calling.]—See Sub-sect. 1, D. (a), *post*.

Office.]—See Sub-sect. 1, E. (a), *post*.

C. Statements in Way of Trade.

(a) General Rules.

233. Statement must be spoken of plaintiff in way of his trade.]—Words against a tradesman

are not of themselves actionable, unless it be averred there was at the time a *colloquium* con- concerning his trade.—*DOTTER v. FORD* (1600), Cro. Eliz. 794; 78 E. R. 1023.

234. —.]—*HARMAN v. DELANY*, No. 110, *ante*.

235. — Bankruptcy.]—An action upon the case was brought for these words, "Thou art a cosener & a bkpt., & hast an occupation to deceive men by"; the words were spoken of a gentleman who had £100 land *per annum* to live upon; & therefore although he used to buy & sell iron, yet because he was not a merchant, nor did not live by his trade, the better opinion of the ct. was that the words were not actionable, & so adjudged.—ANON. (1586), Godb. 40; 78 E. R. 25.

236. —.]—An action upon the case was brought for calling pltf. bkpt., & a verdict passed for pltf.; & now S. showed in arrest of judgment, that pltf. had not declared that he was a merchant, or of any mystery or trade:—*Held*: the declaration insufficient for the same cause, & the ct. made a rule for stay of the judgment accordingly.—ANON. (1588), Gouldsb. 84; 75 E. R. 1011.

237. —.]—*EMERSON v. FAIRFAX* (1666), 1 Sid. 299; 82 E. R. 1118.

238. — Humble character of trade immaterial.]—An action lies for speaking scandalous words of any man of any trade or profession, be it ever so base, *e.g.* a lime burner, if they are spoken with reference to his profession (*per* CUR.).—*TERRY v. HOOPER* (1663), 1 Lev. 115; 83 E. R. 325.

239. — Trade outside judicial notice of court.]—Spoken words imputing to a man misconduct in his office or trade are actionable, although the office or trade is not one of which the ct. can take judicial notice.

The declaration alleged that it was the duty of pltf., as a gamekeeper, not to kill foxes, that he was employed on the terms of his not doing so, & that a person killing foxes would not be employed as gamekeeper; that deft., knowing the premises, falsely & maliciously said of pltf., as such gamekeeper, that he killed foxes; special damage:—*Held*: on demurrer, a good declaration, even without the allegation of special damage.—*FOULGER v. NEWCOMB* (1867), L. R. 2 Exch. 327; 36 L. J. Ex. 169; 16 L. T. 595; 31 J. P. 503; 15 W. R. 1181.

Annotations:—*Consd.* *Jones v. Jones*, [1916] 2 A. C. 481. *Reid*. *Miller v. David* (1874), 30 L. T. 58.

240. — Dishonest trading.]—*RYLE'S CASE* (1590), Cro. Eliz. 171; 78 E. R. 428.

241. —.]—A declaration for slander stated by way of inducement, that pltf. was a pork butcher, & then charged deft. with publishing to pltf., in presence of other persons, these words of & concerning pltf.: "You are a bloody thief, who stole F.'s pigs? You did, you bloody thief, & I can prove it. You poisoned them with mustard & brimstone"; innuendo, that pltf. was guilty of pig stealing. The jury found that the words were not intended to impute felony, but were spoken of pltf. in relation to his trade:—*Held*: pltf. was not entitled to recover, as the words used did not show that they were necessarily spoken of him in relation to his trade, & no *colloquium* concerning his trade was laid in the declaration. *SIBLEY v. TOMLINS* (1833), 4 Tyr. 90.

242. —.]—We think this declaration sufficient: it is averred that the words are spoken

& their meaning in English.—*POLSKYKI v. CHROMIK*, [1920] 1 W. W. R. 858; 51 D. L. R. 345; 15 Alta. L. R. 274.—CAN.

PART IV. SECT. 2, SUB-SECT. 1.—C. (a).

233 1. Statement must be spoken of plaintiff in way of his trade.]—Words

to be actionable *per se* must be spoken of pltf. in relation to his office, trade or profession.—*CHOMLEY v. WATSON*, [1907] V. L. R. 502.—AUS.

Sect. 2.—Statements actionable per se: Sub-sect. 1, C. (a) & (b) i.]

of pltf. in the way of his trade, when the declaration says you charge for vessels of eight feet water, as if for ten feet (LORD ABINGER, C.B.).—SIMPSEY v. LEVY (1838), 2 Jur. 776.

243. — Inn infected with pox.]—Action for words, & declared, that pltf. was an innholder in D. Deft. spoke these words: "Thy house is infected with the pox, & thy wife was laid of the pox":—*Held*: actionable; for it shall be intended the great pox; & if it were the smallpox, yet they were actionable; for it is a discredit to pltf., & guests would not resort thither. It was adjudged for pltf., & £50 damages given.—LEVER'S CASE (1592), Cro. Eliz. 289; 78 E. R. 543.

Annotation:—**Mentd.** Allen v. Flood, [1898] A. C. 1.

244. — Suppressing will.]—Words: "He is a very varlet, & seeks to suppress his brother's will," etc.

The words which are actionable in such a case ought to touch pltf. in his profession, which these do not do . . . for in the suppressing of his brother's will the case might be such that he might well do it, for perhaps there may be an after will made (MOUNTAGUE, C.J.).—GODFREY v. OWEN (1619), Poph. 148; Palm. 21; 79 E. R. 1248.

245. — Cheating.]—NEEDLER v. SYMNELL (1635), Cro. Car. 417; W. Jo. 366; 79 E. R. 962.

246. — —.]—WAKE v. CHAPMAN (1655), Hard. 8; 145 E. R. 353.

Annotation:—**Refd.** Ludwell v. Hole (1726), 2 Stra. 696.

247. — —.]—To call a tradesman a cheat, an action will lie if he speaks of his profession, but to speak it generally it will not (*per Cur.*).—DAVIES v. JONES (1662), T. Raym. 62; 83 E. R. 35.

Annotations:—**Refd.** Savage v. Robery (1698), 2 Salk. 694; Ludwell v. Hole (1726), 2 Stra. 696.

248. — —.]—Of a malster, he has cheated all the farmers at E. without a *colloquium* of his trade, actionable.—REEVE v. HOLGATE (1672), 2 Lev. 62; 83 E. R. 450.

Annotation:—**Consd.** Jones v. Jones, [1916] 2 A. C. 481.

249. — —.]—It is actionable to say of a dyer, with reference to his trade, "he is a cheating knave for he cheated me." *Qu.*: when the words charge him with being a rogue?—PRESTON'S CASE (1674), 1 Freem. K. B. 276; 89 E. R. 197.

250. — —.]—To say passionately to a tradesman, "You are a cheat," is not actionable, unless alleged in something concerning his trade.—SAVAGE v. ROBURY (1698), 5 Mod. Rep. 398; 2 Salk. 694; 87 E. R. 728.

Annotations:—**Refd.** Ludwell v. Hole (1726), 2 Stra. 696; Hawkes v. Hawkey (1807), 8 East, 427.

251. — —.]—"He is a cheat" not actionable, without a *colloquium*.—BURNET v. WELLS (1700), 12 Mod. Rep. 420; 88 E. R. 1423.

Annotation:—**Mentd.** Mellin v. White (1894), 7 R. 351.

252. — —.]—"Tis not actionable to charge a man with cheating, unless he is a trader, & the words were spoken of him in his trade.—LUDWELL v. HOLE (1726), 2 Ld. Raym. 1417; 2 Stra. 696; 92 E. R. 422.

253. — —.]—These words, "You cheated the lawyer of his linen, & stood bawd to your daughter, to make it up with him, you cheat everybody, you cheated me of a sheet, you cheated S., & I will let him know it":—*Held*: not actionable, without a *colloquium* of pltf.'s trade or profession.—DAVIS v. MILLER (1742), 2 Stra. 1169; 93 E. R. 1105.

254. — Inefficiency.]—To say of a watch-

maker, that he is "a bungler, & cannot make a good piece of work," is not actionable.—REDMAN v. PYNE (1669), 1 Mod. Rep. 19; 2 Keb. 568; 86 E. R. 698.

Annotation:—**Refd.** Harman v. Delany (1731), 2 Stra. 898.

255. — Rogue.]—"He is a runnagate rogue, & worse than a rogue, & if he had his deserts he had been hanged," said of a trader:—*Held*: not actionable without showing special damage.—COCKAINE v. HOPKINS (1677), 2 Lev. 214; 83 E. R. 525.

Annotation:—**Refd.** Iveson v. Moore (1698), 1 Salk. 15.

256. — —.]—Pltf. being a carpenter, brought an action for these words, "He has charged A. for forty days' work, & received the money for the work, that might have been done in ten days, & he is a rogue for his pains." After verdict for pltf. the judgment was arrested, the words not being actionable.—LANCASTER v. FRENCH (1728), 2 Stra. 797; 93 E. R. 855.

257. — "A regular prover in bankruptcies."]—Case for defamation. The first count stated as inducement, that pltf. was a livery stable keeper, & by that trade & business acquired profit. The last count stated that deft. spoke these words of & concerning pltf., & of & concerning him in his trade: "You (meaning pltf.) are a regular prover under bkpcies" (meaning that pltf. was accustomed to prove fictitious debts under commissions of bkpt.). Verdict for pltf. on all counts. On error brought:—*Held*: the words did not impute a charge against pltf. in the way of his trade & business.—ANGLE v. ALEXANDER (1830), 7 Bing. 19; 131 E. R. 46; *sub nom.* ALEXANDER v. ANGLE, 1 Cr. & J. 143; 4 Moo. & P. 870; 1 Tyr. 9.

Annotations:—**Mentd.** Empson v. Griffin (1839), 11 Ad. & El. 186; McGregor v. Gregory (1843), 11 M. & W. 287; R. v. O'Connell (1844), 5 State Tr. N. S. 1; O'Brien v. Clement (1846), 16 M. & W. 159.

258. — Employing prostitute.]—Words spoken of a tradesman, imputing to him that his trade is maintained by the prostitution of a female employed by him, are not actionable, although laid to be spoken of him in his trade; unless they can be construed as imputing that he kept a bawdy house.—BRAYNE v. COOPER (1839), 5 M. & W. 249; 9 L. J. Ex. 80; 151 E. R. 106.

259. — Failure to pay debts.]—SMITH v. WILLOUGHBY (1899), 15 T. L. R. 314, C. A.

260. Trade must be carried on at time of publication.]—In slander, a general allegation that pltf. was a trader is, after verdict, sufficient.—TUTHILL v. MILTON (1609), Cro. Jac. 222; Yelv. 158; 79 E. R. 193.

Annotations:—**Refd.** Bellamy v. Burch (1847), 16 M. & W. 590. **Mentd.** Shorcrosse v. Bland (1673), Freem. K. B. 318; Colethirst v. Wiseman (1693), 12 Mod. Rep. 47.

261. —.]—A declaration for scandalous words against a trader must aver that he was a trader at the time the words were spoken.—COLLIS v. MALIN (1632), Cro. Car. 282; W. Jo. 304; 79 E. R. 847.

Annotations:—**Consd.** Mills v. Hughes (1745), Willes, 588. **Refd.** Whittington v. Gladwin (1825), 2 C. & P. 146; Whitaker v. Bradby (1826), 4 L. J. O. S. K. B. 125.

262. — Proof of alleged trade — Statement in respect of two trades — Only one proved.]—In slander, the declaration alleged that pltf. at the time of speaking, etc., was of two trades, & that deft., intending to injure him in his several trades as aforesaid, & to prevent persons from employing him in the way of his several trades, in a certain discourse which he had of & concerning pltf. in one of his trades, spoke, etc.:—*Held*: though pltf. failed to prove he was of both trades, yet he might recover upon proof that he was of that trade concerning which deft. was charged to have spoken

the words.—**FIGGINS v. COGSWELL** (1815), 3 M. & S. 369; 105 E. R. 650.

Annotations:—**Consd.** Chalmers v. Shackell (1834), 6 C. & P. 475. **Refd.** Ducas v. Gregorie (1833), 2 L. J. Ex. 189. **Mentd.** Rutherford v. Evans (1830), 4 Moo. & P. 163.

(b) *Words Imputing Insolvency.*

i. *In General.*

263. "Broken."—To say of a merchant, "he is broken," is actionable; for it is the usual expression to signify that a trader has failed in his credit, & become a bkpt.—**JOHNSON v. LEMAN** (1620), Cro. Jac. 562; Palm. 63; 79 E. R. 481.

264. —.]—Words importing slander in the time past, as "he came a broken merchant from Hamburgh," are actionable.—**LEYCROFT v. DUNKER** (1633), Cro. Car. 317; W. Jo. 321; 79 E. R. 877.

Annotations:—**Refd.** Dawe v. Palmer (1611), Hut. 125; Drake v. Hill (1669), 1 Sid. 424; Simson v. Barlow (1701), 12 Mod. Rep. 591.

265. —.]—W., a corn merchant & a baker in London, brought an action upon the case against J. for speaking these words of him, "Thou art a broken fellow, & hast cheated me of £100."

Take all the words together as they are laid they imply he is broken in his trade . . . & the words are very scandalous. . . . Therefore *judicium pro querente* (ROLL, C.J.).—**WISE v. JEFFRYES** (1654), Sty. 429; 82 E. R. 835.

266. —.]—**WALKENDEN v. HAYCOCK** (1654), Sty. 424; 82 E. R. 832.

Annotation:—**Refd.** Simson v. Barlow (1701), 12 Mod. Rep. 591.

267. —.]—**SOUTHAM v. ALLEN** (1673), T. Raym. 231; 83 E. R. 121.

Annotations:—**Refd.** Whittaker v. Bradley (1826), 7 Dow. & Ry. K. B. 619; Whittington v. Gladwin (1826), 5 B. & C. 180.

268. —.]—To say of a husbandman or farmer, "He owes more money than he is worth, he is run away & broke," is actionable.—**DOBSON v. THORNISTONE** (1686), 3 Mod. Rep. 112; 87 E. R. 71.

269. —.]—To say of a trader, "He is broken & run away, & will never return again," is actionable.—**CHAPMAN v. LAMPHIRE** (1688), 3 Mod. Rep. 155; Comb 74; 87 E. R. 100.

270. "Worth nothing."—**STARKEY v. TAYLOR** (1629), as reported in Het. 139; 124 E. R. 406; *on appeal, sub nom.* **TAYLOR v. STARKEY** (1630), Cro. Car. 192.

271. —.]—To say of a merchant that he is £100 worse than nothing is tantamount to calling him a bkpt.—**GOODYEAR v. BISHOP** (1632), Cro. Car. 265; 79 E. R. 831.

272. "Not worth a groat."—(1) D., pltf., against P., in an action upon the case, & count that whereas he was a fuller, & he used the trade of fulling, & thereby acquired his livelihood, & was of good credit, etc. Deft. said of him, "Trust him not for he owes me £100, & is not worth one groat"; & at another day he said, "He is a bkpt. rogue"; & upon not guilty pleaded, the jurors found for pltf., & gave entire damages.

The first words are actionable at common law

before the statute, "Trust him not, he is not worth one groat" (*per* CUR.).

(2) Go not to buy of J., a merchant, for he will deceive you. . . . All these words are actionable (*per* CUR.).

(3) He will be bkpt. within seven days . . . he is a bkpt. rogue, that . . . is actionable (*per* CUR.).—**DAWE v. PALMER** (1635), Hut. 124; 123 E. R. 1147.

Annotations:—*As to* (1) **Refd.** Simson v. Barlow (1701), 12 Mod. Rep. 591. *Generally, Refd.* Harman v. Delany (1731), 2 Stra. 898.

273. —.]—**MEADE v. AXE** (1639), March, 15, pl. 37; 82 E. R. 391.

274. —.]—**VICCARYE v. BARNES** (1650), Sty. 217; 82 E. R. 658.

275. —.]—(1) To say "He is not worth a groat" is not actionable, because he may be an honest man notwithstanding (**KELYNG, C.J.**).

(2) H. may pay his debts, & yet not worth a groat after; but to say "He is not able to pay his debts" is actionable (**TWISDEN, J.**).—**DRAKE v. HILL** (1669), 1 Sid. 424; T. Raym. 184; 1 Lev. 276; 2 Keb. 549; 82 E. R. 1195.

Annotations:—*As to* (2) **Refd.** Garret v. Shelton (1683), 2 Show. 295; Simson v. Barlow (1701), 12 Mod. Rep. 591.

276. —.]—To say of a trader that he is not worth a groat, is actionable.—**GARRET v. SHELTON** (1683), 2 Show. 295; 89 E. R. 948.

Annotation:—**Refd.** Cook v. Tucker (1694), Carth. 330.

277. —.]—To say to a milliner, "Thou art a beggarly fellow, & not worth a farthing," is actionable without special damages.—**SIMSON v. BARLOW** (1701), 12 Mod. Rep. 591; 88 E. R. 1540.

278. "Not able to pay debts."—To say of a trader that he is "a beggarly fellow, & not able to pay his debts," is tantamount to calling him a bkpt.—**ANON.** (1637), Cro. Car. 472; 79 E. R. 1008.

279. —.]—**VICCARYE v. BARNES** (1650), Sty. 217; 82 E. R. 658.

280. —.]—R. brought an action upon the case against S. for speaking these words of him, "Thou art a poor fellow, & art not able to pay 2s. in the pound, & art not able to pay thy debts."

There is no need for pltf. to show he had a particular loss by the words, for it is enough that he is generally scandalised by them, neither is it necessary for him to aver that he was able to pay all his debts. . . . Therefore let pltf. have his judgment (**ROLL, C.J.**).—**ROOKE v. SMITH** (1651), Sty. 273; 82 E. R. 705.

281. —.]—**DRAKE v. HILL**, No. 275, *ante*.

282. —.]—**HOOKE v. TUCKER** (1694), Comb. 292; Holt, K. B. 39; 90 E. R. 485; *sub nom.* **COOK v. TUCKER**, Carth. 330.

Annotation:—**Refd.** Jones v. Jones, [1916] 2 A. C. 481.

283. "Avoiding creditors."—**JONES v. JACOB** (1648), Sty. 142; 82 E. R. 595.

284. —.]—**ARNE v. JOHNSON** (1713), 10 Mod. Rep. 111; 88 E. R. 651.

285. —.]—**FOTHERGILL v. JACKSON** (1714), Gilb. 314; 93 E. R. 340.

286. "Failed."—Pltf. declared that he was at the time of the words spoken, & yet was, a

PART IV. SECT. 2, SUB-SECT. 1.—
C. (b) i.

h. Inclusion in Black List.—A party publishing a copy of a judgment does so at his peril; & if the judgment has been satisfied by payment before the publication, & he publishes it as an existing liability, he is liable in an action for libel, & if special damage has followed, in an action for a false representation.—**OLDHAM v. OLDHAM** (1863), 8 L. T. 604.—**IR.**

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k. —.]—**ANDREWS v. DRUMMOND & GRAHAM** (1887), 14 R. (Ct. of Sess.) 568; 24 Sc. L. R. 415.—**SCOT.**

l. —.]—**CRABBE & ROBERTSON v. STUBBS, LTD.** (1895), 22 R. (Ct. of Sess.) 860; 32 Sc. L. R. 650; 3 S. L. T. 73.—**SCOT.**

m. —.]—**PICKARD v. SOUTH AFRICAN TRADE PROTECTION SOCIETY** (1905), 22 S. C. 89.—**S. AF.**

n. Allegation by

In an action brought by a co. against certain of its shareholders concluding for damages for slander on the ground that defenders had maliciously stated that the co. was insolvent, with the result that the business of the co. was injured, the pursuers obtained an issue.—**AITCHISON & SONS, LTD. v. McEWAN** (1903), 5 F. (Ct. of Sess.) 303; 40 Sc. L. R. 249; 10 S. L. T. 524.—**SCOT.**

o. "Run away owing money"
Deft. spoke of pltf., a miller &

D

Sect. 2.—Statements actionable per se: Sub-sect. 1, C. (b) i. & ii., & (c).]

merchant; & there being a communication of him, deft. spoke these words of him: "I believe all is not well with V.; there are many merchants that have lately failed, & I expect no otherwise of V." After verdict adjudged for pltf.—*VIVIAN v. WILLET* (1670), T. Raym. 207; 83 E. R. 109; *sub nom.* *VINIAN v. WILLET*, 2 Keb. 718.

287. "Owes more than he is worth."]—Words spoken of a trader. Pltf. was a sugar baker, etc., & deft. discoursing with one of his creditors, to whom he owed about £10 said, "I will not give you 2s. in the pound for your debt, he (innuendo pltf.) is a pitiful fellow, & owes £40 more than he is worth." By the opinion of the ct. the words were actionable.—*BROWNE v. ROBINSON* (1671), 1 Freem. K. B. 18; 89 E. R. 16.

288. "Gone off."]—*HARRISON v. THORNBOROUGH*, No. 753, *post*.

289. "Compounded his debts."]—'Tis actionable to say of a tradesman, "He is a sorry pitiful fellow, & a rogue, he compounded his debts at 5s. in the pound," though there is no *colloquium* of his trade.—*STANTON v. SMITH* (1727), 2 Ld. Raym. 1480; 2 Stra. 762; 92 E. R. 462; *sub nom.* *STANTON v. SQUIBB*, 1 Barn. K. B. 13.

Annotations:—*Consd.* *Doyley v. Roberts* (1837), 3 Bing. N. C. 835. *Appld.* *Jones v. Littler* (1841), 7 M. & W. 423. *Consd.* *Jones v. Jones*, [1916] 2 A. C. 481.

290. "Ware hawk, mind what you are about."]—In an action for words spoken of a man in the way of his trade, it is not necessary to prove the whole of the words laid in the declaration; it is enough if sufficient is proved to sustain the action provided the words not proved do not alter the sense of those that are. Thus, proof that deft. spoke of pltf. to one with whom he did business: "Ware hawk there; mind what you are about," will sustain a declaration alleging the words spoken to have been: "Ware hawk; you must take care of yourself there; mind what you are about."—*ORPWOOD v. BARKES* (1827), 4 Bing. 261; 12 Moore, C. P. 492; 5 L. J. O. S. C. P. 167; 130 E. R. 767.

291. "In a sponging house."]—Slander for speaking of pltf. the following words: "I will bet £5 to £1 that Mr. J. (ptf.) was in a sponging house for debt within the last fortnight, & I can produce the man who locked him up; the man told me so himself." In answer to the following question from a bystander, "Do you mean to say, that J. brewer of Rosehill, has been to a sponging house within this last fortnight for debt?" deft. said, "Yes, I do." The jury found that the words were spoken of pltf. in the way of his trade:—*Held*: that the action was maintainable, & the verdict was right, as it was plain from the conversation that the words were spoken of pltf. in his character of a brewer. *Semble*: the words were actionable independently of that, because they must necessarily affect pltf. in his trade & credit.

Here the imputation is that of insolvency which must be injurious; for if a tradesman be incapable of paying all his debts, whether in or out of trade, his credit as a tradesman . . . must be

buyer, that one of the big millers, meaning pltf., had run away owing money to him & others; that he, deft., had come in to catch pltf. but that he had gone or cleared out:—*Held*: the words used cast an imputation upon the solvency & financial standing of pltf., & it was for the jury to say whether they were spoken in reference to his business, & calculated

to injure him therein.—*LOTT v. DRURY* (1882), 1 O. R. 577.—*CAN.*

p. "Has given a chattel mortgage." A statement that a man has given a chattel mtge. is not libellous *per se*, & no action will lie for the publication of such a statement without an innuendo to bring out some injurious meaning to be attached to

injured (*PARKE, B.*).—*JONES v. LITTLER* (1841), 7 M. & W. 423; 10 L. J. Ex. 171; 151 E. R. 831.

Annotation:—*Expld.* *Jones v. Jones*, [1916] 2 A. C. 481.

292. Inclusion in weekly list of judgments by default.]—In order to support an action for libel the innuendo must represent the reasonable, natural, or necessary inference from the words complained of, regard being had to the occasion & circumstances of their publication. It is not enough that the words may be made to bear a defamatory meaning by putting upon them a strained & improbable construction.

In an action for libel brought by a tradesman in Scotland against the proprietors of a trade journal, known as *Stubbs' Weekly Gazette*, defenders admitted that in a certain issue of their journal pursuer's name had erroneously appeared in the weekly list of persons against whom decrees in absence had been obtained in the small debts cts., the fact being that the debt had been paid & the action dismissed. This list was headed by a note explaining that in no case did the publication of the decree imply inability to pay on the part of any one named. Pursuer averred that the entry falsely & calumniously represented that he was unable to pay his debts, & the ct. approved an issue for the trial embodying this innuendo:—*Held*: the entry, when read in connection with the explanatory note, was incapable of bearing the defamatory meaning ascribed to it, & consequently there was no question to go to the jury, & the issue ought to have been disallowed.—*STUBBS, LTD. v. RUSSELL*, [1913] A. C. 386; 82 L. J. P. C. 98; 108 L. T. 529; 29 T. L. R. 409, H. L.

Annotation:—*Distd.* *Stubbs v. Mazure*, [1920] A. C. 66.

293. —.]—In an action for libel brought by a tradesman in Scotland against the proprietors of *Stubbs' Weekly Gazette*, a commercial newspaper containing information as to the credit of traders, defenders admitted that in a certain issue of the gazette the pursuer's name had erroneously appeared in the weekly list of persons against whom decrees in absence had been obtained in the small debt cts., the fact being that the claim had been settled out of ct. The list was headed by a note stating that in no case did the publication of the decree imply inability to pay on the part of any one named, or anything more than the fact that the entry published appeared in the ct. books. Pursuer averred by way of innuendo that the entry falsely & calumniously represented that the pursuer was given to or had begun to refuse or delay to make payment of his debts, & that he was not a person to whom credit should be given:—*Held*: in the circumstances of its publication, the entry was capable of bearing the meaning attributed to it by the innuendo, & the prefatory note afforded no defence to the action.—*STUBBS, LTD. v. MAZURE*, [1920] A. C. 66; 88 L. J. P. C. 135; 122 L. T. 5; 35 T. L. R. 697; 25 Com. Cas. 36, H. L.

ii. Allegation of Bankruptcy.

294. Words actionable.]—"K. will within these two days be a bkpt." are actionable words.

the words.—*SMITH v. DUN* (1911), 21 Man. L. R. 583.—*CAN.*

PART IV. SECT. 2, SUB-SECT. 1.—C. (b) ii.

294 i. Words actionable.]—*REID v. OUTRAM* (1852), 14 Dunl. (Ct. of Sess.) 577; 24 Sc. Jur. 282; 1 Stuart, 521.—*SCOT.*

—KEMPE'S CASE (1552), 1 Dyer, 72 b; 73 E. R. 155.

Annotation :—*Refd* Brittridge's Case (1602), 4 Co. Rep. 18 b.

295. ——.] — Action for these words, "Where is that bkpt. knave? where is that pillory knave?" (innuendo pltf.) & averred he was a merchant; & the words were adjudged actionable.—GRIFFITH v. MORISON (1584), Cro. Eliz. 26; 78 E. R. 292.

296. ——.] — It is actionable to call a shoe-maker a bkpt.—STANLEY v. OSBASTON (1592), Cro. Eliz. 208; 78 E. R. 523.

297. ——.] — It is actionable to say of a merchant that he is "a bkpt. knave."—WOLVERSTON v. MERES (1602), Cro. Eliz. 911; 78 E. R. 1133.

298. ——.] — An action upon the case was brought by L. against C. for these words: "L. is a bkpt. rogue, I may well say it, for I have paid for it": & it was adjudged for pltf.

The first words are actionable, although the word bkpt. be spoken adjective, because they scandalise pltf. in his trade (*per* CUR.).—LANGLEY & COLSON'S CASE (1607), Godb. 151; 78 E. R. 92.

299. ——.] — Action upon the case for words, being a beggarly gentleman & a bkpt., spoken of a grasier. Judgment given for pltf.—ANON. (1610), 1 Bulst. 40; 80 E. R. 744.

Annotations :—*Refd* Hawkins v. Cutts (1622), Hut. 49; Emerson v. Fairfax (1666), 1 Sid. 299.

300. ——.] — An action upon the case for words. The words were these, that pltf. was a bkpt. knave.

Clearly these words are scandalous & well actionable, for here are two nouns; & so if the words were, a traitor knave, these were well actionable, for here are two nouns, otherwise if the words were a traitorous knave & so spoken in the adjective, there not actionable, because there, the adjective word hath reference to the substantive (COKE, C.J.).—SELBY v. CARRYER (1614), 2 Bulst. 210; Cro. Jac. 345; 1 Roll. Rep. 22; 80 E. R. 1074.

301. ——.] — NICHOLS v. CATSEY (1614), 2 Bulst. 267; 80 E. R. 1112.

302. ——.] — A dyer is a trader within the statutes of bkpts.; & therefore to call him "bkpt." is actionable.—SQUIRE v. JOHNS (1620), Cro. Jac. 585; Palm. 151; 79 E. R. 500; *sub nom.* SQUIRE'S CASE, Jenk. 319.

303. ——.] — ALLEN v. SWIFT (1621), Hut. 46; 123 E. R. 1090.

304. ——.] — HAWKINS v. CURTS (1622), Hut. 49; 123 E. R. 1093.

Annotation :—*Refd* Emerson v. Fairfax (1666), 1 Sid. 299.

305. ——.] — BARKER v. RINGROSE (1627), Poph. 184; 79 E. R. 1279.

306. ——.] — It is actionable to call a shoe-maker "a bkpt. rogue"; for he is a trader within the statutes of bkpcy.—CRUMPE v. BARNE (1626), Cro. Car. 31; 79 E. R. 630.

307. ——.] — WATERS v. THOMSON (1632), Het. 171; 124 E. R. 429.

308. ——.] — DAWES v. PALMER, No. 272, *ante*.

309. ——.] — ANON. (1639), March, 8; 82 E. R. 387.

310. ——.] — Words, imputing insolvency to a trader, are actionable without special damage.—PASTNAGE v. WEEDEN (1674), Freem. K. B. 275; 89 E. R. 197.

311. ——.] — To say of a trader "he is a bkpt."

is actionable, although no special damage ensue.

—ANON. (1680), 2 Show. 153; 89 E. R. 855.

312. ——.] — The character of a pawnbroker may be injured by slandering his solvency in trade.—ANON. (1699), 12 Mod. Rep. 344; 88 E. R. 1368.

313. ——.] — Words which charge a tradesman with insolvency are actionable. An allegation that words were spoken *de statu* of a tradesman is equivalent to an allegation that they were spoken *de arte*.—READ v. HUDSON (1700), 1 Ld. Raym. 610; 91 E. R. 1308.

Annotations :—*Apld.* Whittington v. Gladwin (1826), 5 B. & C. 180. *Refd.* Jones v. Jones, [1916] 2 A. C. 481.

314. ——.] — Where pltf. declared that he had been a woolstapler at Cirencester, & was a brewer at Oxford, & that deft. spoke of him as such trader these words: "H. (ptf.) & B. have both been bkpts., H. at Cirencester," & gave no evidence of his having been a woolstapler, but only that he was a brewer at Oxford, & proved the words spoken to have been these, "He was a bkpt. at Cirencester," etc.:—*Held*: this proof sustained the allegation that the words were spoken of him in his trade of a brewer, for a trader at Oxford may be a bkpt. at Cirencester.—HALL v. SMITH (1813), 1 M. & S. 287; 105 E. R. 107.

315. ——. Trader not subject to bankruptcy laws.] — Words of an innkeeper imputing insolvency are actionable, although at the time when they were spoken an innkeeper was not subject to the bkpt. laws.—WHITTINGTON v. GLADWIN (1826), 5 B. & C. 180; 2 C. & P. 146; 108 E. R. 67; *sub nom.* WHITTAKER v. BRADLEY, 7 Dow. & Ry. K. B. 649; *sub nom.* WHITAKER v. BRADBY, 4 L. J. O. S. K. B. 125.

Annotations :—*Refd.* Capital & Counties Bank v. Henty (1882), 7 App. Cas. 741; Jones v. Jones, [1916] 2 A. C. 481.

316. ——. Impending bankruptcy.] — To say of a tradesman, "If he does not come & make terms with me, I will make a bkpt. of him, & ruin him," is actionable, without proof of special damage.—BROWN v. SMITH (1853), 13 C. B. 596; 1 C. L. R. 4; 22 L. J. C. P. 151; 21 L. T. O. S. 60; 17 Jur. 807; 1 W. R. 288; 138 E. R. 1333.

(c) Words Imputing Dishonest Trading.

317. Keeping false debt book.] — BROKE'S CASE (1595), Moore, K. B. 409; 72 E. R. 661.

318. ——.] — (1) An action upon the case was brought for words. Pltf. set forth in his declaration, that he was a mercer by his trade, & did sell wares & commodities in his shop, & did keep divers books of his trade, & debt books; & that deft. said unto P., being pltf.'s father-in-law, these words of pltf., viz. "Your son-in-law B. deceived me in a reckoning, & he keeps in his shop a false debt book, & I will shame him in his calling."

The action would not lie for those words, because the words single of themselves are not any slander; & when words will bear an action, it ought to be out of the force & strength of the words themselves. The first words, "Thou has deceived me in a reckoning" will bear no action, because it is impossible but that tradesmen & merchants which keep debt books will sometimes mistake one figure for another, & so same turns to the prejudice & damage of another against the

PART IV. SECT. 2, SUB-SECT. 1.— C. (a).

q. Extortimate dealings with visitors.]
—*Held*: in this case a sufficient cause

of action for libel was stated, the article complained of charging pltf. with being concerned in a system of plundering visitors to the Falls.—BARNET v. DAVIS (1856), 14 U. C. R.

271.—CAN.

r. "Fraudulent, untrustworthy & unprincipled."—PAINT v. MACLEAN (1873), 9 N. S. R. 316.—CAN.

2.—*Statements actionable per se: Sub-sect. 1, (C. (c), & D. (a).]*

will of the party himself. So the subsequent words, "He keeps a false debt book," are not actionable, because it may be falsified by the servants of the party, & not by deft. himself; & also it may be false written. *Et interest reipublice ut sit finis litium*: & it should be a cause of many suits, if such a nice construction should be made of words as to make them actionable; & words shall be taken *in mitiori sensu*, if there be no particular description & declaration that the words were spoken maliciously. Therefore general words which of themselves are actionable, by construction shall be taken to bear no action (*per CUR.*).

(2) When words are spoken which scandal a man in his trade or profession, they are actionable: as if one say of an attorney, "Thou cosenest W. of his fees": & so if words are spoken maliciously (WARBURTON, J.).—BROOK'S CASE (1613), Godb. 241; 78 E. R. 140.

319. **Cheating.**—DAWE v. PALMER, No. 272, *etc.*

320. —.—.]—It is actionable to call a merchant "a cheating knave."—ARUNDEL v. MARE (1639), Cro. Car. 552; 79 E. R. 1075.

Annotation:—**Refd.** Preston's Case (1674), Freem. K. B.

321. —.—.]—An action lies for saying of a tailor that he cheated in his trade, *per quod* he lost divers customers.—IRELAND v. LOCKWOOD (1639), Cro. Car. 570; 79 E. R. 1090.

Annotation:—**Mentd.** Anon. (1675), Freem. K. B. 311.

322. —.—.]—To say of a woollen draper, "You are a cheating fellow & keep a false book" is actionable.—TODD v. HASTINGS (1671), 2 Wms. Saund. 307; 1 Vent. 117; 85 E. R. 1103.

Mentd. Savage v. Robery (1698), 2 Salk. 694.

323. —.—.]—SMITH v. JONES (1731), 2 Barn. K. B. 11; 94 E. R. 326.

324. —.—.]—GRIFFITHS v. LEWIS, No. 327, *post*.
—Only if words have reference to trade.]—
See Nos. 245-253, ante.

325. **Giving false measure.**—DEAN v. STEEL (1626), Lat. 188; 82 E. R. 339.

326. —.—.]—BAINE v. — (1641), March, 115; 82 E. R. 436.

Annotation:—**Refd.** B. v. A. (1641), March, 119.

327. **Fraudulent weights.**—(1) Where a declaration in slander sets out words alleged to have been uttered, some in one discourse, & the remainder in a second discourse, & there are in form but two counts, each containing only the words alleged to have been uttered in one discourse, the declaration will be treated as containing only two counts, though each of such two counts contains separate allegations of the uttering of different words in the particular discourse. Therefore, if in each count there be any words set out which are slanderous, judgment for pltf. will not be arrested after verdict, though the damages be general, & some of the separate allegations recite only words not actionable.

The first count stated that pltf. was a butcher, & that deft., contriving to cause it to be believed that pltf. had been & was guilty of, in her trade, fraudulently using two weights to a steelyard (as

to which there was no previous direct allegation) by her used in her trade, & of using improper & fraudulent weights in her trade, & thereby to injure pltf. in her trade, in a discourse of & concerning pltf. in her trade, & of & concerning M., a son of pltf. & her servant in her trade, as such servant, & of & concerning pltf. having, as supposed by deft., by M. as her agent & servant, "used improper & fraudulent weights" in her trade, & defrauded & cheated in said trade, & of & concerning her being, as supposed by deft., guilty of defrauding & cheating in her trade, & having, as supposed by deft., in her trade, by M. as her agent & servant, fraudulently used two weights to a steelyard by her used in her trade, spoke, in the presence, etc., of & concerning pltf. in her trade, & of & concerning M., as & then being such servant, & of & concerning pltf. having, as supposed by deft., by M., as her agent & servant, used improper & fraudulent weights in her trade, & being, as supposed by deft., guilty of defrauding & cheating in her trade, & of & concerning pltf. having, as supposed by deft., in her trade, by M., as her agent & servant, fraudulently used two weights to a steelyard, by her used in her trade, these false, etc., words: M. (meaning M., so being such servant) uses two balls to his mother's steelyard (meaning that pltf. by & servant, used improper & fraudulent weights in her trade, & defrauded & cheated in her trade). On motion to arrest judgment:—**Held**: the words being susceptible of both a harmless & an injurious meaning, the *innuendo* was properly applied to point to the injurious meaning.

(2) The second count, with similar preliminary averments & description of the intention of deft. & subject of the discourse & of the words, adding that the discourse & words were also of & concerning deft. himself, alleged that deft. in the presence, etc., spoke, in answer to a question put by pltf. to deft. as to whether deft. had said to G. that pltf.'s son used two balls to pltf.'s steelyard, these false, etc., words: To be sure I (meaning deft.) did (meaning that deft. had said to G. that pltf.'s son used two balls to pltf.'s steelyard, & also that pltf., in her trade, had, by a son of pltf., as her agent & servant, fraudulently used two weights to a steelyard by her used in her trade); I (meaning deft.) will swear to it in any ct.; you, G., have used them for years (meaning that pltf. had in her trade fraudulently used two weights to a steelyard by her used in her trade). On motion to arrest judgment:—**Held**: the words, as stated & explained, were actionable.—GRIFFITHS v. LEWIS (1846), 8 Q. B. 841; 15 L. J. Q. B. 249; 7 L. T. O. S. 177; 10 Jur. 711; 115 E. R. 1091.

Annotation:—**Generally, Mentd.** Alfred v. Farlow (1846), 8 Q. B. 851.

328. **Adulterating goods.**—*Semble*: to say of a victualler that he puts lime in his ale, & that one lost his life & his eyes by drinking it, is actionable without special damage.—NUTON'S CASE (1671), 1 Freem. K. B. 25; 89 E. R. 22.

329. **Delivering inferior goods—Sapphire sold as diamond—Allegation against goldsmith.**—LITMAN v. WEST (1628), Het. 123; 124 E. R. 392.

319 i. (*Cheating*).—Pltf. & deft. were tailors, the latter also selling dry goods. Pltf. went into deft.'s shop to buy cloth to make up a pair of trousers for A., who was with him, when deft. said to A., "Don't you have anything to do with that man; that man will rob you; he is a rogue." He also asked A. to let him make the

s. The jury were directed that the words were actionable if spoken to pltf. in the way of his trade; & a verdict found for pltf. was upheld.—SIOMAN v. CHISHOLM (1862), 22 U. C. R. 20.—**CAN.**

t. "Held town up"—*Estate dealer.*—HOLLAND v. HALL (1912), 22 O. W. R.

209; 3 O. W. N. 1304; 3 D. L. R. 723.—**CAN.**

a. *Dishonest business methods.*—LEVER BROTHERS, LTD. v. DAILY RECORD, GLASGOW, LTD., [1909] S. C. 1004; 40 Sc. L. R. 725; [1909] 1 S. L. T. 553.—**SCOT.**

b. *Corrupt method of securing*

330. —.]—To say of one who carries on the business of a corn vendor, "You are a rogue & a swindling rascal; you delivered me 100 bushels of oats worse by 6d. a bushel than I bargained for," is actionable, & entitles him to a verdict without proof of special damage.—**THOMAS v. JACKSON** (1825), 3 Bing. 104; 10 Moore, C. P. 425; 3 L. J. O. S. C. P. 182; 130 E. R. 453.

331. —.]—**ODDY v. PAULET** (LORD) (1865), 4 F. & F. 1009, N. P.

332. Imputation of past dishonesty.—Pltf. in 1840 carried on a certain trade; then ceased to trade till 1849, when he set up in a different trade. Deft., in relation to the trade carried on in 1840, spoke the following words: "Thou hast cheated me of £100; I will not apologise to that thief"; & the bystanders understood them with reference to the trade in 1840:—**Held**: the words were nevertheless actionable, having a tendency to injure pltf. in any trade which he might carry on.—**WADSWORTH v. BENTLEY** (1853), 23 L. T. O. S. 65; 2 W. R. 376.

See, also, Nos. 233-259, ante.

D. Statements in Way of Profession or Calling.
(a) General Rules.

333. Words must be spoken of plaintiff in way of profession or calling.—Words of defamation not actionable, if they do not touch pltf.'s profession.—**BETTS v. TREVAMAN** (1620), Cro. Jac. 536; 79 E. R. 459.

334. — **Solicitor—Dishonesty.**—*Qu.*: If an action can be maintained for calling an attorney dishonest, without alleging it to be in his practice.—**LOVE v. PLAYTER** (1626), Cro. Car. 40; 79 E. R. 639.

335. — **Barratry.**—It is actionable to call an attorney a common barrator; for the words shall be taken *secundum conditionem personarum*.—**TAYLOR v. STARKEY** (1630), Cro. Car. 192; 79 E. R. 768; *affg.* S. C. *sub nom.* **STARKEY v. TAYLOR** (1629), Het. 139, 143; Hut. 104.

336. — **Cheating.**—**ALLESTON v. MOOR** (1631), Het. 167; 124 E. R. 426.

337. — **General abuse.**—In an action for slander of an attorney, the judge nonsuited pltf. on the ground that the words were mere general abuse, & not of & concerning him in his professional character.—**TOMLINSON v. BRITTLEBANK** (1835), 1 Har. & W. 573.

338. — **Defrauding creditors—Horse-whipped off racecourse.**—"He has his defrauded creditors, & has been horsewhipped off the course at Doncaster," spoken of an attorney:—**Held**: not actionable, unless spoken of him in his profession.—**DOYLEY v. ROBERTS** (1837), 3 Bing. N. C. 835; 3 Hodg. 154; 5 Scott, 40; 6 L. J. C. P. 279; 1 Jur. 242; 132 E. R. 632.

Annotations:—**Expld.** **Jones v. Littler** (1841), 7 M. & W. 423. **Distd.** **Southey v. Denny** (1847), 1 Exch. 196. **Expld.** **Jones v. Jones**, [1916] 2 A. C. 481.

339. — **Insolvency.**—In an action of slander it was proved that deft. spoke of pltf. who was a solr., upon one occasion: "Have you heard about our neighbour along here? They tell me he has gone for thousands instead of hundreds this time"; & upon another occasion: "Have you heard anything about D.? It seems to be a worse job than the other was. A. told

me D. has lost thousands":—**Held**: in the absence of special damage, the words were not actionable, as they were not reasonably capable of being construed as conveying an imputation on pltf. in his business as a solr.—**DAUNCEY v. HOLLOWAY**, [1901] 2 K. B. 441; 70 L. J. K. B. 695; 84 L. T. 649; 49 W. R. 546; 17 T. L. R. 493; 45 Sol. Jo. 501, C. A.

Annotation:—**Refd.** **Jones v. Jones**, [1916] 2 A. C. 481.

340. — **Coroner—"Cozening coroner."**—**EGLINTON & AUNSELL'S CASE** (1586), Godb. 88; 78 E. R. 54.

341. — **Bailiff—Cheating.**—To say of A.'s bailiff, that "He is a cheating cosening rogue & hath cheated A. in many things," not actionable without special damage, or reference to his employment.—**HARRIS v. TUCKER** (1681), 1 Freem. K. B. 279; 89 E. R. 200.

342. — **Letter carrier—Theft.**—To say of a letter carrier that he breaks open letters, & takes out bills of exchange, is not actionable without a colloquium of his employment, although the loss of his place be alleged as special damage. A colloquium of employment is unnecessary, when the words spoken necessarily relate to it.—**BELL v. THATCHER** (1675), 1 Freem. K. B. 276; 1 Vent. 275; 89 E. R. 198.

Annotation:—**Refd.** **Rogers v. Clifton** (1803), 3 Bos. & P. 587.

343. — **Physician—Adultery.**—Declaration for slander alleged, that deft. used words imputing adultery to pltf. a physician; & the words were laid to have been spoken "of him in his profession." No special damage was laid. After verdict for pltf., judgment was arrested, because such words, merely laid to be spoken of a physician, are not actionable without special damage: & if they were so spoken as to convey an imputation upon his conduct in his profession, the declaration ought to show how the speaker connected the imputation with the professional conduct.—**AYRE v. CRAVEN** (1834), 2 Ad. & El. 2; 4 Nev. & M. K. B. 220; 4 L. J. K. B. 35; 111 E. R. 1.

Annotations:—**Expld. & Distd.** **James v. Brook** (1846), 9 Q. B. 7. **Consd.** **Jones v. Jones**, [1916] 2 A. C. 481. **Refd.** **Doyley v. Roberts** (1837), 3 Bing. N. C. 835; **Brayne v. Cooper** (1839), 5 M. & W. 249; **Jones v. Littler** (1841), 7 M. & W. 423; **Pemberton v. Colls** (1847), 16 L. J. Q. B. 403; **Southey v. Denny** (1847), 1 Exch. 196; **Hopwood v. Thorn** (1849), 8 C. B. 293; **Gallwey v. Marshall** (1853), 9 Exch. 291; **Foulger v. Newcomb** (1867), 1 L. R. 2 Exch. 327; **Miller v. David** (1874), 22 W. R. 332.

344. — **Dissenting minister—Cheating in business partnership.**—A declaration stated as inducement that pltf. was a dissenting minister, & that before the grievances therein mentioned he had been in trade in partnership with P.; that the partnership had been dissolved, & that certain reports had been circulated of & concerning pltf. & the partnership accounts & money transactions; that deft., well knowing the premises, etc., said of & concerning pltf. & of & concerning him in his ministry, & of & concerning the partnership, etc., "H. is a rogue, & I can prove him to be so by the books at S. H. pretends to say he has been as good as a father to him, but you see he has been robbing him; he has cheated P. of £2,000. I will so expose H. that he will not be able to hold up his head in T. pulpit or any other." The second count was for saying "H. has cheated P. his brother-in-law of upwards of £2,000. I wonder

contract.—**WADDELL v. ROXBURGH** (1894), 21 R. (Ct. of Sess.) 883; 31 Sc. L. R. 721; 2 S. L. T. 85.—**SCOT.**

PART IV. SECT. 2, SUB-SECT. 1.—
D. (a).

333 i. Words must be spoken of

plaintiff in way of profession or calling.—In order that defamatory words which tend to injure a person in respect of his business or profession may be actionable without proof of special damage, they must have been spoken of him in the way of that business or

profession.—**RONALD v. HARPER** (1910), 11 C. L. R. 63.—**AUS.**

333 ii. —.]—**CROSSKILL v. MORNING HERALD PRINTING & PUBLISHING CO.** (1883), 16 N. S. R. (4 R. & G.) 200.—**CAN.**

Sect. 2.—Statements actionable per se: Sub-sect. 1, D. (a), (b) & (c).]

how any respectable person can countenance such a man by their presence. I have been advising some other persons to go to the W. chapel, as they would there hear plain honest men." There were also counts for libel, & special damage was alleged, that divers persons discontinued their attendance at pltf.'s chapel. It was proved that pltf. received £30 *per annum* & house rent, but not how that sum was to be raised, or the parties by whom it was to be paid. It was also proved that the attendance of the chapel was diminished, but why, or whether the seceders were contributors to the funds of the chapel, did not appear. The libels complained of were written by deft. to one A., acting for pltf. in the course of a correspondence arising out of an invitation to deft. by A., with pltf.'s concurrence, to investigate certain charges brought against pltf.:—*Held*: (1) the words in the first & second counts were not actionable *per se*, & could not be deemed to have been spoken of pltf. *qua* minister in any sense that would subject deft. to an action; (2) there was no evidence of special damage resulting from these words so as to support an action on them; (3) the libels declared on were privileged communications.—*HOPWOOD v. THORN* (1849), 8 C. B. 293; 19 L. J. C. P. 94; 15 L. T. O. S. 45; 14 Jur. 87; 137 E. R. 522.

Annotation:—*As to* (2) *Reid*. Ratcliffe v. Evans, [1892] 2 Q. B. 524.

345. — Schoolmaster — Adultery.] — JONES v. JONES, No. 177, *ante*.

346. — Skipper of fishing boat — Misconduct as member of trade union.] — Pltf. & deft. were skippers of steam trawlers, & both of them were members of a fishermen's trade union, deft. being on the committee of management. In Jan. 1920, a number of the members were dissatisfied with their remuneration, & a meeting of a small proportion of the members of the union was held & a resolution was carried declaring a strike. Pltf. voted in favour of the strike & deft. against it. A partial strike only took place, & it proved a failure. At a general meeting of the union held in Feb. pltf. alleged that deft. said of pltf. to the members present: "I know that the two Myrofts have been down dock to B.'s office & asked for a ship each to proceed to sea, & I have a witness to prove it, whose name is D." Pltf. claimed damages for slander. No special damage was alleged:—*Held*: (1) in the circumstances the words were defamatory, but they were not spoken of pltf. in relation to his calling, but only to his conduct as a member of a trade union; therefore, in the absence of proof of special damage, the action failed; & (2) the occasion was privileged, & there was no evidence of malice.

A person is defamed, I conceive, when words have been spoken or written which injure or tend to injure that person's reputation or to bring him into odium, ridicule, or contempt. . . . The words complained of must be such as would injure pltf.'s reputation in the minds of ordinary, just & reasonable citizens (*McCARDIE, J.*).—*MYROFT v. SLEIGHT* (1921), 90 L. J. K. B. 883; 125 L. T. 622; 37 T. L. R. 646.

347. Profession or calling must be carried on at time of publication — Solicitor.] — MOORE v. SYNNE (1620), 2 Roll. Rep. 84; 81 E. R. 675.

348. — Renter of tolls.] — An action of slander cannot be maintained by a lessee or renter of tolls for words spoken of him in his character of contractor for tolls, after he has ceased to

contract for renting the tolls respecting which the words are spoken.—*Semble*: the renting of tolls is not a profession or trade.—*BELLAMY v. BURCH* (1847), 16 M. & W. 590; 8 L. T. O. S. 413; 153 E. R. 1325.

349. — Clergyman.] — A declaration for slander by charging a clergyman in holy orders with incontinency, is bad without showing actual damage, or that he holds some office or employment producing temporal profit. C. L. P. Act, 1852 (c. 76), s. 61, does not remedy such an omission.

If the slander had been of a barrister imputing to him such misconduct as would justify his being disbarred, it might be a good cause of action against the slanderer, although the slandered person never held a brief or his profits were merely honorary (*PLATT, B.*).—*GALLWEY v. MARSHALL* (1853), 9 Exch. 294; 2 C. L. R. 399; 23 L. J. Ex. 78; 22 L. T. O. S. 172; 2 W. R. 106; 150 E. R. 126.

Annotations:—*Consd.* Jones v. Jones, [1916] 2 A. C. 481. *Folld.* Wakeford v. Wright (1922), 39 T. L. R. 107. *Reid.* Churchill v. Siggers (1854), 2 C. L. R. 1509; Curigan v. Ryan (1866), 15 W. R. 61. *Mentd.* Alexander v. Jenkins, [1892] 1 Q. B. 797.

350. —] — In an absence of special damage an action by a person in holy orders is not sustainable for words spoken of him as a clergyman unless he was holding office or was in receipt of professional temporal profit when the words were spoken.—WAKEFORD v. WRIGHT (1922), 39 T. L. R. 107, C. A.

351. — Proof of alleged calling — Solicitor — Proof of acting as such.] — In an action by an attorney for words spoken of him in his profession, he need not prove that he is an attorney by his admission, or by a copy of the roll of attorneys; proof that he acted as such is sufficient.—BERRYMAN v. WISE (1791), 4 Term Rep. 366; 100 E. R. 1067.

Annotations:—*Consd.* Smith v. Taylor (1805), 1 Bos. & P. N. R. 196. *Expld.* Bagnall v. Underwood (1823), 11 Price, 621. *Reid.* Pearce v. Whale (1826), 5 B. & C. 38; Butler v. Ford (1833), 1 Cr. & M. 662; M'Gahey v. Alston (1836), 2 M. & W. 206; Doe d. Bowley v. Barnes (1846), 7 L. T. O. S. 139. *Mentd.* R. v. Morris Roberts (1878), 38 L. T. 690.

352. — Statements in respect of two callings — Only one proved.] — In the inducement, in a declaration for slander, it was stated, that pltf. was treasurer & collector of certain tolls, & that deft. spoke of & concerning him, as such treasurer & collector, certain words, thereby meaning, that pltf., as such treasurer & collector, had been guilty of the act imputed to him. In every count, there was an innuendo applying the words to him as collector. At the trial, pltf. proved that he was treasurer, but not that he was collector:—*Held*: it was a fatal variance.—SELLERS v. TILL (1825), 4 B. & C. 655; 7 Dow. & Ry. K. B. 121; 4 L. J. O. S. K. B. 27; 107 E. R. 1204.

Annotation:—*Reid.* Williams v. Stott (1833), 1 Cr. & M. 675.

(b) Barristers.

353. Professional misconduct.] — SNAG v. GRAY (1571), 1 Roll. Abr. 57, pl. 37.

354. —] — HELE v. GYDDY (1591), 2 And. 40; 123 E. R. 535; *sub nom.* GIDDYE v. HEALE, Moore, K. B. 695.

Annotations:—*Reid.* Harman v. Delany (1731), 2 Stra. 898. *Mentd.* Cave v. Polewheel (1621), Cro. Jac. 616.

355. —] — GIBS v. PRICE (1650), Sty. 231; 82 E. R. 670.

356. —] — Words defaming a counsellor in his profession are actionable.—KING v. LAKE (1670), Freem. K. B. 14; 2 Vent. 28; 89 E. R. 12.

357. —.]—GALLWEY v. MARSHALL, No. 349, *de.*

358. **Professional incapacity.**]—Words impeaching the knowledge of a lawyer in his profession are actionable.—PALMER v. BOYER (1594), Cro. Eliz. 342; Gouldsb. 126; 78 E. R. 590.

Annotations:—**Refd.** Broke's Case (1595), Moore, K. B. 409; Curle's Case (1622), Win. 39; Cawdry & Tetley's Case (1632), Godb. 441.

359. —.]—To say of a barrister "Thou a barrister? Thou art no barrister, thou art a barrator; thou wert put from the Bar, & thou darest not show thyself there. Thou study law? Thou hast as much wit as a daw," is actionable.—DISON & BESTNEY'S CASE (1610), 13 Co. Rep. 71; 77 E. R. 1480; *sub nom.* BESTNEY'S CASE, Jenk. 329.

360. —.]—BANKES v. ALLEN (1615), 1 Roll. Abr. 54, pl. 14.

Annotation:—**Refd.** Gyles v. Bishop (1680), Freem. K. B. 278.

361. —.]—CARY'S CASE (1626), Poph. 207; 79 E. R. 1297.

362. —.]—It is actionable to say of a barrister that he is a dunce & will get little by the law.—PEARCE v. JONES (1634), Cro. Car. 382; 79 E. R. 933.

(c) *Solicitors.*

Words must be spoken in way of profession.]—See Nos. 334–339, *ante*.

363. **Imputation of professional misconduct—Barrator.**]—ANON. (1584), Moore, K. B. 180; 72 E. R. 517.

364. —.]—T. brought an action of the case against J., & laid that where he was a carrier, & a man of honest fame, that deft. had said of him that he was a common barrator.

Now we are of opinion that if those words were spoken of a justice of the peace, or public officer, or of an attorney, or the like, that they would bear an action (*per CUR.*).—THORNTON v. JEBSON (1616), Hob. 140; 80 E. R. 290.

365. —.]—TAYLOR v. STARKEY, No. 335, *ante*.

366. —.]—Action for these words of an attorney: "Thou art a knave, & stirrest up suits betwixt parties; & stirredst up a suit betwixt such parties to their undoing; & it is great pity such persons should go unchanged":—**Held**: the action lay.—ANON. (1631), Cro. Car. 229; 79 E. R. 800.

367. —.]—SMITH v. ANDREWS (1649), Sty. 183; 82 E. R. 630.

Annotations:—**Mentd.** Pierson v. Hughes (1672), Freem. K. B. 71; Wild v. Simpson, [1919] 2 K. B. 544.

368. —.]—ANNISON v. BLOFIELD (1670), Cart. 214; 124 E. R. 924.

369. — **Corruption.**]—"You are well known to be a corrupt man, & to deal corruptly," being spoken of a sworn attorney, are actionable, because it touches him in his oath, & also in the duty of his profession, whereby he acquires his living; *secus* if the preceding parlance had been that pltf. was an usurer, or was an exor., & would not perform the testament, etc.—BIRCHLEY'S CASE (1585), 4 Co. Rep. 16 a; 76 E. R. 894; *sub nom.* BYRCHLEY'S CASE, Jenk. 262.

Annotations:—**Refd.** Waldegrave v. Agas (1590), Cro. Eliz. 191; Frost v. Eyre (1616), 3 Bulst. 265; Curle's Case (1622), Win. 39; Litman v. West (1628), Het. 123; Starkey v. Taylor (1629), Het. 139; Alexander v. Jenkins, [1892] 1 Q. B. 797.

370. — **Acting for both sides.**]—BROKE'S CASE (1595), Moore K. B. 409; 72 E. R. 661.

371. —.]—Words which impute double dealing to a lawyer, are actionable.—KING v. SHORE

(1603), Cro. Eliz. 914; 78 E. R. 1135; *sub nom.* SHIRE v. KING, Yelv. 32.

372. —.]—YARDLEY v. ELLILL (1613), Hob. 8; Moore, K. B. 855; 1 Brownl. 6; 80 E. R. 159.

Annotations:—**Refd.** Fleetwood v. Curley (1619), Hob. 267; Curle's Case (1622), Win. 39; Litman v. West (1628), Het. 123.

373. —.]—An action upon the case was brought by an attorney of the ct. against another man, for speaking these words of him, viz. "Thou art an ambodexter":—**Held**: the words were actionable, because same slandered him in his profession, for it is as much in effect as if he had said, that he was corrupt in his office.—ANON. (1613), Godb. 214; 78 E. R. 130.

374. — **Dishonesty towards clients.**]—GIDDY v. HEALE (1591), Moore, K. B. 695; 72 E. R. 846; *sub nom.* HELE v. GYDDY, 2 And. 40.

Annotations:—**Refd.** Harman v. Delany (1731), 2 Stra. 898. **Mentd.** Cave v. Polewheel (1621), Cro. Jac. 616.

375. —.]—To say of an attorney that he has made a false bill of costs is actionable.—STANLEY v. BOSWEL (1598), Cro. Eliz. 603; 78 E. R. 846.

376. —.]—BROOK'S CASE, No. 318, *ante*.

377. —.]—Words which touch an attorney in his profession are actionable. Action upon the case by an attorney for these words: "Thou art a false knave, a cosening knave, & hast gotten all thou hast by cosenage; & thou hast cosened all those that have dealt with thee."

The action well lay; for they are very slanderous of an attorney, & touch him in his profession (*per CUR.*).—JENKINS v. SMITH (1620), Cro. Jac. 586; 79 E. R. 501.

378. —.]—LITMAN v. WEST (1628), Het. 123; 124 E. R. 392.

379. —.]—STARKEY v. TAYLOR (1629), Het. 139, 143; Hut. 104; 124 E. R. 406, 409; *affd. sub nom.* TAYLOR v. STARKEY (1630), Cro. Car. 192.

380. —.]—To charge an attorney with having cosened his clients, is actionable.—MEAD v. PERKINS (1632), Cro. Car. 261; 79 E. R. 828.

]—ANON. (1639), March, 8;

382. —.]—HILTON v. PLATER (1647), Aleyn, 13; 82 E. R. 889.

383. — **Champerty or maintenance.**]—An attorney brought an action upon the case against B. for these words: "Thou art a common maintainer of suits, & a champertor, & I will have thee thrown over the Bar next term." After a verdict for pltf. upon a motion in arrest of judgment the ct. gave judgment for pltf., only upon the word champertor.

There is maintenance lawful & unlawful, & where the word is indifferent it shall be taken in *mitiorem partem*. Now an attorney may & ought by his office to maintain his clients' causes; & yet in an action of maintenance he cannot plead not guilty, but must justify. An attorney may well be said to be a common maintainer, because he is common to as many as will retain him. . . . But indeed it is a slander to an attorney, & that in his vocation of attorney to be a champertor, for that is not only beyond but against his office (*per CUR.*).—BOX v. BARNABY (1616), Hob. 117; 80 E. R. 266.

Annotations:—**Refd.** Fleetwood v. Curley (1619), Hob. 267; Baker v. Pierce (1703), 6 Mod. Rep. 23. **Mentd.** Pierson v. Hughes (1672), Freem. K. B. 71; Guy v. Gower (1816) 2 Marsh. 273.

384. —.]—COX'S CASE (1616), Moore K. B. 867; 72 E. R. 961.

Sect. 2.—Statements actionable per se: Sub-sect. 1, D. (c), (d) & (e).]

385. — “Deserves to be struck off the rolls.”]

(1) It is not actionable to say of an attorney, “I have taken out a summons to tax his bill. I shall bring him to book, & have him struck off the roll.” *Aliter*, to say “He deserves to be struck off the roll.”

(2) A libellous letter, addressed to the party himself, is not actionable.—*PHILLIPS v. JANSEN* (1798), 2 Esp. 623, N. P.

Annotation:—As to (1) Refd. South Hetton Coal Co. v. North Eastern News Assocn., [1894] 1 Q. B. 133.

386. — “Struck off the rolls.”]—A text writer having occasion to treat of topics connected with professional misconduct, is privileged in citing or stating the effect of reported cases of such misconduct, if he does so fairly, that is to say, with reasonable care: but if through want of such reasonable care, he makes serious misstatements as to the nature, or even the degree of the misconduct, in a particular instance, he will lose his privilege & be liable to action. Thus the writer of a treatise on the law of attorneys having in support of the proposition, that an attorney who is guilty of misconduct may be struck off the rolls, referred to the case of *pltf.* as an attorney who had been so struck off the rolls, whereas, as appeared from the very report cited, he had only been suspended for two years:—*Held*: although if he had only referred to the case, or even fairly stated its effect & result, he would have been protected, as it was relevant, yet under the circumstances there was evidence of such carelessness as left him without legal excuse, & so liable to action.

There can be no doubt that it is libellous to say an attorney has been struck off the rolls (*COCKBURN, C.J.*).—*BLAKE v. STEVENS* (1864), 4 F. & F. 232; 11 L. T. 543, N. P.

387. General abuse — False knave.]—*ANON.* (1564), Moore, K. B. 61; 72 E. R. 441.

388. — Base rascal.]—*TROWBRIDGE v. HARD* (1626), Lat. 220; 82 E. R. 355.

389. — —.]—*ROBERTS v. LORD* (1627), Ley, 70; 80 E. R. 637.

390. — —.]—*ANON.* (1638), No. 392, *post*.

391. — A Judas.]—*STARKEY v. TAYLOR* (1629), Het. 139, 143; Hut. 104; 124 E. R. 406, 409; *affd. sub nom. TAYLOR v. STARKEY* (1630), Cro. Car. 192.

392. — Cheating knave.]—To call an attorney a base rogue & a cheating knave is actionable.—*ANON.* (1638), Cro. Car. 516; 79 E. R. 1046.

393. — Notorious knave.]—An attempt to dissuade a client from employing an attorney by saying that he is a notorious knave, etc., is actionable.—*WEBB v. NICHOLIS* (1636), Cro. Car. 459; 79 E. R. 998.

394. — Perjured & suborned knave.]—*WHITE'S CASE* (1647), Sty. 17; 82 E. R. 495.

395. — Extortioner.]—*SCROOP'S CASE*, No. 400, *post*.

396. — Forging rogue.]—Words, “That I never forged any man's hand, but you are a forging rogue,” when spoken of an attorney:—*Held*: actionable.—*ANON.* (1717), 1 Com. 262; 92 E. R. 1063.

397. Professional incompetence.]—Words which impute folly or dishonesty to an attorney are actionable.—*MARTYN v. BURLINGS* (1597), Cro. Eliz. 589; Gouldsb. 128; 78 E. R. 832.

398. —.]—*BAKER v. MORPHEW* (1666), 2 Keb. 202; 1 Sid. 327; 84 E. R. 126.

—.]—To say of an attorney, “He

cannot read a declaration,” is actionable, without special damage.—*JONES v. POWEL* (1670), 1 Mod. Rep. 272; T. Raym. 196; 1 Vent. 98; 86 E. R. 875; *sub nom. POWELL v. JONES*, 2 Keb. 710; 1 Lev. 297.

400. —.]—Words, imputing extortion & want of understanding to an attorney, are actionable.—*SCROOP'S CASE* (1674), Freem. K. B. 276; 89 E. R. 198.

401. —.]—In an action by an attorney, the following words spoken of an attorney in his business were upon motion in arrest of judgment held actionable. “H. is a rogue, for taking your money, & has done nothing for it; he has not entered an appearance for you; he is no attorney at law; he don't dare to appear before a judge. What signifies going to him? He is only an attorney's clerk & a rogue, he is no attorney.”—*HARDWICK v. CHANDLER* (1740), 2 Stra. 1138; 93 E. R. 1086.

402. —.]—He is no more a lawyer than the devil, spoken of an attorney, is actionable.—*DAY v. BULLER* (1770), 3 Wils. 59; 95 E. R. 932.

(d) Physicians and Surgeons.

403. Professional misconduct—Aggravation of patient's illness.]—*ANON.* (1591), Sav. 126; 1 And. 268; 123 E. R. 1050.

404. — Treatment causing death of patient.]—It is not actionable to say that a physician has killed his patient with medicine, unless it be charged that he knowingly & wilfully administered it for that purpose.—*POE v. MONDFORD* (1598), Cro. Eliz. 620; 78 E. R. 861.

Annotation:—Refd. Murrey v. — (1614), 2 Bulst. 207.

405. — —.]—(1) For the words, if he had said “For lack of skill of chirurgery, etc., thou didst kill him,” will bear an action; for that is a slander to his profession (*HUTTON, J.*).

(2) If one says of a merchant, “Put not your son to him, for he will starve him to death.” These words are actionable; for that it comes within the compass of the disgrace of his profession. So of a schoolmaster, “Put not your son to him, for he will come away as very a dunce as he went” (*YELVERTON, J.*).—*WATSON v. VANDERLASH* (1627), Het. 69; 124 E. R. 350.

Annotation:—Generally, Refd. Harman v. Delany (1731), 2 Stra.

THEE v. DENNY, No. 411, *post*.

407. Lack of qualification — “Quack.”]—*ALLEN v. EATON* (1628), 1 Roll. Abr. 54.

408. — —.]—*PICKFORD v. GUTCH* (1787), 8 Term Rep. 305, n.; 101 E. R. 1403, N. P.

Annotations:—Refd. Smith v. Taylor (1805), 1 Bos. & P. N. R. 196; Collins v. Carnegie (1834), 3 Nev. & M. K. B. 703.

409. — “No scholar.”]—An action lies for saying of a doctor of physic that “he is no scholar,” without averring that there was at the time a colloquium concerning his profession.—*CAWDRY v. HIGLEY* (1632), Cro. Car. 270; 79 E. R. 835; *sub nom. CAWDRY & TETLEY'S CASE*, Godb. 441.

410. — “Empiric & mountebank.”]—*GODDART v. HASELFOOT* (1636), 1 Roll. Abr. 54, pl. 12.

411. — “None of the medical men here will meet him.”]—A declaration stated that *pltf.* was a surgeon & accoucheur, & in that character had attended one R. during her confinement; that *def.*, in a discourse which he had with R., of & concerning *pltf.*, & of & concerning *pltf.* in relation to his profession & business, spoke of & concerning, etc., the following words: “I wonder you had him to attend you. Do you know him? He is

not an apothecary; he has not passed any examination; he is a bad character; none of the medical men here will meet him. There have been many inquests had upon persons who have died because he attended them." Deft. pleaded not guilty. At the trial the latter words, as to the inquests, were not proved, but the words proved were, "several have died that pltf. had attended, & there have been inquests held on them." The judge amended the declaration accordingly, & a verdict was found for pltf.:—*Held*: the judge was justified in making the amendment; also, the words as amended were actionable, without the aid of any innuendo to explain them by reference to extrinsic circumstances. *Semble*: the words, "he is a bad character, none of the medical men here will meet him," alone were actionable, as importing the want of a necessary qualification for a surgeon in the ordinary discharge of his professional duties.—*SOUTHERN v. DENNY* (1847), 1 Exch. 196; 17 L. J. Ex. 151; 154 E. R. 83.

412. — Proof of qualification to practise—Evidence of having practised—Production of diploma.]—*PICKFORD v. GUTCH* (1787), 8 Term Rep. 305, n.; 101 E. R. 1403, N. P.

Annotations:—*Refd.* *Smith v. Taylor* (1805), 1 Bos. & P. N. R. 196; *Collins v. Carnegie* (1834), 3 Nev. & M. K. B. 703.

413. — — — — —.]—Action for these words spoken by deft. of pltf. in his profession of a physician, "Dr. S. has upset all we have done, & die he (the patient) must." It was proved that pltf. had practised several years as a physician, & having been called in during the absence of a physician, who, with deft., attended the patient; deft. as apothecary made up the medicines prescribed by pltf. for the patient in question. *Qu.*: whether on this declaration it was necessary for pltf. to produce a diploma or other direct evidence that he had taken a degree in physic, in order to maintain the action.—*SMITH v. TAYLOR* (1805), 1 Bos. & P. N. R. 196; 127 E. R. 435.

Annotations:—*Refd.* *Collins v. Carnegie* (1834), 1 Ad. & El. 695. *Mentd.* *A. G. v. Pemberton* (1824), 1 McCle. 634.

414. — — — — —.]—(1) To prove that a party had received the degree of doctor of medicine in the University of St. Andrew's, a sealed instrument & a written paper were produced; the sealed instrument purported to be a diploma of the degree conferred by the university, & it was proved that a person at St. A. calling himself the university librarian, had shown, as the university seal, in a room which he stated to be the university library, a seal corresponding to that on the instrument produced. The written paper was, on the face of it, an act of the university conferring the degree & it was proved that, in the same room the same person, & other persons calling themselves professors of the university, had shown, as the book of acts of the university, a book containing an entry agreeing with the written paper:—*Held*: sufficient proof.

(2) Where a declaration alleged that pltf. had been & was a physician, & exercised that profession in England, & on that account had been & was called doctor meaning doctor of medicine & then stated that deft. slandered pltf. in his character of a physician practising in England, & denied his right to be called a doctor of medicine:—*Held*: pltf. must prove that he was entitled to practise as a physician in England. Such proof is not furnished by showing the fact of his having so practised; nor by showing that he has received the degree of doctor of medicine at the University of St. Andrew's.—*COLLINS v. CARNEGIE* (1834), 1 Ad. &

El. 695; 3 Nev. & M. K. B. 703; 3 L. J. K. B. 196; 110 E. R. 1373.

Annotation:—*Generally, Refd.* *M'Gahey v. Alston* (1836), Tyr. & Gr. 981.

415. Adultery.]—*AYRE v. CRAVEN*, No. 343, ante.

(e) *Clergymen.*

Clergyman must be in receipt of temporal profit—At time of publication.]—*See* Nos. 349, 350, ante.

416. Adultery or incontinency—Loss of temporal profit.]—Pltf. declared that he was instituted & inducted into a parsonage in Ireland, & executed the office of a pastor in that church by the space of four years after, & deft. said of him, "He was a drunkard, a whoremaster, a common swearer, & a common liar, & has preached false doctrine & deserves to be degraded." After verdict for pltf. it was moved in arrest of judgment that the words in themselves are not actionable because the crimes charged impute no civil or temporal damage to pltf. for which he might have an action; but the opinion of the ct. was clear for pltf. on that point.

The matters charged are good cause to have him degraded whereby he should lose his freehold, which is a temporal damage to him (*per* CUR.).—*DOD v. ROBINSON* (1648), Aleyn, 63; 82 E. R. 917.

Annotations:—*Consd.* *Galloway v. Marshall* (1853), 9 Exch. 294; *Jones v. Jones* (1915), 84 L. J. K. B. 1140.

417. — — — — —.]—He has a bastard, spoken of a minister whereby he lost a chaplainship.

His preferment is temporal, like as a parsonage (*per* CUR.).—*PAYNE v. BEUWMORRIS* (1668), 1 Lev. 248; 83 E. R. 391; *sub nom.* *DUMEWICK v. PAIN*, 1 Sid. 376; *sub nom.* *HUMORIST v. PAYNE*, 2 Keb. 400.

Annotations:—*Refd.* *Jones v. Jones*, [1916] 2 A. C. 481. *Mentd.* *Holt v. Ward* (1729), 1 Barn. K. B. 247.

418. — — — — —.]—*GALLWEY v. MARSHALL*, No. 349, ante.

419. — — — — —.]—*HIGHMORE v. HARRINGTON (EARL & COUNTESS)* (1857), 3 C. B. N. S. 142; 140 E. R. 693.

420. Misappropriation of church funds.]—*SYBTHORP'S CASE* (1635), Cro. Car. 417; 79 E. R. 963; *sub nom.* *SIBTHORP'S CASE*, W. Jo. 366.

Annotations:—*Refd.* *Stukely's Case* (1672), Freem. K. B. 61; *Galloway v. Marshall* (1853), 9

421. — — — — —.]—*HIGHMORE v. I & COUNTESS* (1857), 3 C. B. N. S. 142; 140 E. R. 693.

422. Preaching sedition.]—Adjective words are actionable, if they import an act done: *secus*, if they import an inclination only. So words spoken adjectively are actionable, if they slander one in his office or trade, etc.; as to say of a judge, he is corrupt; of a clergyman, he has made a seditious sermon.—*BRITTRIDGE'S CASE* (1602), 4 Co. Rep. 18 b; 76 E. R. 905; *sub nom.* *BRIDGE v. ATKINS*, Moore, K. B. 666; *sub nom.* *BRECHELEY v. ATKINS*, Yelv. 10.

Annotations:—*Refd.* *Colt & Gilbert's Case* (1613), Godb. 241; *Yardly v. Ellyll* (1613), Brownl. 7; *Trevillian & Bettie's Case* (1620), Palm. 10; *Wheeler v. Appleton* (1623), 2 Roll. Rep. 342; *Witherly v. Hermitage* (1678), Freem. K. B. 277.

423. Preaching false doctrine.]—It is actionable to say of a master of acts & incumbent of a living, "Thou hast preached lies in the pulpit."—*DRAKE v. DRAKE* (1652), Sty. 363; 1 Roll. Abr. 58; 82 E. R. 780.

Annotations:—*Refd.* *Evans v. Gwyn* (1844), 5 Q. B. 844; *Galloway v. Marshall* (1853), 2 W. R. 106; *Clarges v. Rowe* (1681), Freem. K. B. 280; *Cranden v. Walden* (1681), 3 Lev. 17.

424. Abuse—"Drunkard, swearer & liar."]—*DOD v. ROBINSON*, No. 416, ante.

Sect. 2.—Statements actionable per se: Sub-sect. 1, E. (a), (b) & (c) i. & ii.]

Boston (1845), 5 L. T. O. S. 152; James v. Brook (1846), 9 Q. B. 7; Southey v. Denny (1847), 17 L. J. Ex. 151; Alexander v. Jenkins, [1892] 1 Q. B. 797.

458. ——— Police officer—Misconduct.]—

A declaration for slander alleged that pltf. was a salaried superintendent of police at L., & that it was his duty, as such, to conduct himself temperately, & with decency & propriety, while on duty, & to hinder & repress indecent & disorderly conduct in the police office: that deft., intending to injure pltf. in his office, & cause it to be believed that he had misconducted himself as such superintendent, & cause him to be dismissed from his office, in a discourse which he had concerning pltf. as such superintendent, & concerning pltf.'s conduct in his office, falsely, etc., spoke & published concerning pltf., & concerning him as such superintendent, & concerning his conduct in his office, the false, etc. words: "I," meaning deft., "saw a letter, two or three days since, regarding an officer of the L. police force," meaning pltf., "who," meaning pltf., "had been guilty of conduct unfit for publication." Judgment arrested, after verdict, on the ground that the declaration did not show how the imputation was connected by the speaker with pltf.'s office.—JAMES v. BROOK (1846), 9 Q. B. 7; 16 L. J. Q. B. 17; 7 L. T. O. S. 182; 10 Jur. 511; 115 E. R. 1178.

Annotation:—*Refd.* Jones v. Jones, [1916] 2 A. C. 481.

459. ——— Trade union official—Misconduct.]—THOMAS v. MOORE, No. 41, ante.

460. Office must be held at time of publication—Office of honour—Justice of peace.]—TUTHILL v. MITCHELL (1609), Cro. Jac. 222; Yelv. 158; 70

Mod. Rep. 100. ——— *Dist.* Bellamy v. Burch (1847), 16 M. & W. 590. *Mentd.* Shorerosse v. Bland (1673), Freem. K. B. 318; Coletthirst v. Wiseman (1693), 12 Mod. Rep. 47.

461. ———.]—HASTINGS v. BEAUMONT (1610), 1 Bulst. 36; 80 E. R. 740; sub nom. BEAMOND v. HASTINGS, Cro. Jac. 210; sub nom. BEAUMONT'S CASE, Jenk. 317.

462. ——— Churchwarden.]—Qu.: whether words imputing misconduct to a churchwarden spoken after he was out of office, are actionable. —RAMSEY v. ELMS (1839), 3 Jur. 1189.

(b) Office of Profit.

Words must be spoken in way of office.]—See Sub-sect. 1, E. (a), ante.

Office must be held at time of publication.]—See Sub-sect. 1, E. (a), ante.

463. Words sufficient to sustain action—Mere imputation of want of ability—Office of honour distinguished.]—Words spoken of a man who has been elected to the office of town councillor of a borough, alleging that he is an habitual drunkard & unfit for the office of town councillor, are not actionable, in the absence of special damage. In an action for slander of pltf., who had been elected to the office of town councillor for a borough, it appeared that the words spoken were: "A., pltf., 'is never sober, & is not a fit man for the the night of the election he

No special damage shown. ——— as much as the of town councillor was not one of profit, & ecting pltf. such as, if true, afforded

—CAN.

PART IV. SECT. 2, SUB-SECT. 1.—E. (b).

1. Company director.]—Words charging directors with not having honestly safeguarded the interests of the co.

no ground for dismissing him from his office, the action was not maintainable

It is quite clear that as regards a man's business, or profession, or office, if it be an office of profit, the mere imputation of want of ability to discharge the duties of that office is sufficient to support an action. It is not necessary that there should be imputation of immoral or disgraceful conduct. It must be either something said of him in his office or business which may damage him in that office or business, or it must relate to some quality which would show that he is a man who, by reason of his want of ability or honesty, is unfit to hold the office. So much with regard to offices of profit: the reason being that in all those cases the ct. will presume, or perhaps I should rather say the law presumes, such a probability of pecuniary loss from such imputation, in that office, or employment, or profession, that it will not require special damage to be shown. But when you come to offices that are not offices of profit, the loss of which, therefore, would not involve necessarily a pecuniary loss, the law has been differently laid down, & it is quite clear that the mere imputation of want of ability or capacity, which would be actionable if made in the case of a person holding an office of profit, is not actionable in the case of a person holding an office which has been called an office of credit or an office of honour. I will put it shortly thus: that where the imputation is an imputation not of misconduct in an office, but of unfitness for an office, & the office for which the person is said to be unfit is not an office of profit, but one merely of what has been called honour or credit, the action will not lie, unless the conduct charged be such as would enable him to be removed from or deprived of that office (LORD

ALEXANDER v. JENKINS, [1892] 1 Q. B. 797; 61 L. J. Q. B. 634; J. P. 452; 40 W. R. 546; 8 T. L. R. 421; Sol. Jo. 326, C. A.

Annotations:—*Consd.* Booth v. Arnold, [1895] 1 Q. B. 571. *Refd.* Jones v. Jones, [1916] 2 A. C. 481.

464. ——— Want of integrity, dishonesty or malversation.]—In my judgment, words imputing want of integrity, dishonesty, or malversation to any one holding a public office of confidence or trust, whether an office of profit or not, are actionable *per se*. On the other hand, when the words merely impute unsuitableness for the office, incompetency, or want of ability, without ascribing any misconduct touching the office, then, according to the decision in *Alexander v. Jenkins*, No. 463, *ante*, no action lies, where the office is honorary, without proof of special damage (LOPES, L.J.). BOOTH v. ARNOLD, [1895] 1 Q. B. 571; 64 L. J. Q. B. 443; 72 L. T. 310; 59 J. P. 215; 43 W. R. 360; 11 T. L. R. 246; 39 Sol. Jo. 314; 14 R. 326, C. A.

465. Judge—Corruption.]—To say of a judge "he is a corrupt judge" is actionable. —BIRCHLEY'S CASE (1585), as reported in 4 Co. Rep. 16 a; 76 E. R. 894.

Refd. Waldegrave v. Agas (1590), Cro. Eliz. 191; Frost v. Eyre (1616), 3 Bulst. 265; Curle's (1622), Win. 39; Litman v. West (1628), Het. 123; Starkey v. Taylor (1629), Het. 139; Alexander v. Jenkins [1892] 1 Q. B. 797.

466. ———.]—CÆSAR v. CURSENY (1593), as reported in Cro. Eliz. 305; Poph. 35; 78 E. R. 556.

Annotation:—*Mentd.* Levinger v. R. (1870), L. R. 3 P. C. 282.

they represented, but with having promoted the interests of another & rival co.:—*Refd.* defamatory. —ROOS v. SPENT (1900), T. S. 988. —S. AF.

467. — Common barrator.] — STARKEY v. TAYLOR (1629), *Het.* 139; *Hut.* 104; 124 E. R. 406; *on a* *nom.* TAYLOR v. STARKEY (1630), *Cro. Car.*

Deafness.] — See No. 330, *ante*

468. Officer of Court Baron—Dishonesty.] Words which impeach the integrity of an officer [of Court Baron] are actionable. — BAXTER v. SHADE (1594), *Cro. Eliz.* 342; 78 E. R. 590.

469. Clarenceux, King of Arms—"A scrivener & no herald."]—Slandorous words which affect a man's profession are actionable; & though a verdict is found generally where some of the counts are for words not actionable, it shall be intended that the damages were on the good counts, except the words are laid at different times. — BROOKE v. CLARKE (1594), *Cro. Eliz.* 328; 78 E. R. 578.

470. Commissioner—Returning deposition not taken on oath.]—To say of a comr. that "he has returned the deposition of witnesses who were not sworn" is actionable, & cannot be justified by plea that he returned the deposition of one witness not sworn. — Fysh v. THOROWGOOD (1598), *Cro. Eliz.* 623; 78 E. R. 861.

471. — Taking bribes.] — MOORE v. FOSTER, *Yelv.* 62; *Cro. Jac.* 65; 80 E. R. 43.

472. Arbitrator—Taking bribes.] — MOORE v. FOSTER (1605), *Yelv.* 62; *Cro. Jac.* 65; 80 E. R. 43.

473. Town clerk—Taking bribes.] — LEE & SWAN'S CASE (1608), *Godb.* 157; 78 E. R. 95; *sub nom.* NILE v. SWANSON, *Yelv.* 142.

474. —.] — POWEL'S CASE (1618), *Poph.* 139; 79 E. R. 1240.

475. — A bribing knave.] — POWEL'S CASE (1618), *Poph.* 139; 79 E. R. 1240.

476. — Giving false certificates.] — SMITH v. CORNELIUS (1633), *Hut.* 123; 123 E. R. 1146.

477. Bishop—"Covetous & malicious."] — THOMAS (ARCHBP. OF YORK) v. MARKAM (1562), *Dal.* 38; 123 E. R. 255.

478. — Papist.] — STARKEY v. TAYLOR (1629), as reported in *Het.* 139; 124 E. R. 406; *on appeal, sub nom.* TAYLOR v. STARKEY (1630), *Cro. Car.* 102.

Clerk to public company—Immorality.] — See No. 457, *ante*.

Superintendent of police—Misconduct.] — See No. 458, *ante*.

Trade union official—Misconduct.] — See No. 41, *ante*.

(c) Office of Honour.

i. In General.

479. Words sufficient to sustain action—Imputation sufficient to be ground for removal.]—To say of a deputy lieutenant, justice of the peace, & intended candidate for a seat in Parliament: "Do not vote for him, for he is a Jacobite, who intends to bring in the Pretender & popery to destroy our nation," is actionable. — HOW v.

(1702), *Holt*, K. B. 652; 2 *Ld. Raym.* 812; 7 *Mod. Rep.* 107; 2 *Salk.* 604; 90 E. R. 1260; *sub nom.* HOWE v. PERRY, 2 *Lut.* 1203, *Ex. Ch.*; *affd. sub nom.* PRINN v. HOWE (1704), 1 *Bro. Parl. Cas.* 64, H. L.

Annotations: — *Refd.* Onslow v. Horne (1771), 3 *Wils.* 177; Alexander v. Jenkins, [1892] 1 Q. B. 797; Booth v. Arnold (1895), 64 L. J. Q. B. 443.

480. — Office of profit distinguished.] — ALEXANDER v. JENKINS, No. 463, *ante*.

PART IV. SECT. 2, SUB-SECT. 1. E. (c) i.

479 i. Words to be ground for removal.]—An action of slander will lie without proof of

imputation for words imputing immorality in an office of credit or honour & not of profit, although the facts stated, if true, would not justify the removal of plff. from the office. — LIVINGSTON v. MCCARTIN, [1907] V. L. R. 48.—AUS.

481. — Imputation of dishonesty or malversation.] — BOOTH v. ARNOLD, No. 464, *ante*.

482. Office need not be within judicial notice of LOER v. NEWCOMB, No. 239,

ii. Justice of the Peace.

Words must be spoken in way of office.] — See Sub-sect. 1, E. (a), *ante*.

Office must be held at time of publication.] — See Sub-sect. 1, E. (a), *ante*.

483. Privy to felony.]—To say of a magistrate, that he has discharged by agreement a felon arrested as accessory to the stealing his own goods, is actionable. — STAFFORDE v. — (1596), 2 *And.* 47; 123 E. R. 539; *sub nom.* STAFFORD v. POOLER, *Cro. Eliz.* 536; Moore, K. B. 704.

484. —.] — LASSELS v. LASSELS (1601), *Gouldsb.* 132; Moore, K. B. 401; 75 E. R. 1045.

485. —.]—To say of a justice of peace, "he covereth & hideth felonies, & is not worthy to be a justice of peace" is actionable. — STUCKLEY v. BULHEAD (1602), 4 *Co. Rep.* 16 a; 76 E. R. 895.

Annotations: — *Refd.* Isham v. York (1625), *Cro. Car.* 15; Kirtle v. Osgood (1669), 1 *Mod. Rep.* 22.

486. —.] — HARPER v. BEAMOND (1605), *Cro. Jac.* 56; *Yelv.* 57; 79 E. R. 47.

487. Perversion of justice.] — BOUGHTON v. COVENTRY & LICHFIELD (BP.) (1584), 1 *And.* 119; 123 E. R. 385.

488. —.] — DE LA WARE v. PAWLET (1595), Moore, K. B. 409; 72 E. R. 661.

489. —.] — BLEVERHASSETT v. BASPOOLE (1594), *Cro. Eliz.* 313; 78 E. R. 563.

490. —.]—To say of a justice of the peace, that he is "a partial justice," is actionable. — KEMP v. HOUSGOE (1605), *Cro. Jac.* 90; 79 E. R. 77.

491. —.]—It is actionable to say of a justice that he has given secret warning to a person against whom he has issued a warrant. — BURTON v. TOKIN (1607), *Cro. Jac.* 143; 79 E. R. 125.

492. —.] — BEAMOND v. HASTINGS (1610), *Cro. Jac.* 240; 79 E. R. 207; *sub nom.* HASTINGS v. BEAMOUNT, 1 *Bulst.* 36; *sub nom.* BEAUMONT'S CASE, *Jenk.* 317.

493. —.]—To say of a justice of peace, "I have been often with him for justice, but could never get any at his hand, but injustice," is actionable. — ISHAM v. YORK (1625), *Cro. Car.* 15; 79 E. R. 618.

Annotations: — *Folld.* Kirtle v. Osgood (1669), 1 *Mod. Rep.* 22. *Refd.* Walmsley v. Russel (1704), 6 *Mod. Rep.* 200. *Mentd.* Wakley v. Healey (1849), 7 C. B. 591.

494. —.]—To say of a justice that he is but "half-eared," & "will only hear on one side," is actionable; & an allegation that he has been in the King's commission longer than the King has reigned, is surplusage. — MASHAM v. BRIDGES (1631), *Cro. Car.* 223; 79 E. R. 795.

Annotation: — *Folld.* Kirtle v. Osgood (1669), 1 *Mod. Rep.* 22.

495. —.]—(1) To say of a justice of the peace, that "He makes use of the King's commission to worry men out of their estates," is actionable.

(2) Words must be precisely laid, & not "to the tenor & effect following." — NEWTON v. STUBBS (1685), 3 *Mod. Rep.* 71; 2 *Show.* 435; 87 E. R. 45.

Annotations: — As to (2) *Consd.* Cook v. Cox (1814), 3 M. & S. 110. *Refd.* Bradlaugh v. R. (1878), 3 Q. B. D. 607.

PART IV. SECT. 2, SUB-SECT. 1.— E. (c) ii.

487 i. Perversion of justice.] — TROUGHTON v. MCINTOSH (1896), 17 N. S. W. L. R. 334.—AUS.

Sect. 2.—Statements actionable per se: Sub-sect. 1, E. (c) ii. & iii.; sub-sect. 2, A. (a).]

496. Acceptance of bribes.]—MARRINER v. COTTON (1595), Moore, K. B. 695; 72 E. R. 846.

497. —.]—LEE & SWAN'S CASE (1608), Godb. 157; 78 E. R. 95; *sub nom.* NILE v. SWANSON, Yelv. 142.

498. Procuring false witness.]—To charge a magistrate with having procured a person to take a false oath before him is actionable.—CHETWIND v. MEESTON (1612), Cro. Jac. 308; Yelv. 220; 79 E. R. 263.

499. —.]—PARKER v. LARGE (1620), Palm. 67; 81 E. R. 981.

500. "Blood-sucker."]—"He is a blood-sucker, & sucketh blood," are not actionable, though spoken of a justice of the peace.—**HILLIARD v. CONSTABLE** (1595), Cro. Eliz. 433; Moore, K. B. 418; 78 E. R. 673.

Annotation:—Refd. Compagnon v. Martin (1772), 2 Wm. Bl. 790.

501. Forging evidence.]—HAMOND v. KINGSMILL (1649), Sty. 22, 210; 82 E. R. 499, 652.

Annotations:—Refd. Charges v. Rowe (1681), Freem. K. B. 280. *Mentd. Bill v. Neal* (1661), 1 Lev. 52.

502. "A debauched man."]—**HAMOND v. KINGSMILL** (1649), Sty. 22, 210; 82 E. R. 499, 652.

Annotations:—Consd. Bill v. Neal (1661), 1 Lev. 52. *Refd. Charges v. Rowe* (1681), Freem. K. B. 280.

503. "Beetle-headed justice."]—**BILL v. NEAL** (1661), 1 Lev. 52; 83 E. R. 292.

Annotations:—Consd. How v. Prinne (1702), 2 Ld. Raym. 812. *Expld. Alexander v. Jenkins* (1892), 66 L. T. 391. *Refd. Coxeter v. Parsons* (1698), 1 Ld. Raym. 423.

504. "Forsworn."]—To say of a justice of the peace that "he is forsworn, & not fit to be a justice, or to sit upon the Bench," is actionable.—**KIRLE v. OSGOOD** (1669), 2 Keb. 548, 579; 1 Mod. Rep. 22; 1 Sid. 432; 86 E. R. 701; *sub nom.* KERLE v. OSGOOD, 1 Vent. 50; *sub nom.* CARN v. OSGOOD, 1 Lev. 280.

Annotation:—Refd. Walmsley v. Russel (1704), 6 Mod. Rep. 200.

505. "Plundering."]—To say of a justice of the peace, "He is a knave, a busy knave, for searching after me, & I will make him give me satisfaction for plundering me," is actionable.—**PROWSE v. WILCOX** (1687), 3 Mod. Rep. 163; 87 E. R. 105.

506. Knave, rascal, villain.]—PEPPER v. GAY (1693), 2 Lut. 1288; 125 E. R. 713.

507. —.]—ASTON v. BLAgrave, No. 455, *ante*.

508. Rogue.]—KENT v. POCOCK (1742), 2 Stra. 1168; 93 E. R. 1104.

Annotation:—Refd. Onslow v. Horne (1771), 2 Wm. Bl. 750.

509. Papist.]—To say of one who is a justice of the peace, deputy lieutenant, & a candidate at a Parliamentary election, that he is a Papist & a pensioner, with an averment showing that pensioner means one who sells his vote, held actionable.—CUTLER'S CASE (1680), 1 Freem. K. B. 530; 89 E. R. 397; *sub nom.* CUTLER v. FRIEND, 2 Show. 140.

510. —.]—It is actionable to call a Privy Councillor or a deputy lieutenant of a county, or a justice of the peace, a Papist.—ROE v. CLARGIS (1683), 3 Mod. Rep. 26; Skin. 88; 87 E. R. 15; *sub nom.* ROW v. CLARGIS, T. Raym. 482; 2 Show. 250; *sub nom.* CLARGES v. ROWE, 1 Freem. K. B. 280; 3 Lev. 30.

Annotations:—Consd. How v. Prin (1702), Holt, K. B. 652. *Refd. Walmsley v. Russel* (1704), 6 Mod. Rep. 200.

511. —.]—How v. PRIN, No. 479, *ante*.

iii. Other Offices.

512. Sheriff—"Huddling & shuffling."]—**BROWN v. STREET** (1601), Cro. Eliz. 848; 78 E. R. 1074.

513. Churchwarden—Cheating the parish.]—To charge a constable & churchwarden with having "beguiled & deceived the town of a certain sum in passing his accounts," is not actionable.—HUTTON v. BEECH (1614), Cro. Jac. 339; 79 E. R. 289.

514. —.]—To charge a man who is steward of a leet, churchwarden, collector for the poor, trustee of parish land, with having "deceived & cozened the parishioners," is not actionable.—WILLIS v. SHEPHERD (1621), Cro. Jac. 619; 79 E. R. 533.

515. —.]—STRODE v. HOMES (1652), Sty. 338; 82 E. R. 758.

Annotations:—Distd. Williams v. Stott (1833), 1 Cr. & M. 675. *Refd. Alexander v. Jenkins* (1892), 40 W. R. 546.

516. —.]—TOWNSEND v. BARKER (1653), Sty. 388, 394; 82 E. R. 801, 806.

517. —.]—WOODRUFF v. WEOLEY (1663), Cart. 1; 124 E. R. 788.

518. Privy councillor — Disloyalty.] — WALGRAVE & AGUR'S CASE (1590), 1 Leon. 335; 74 E. R. 305; *sub nom.* WALDEGRAVE v. AGAS, Cro. Eliz. 191.

Annotations:—Distd. Smith v. Turner (1608), Cro. Jac. 202. *Refd. Lewes v. Walter* (1616), 3 Bulst. 225; *Hitcham v. Brooks* (1625), Win. 123; *Charges v. Rowe* (1681), Freem. K. B. 280; *How v. Prinne* (1702), 2 Ld. Raym. 812.

519. — "Cozening knave."]—To call a member of the Privy-Chamber "a cozening knave," held not actionable.—**BRUNKARD v. SEGAR** (1617), Cro. Jac. 427; 79 E. R. 365.

Annotation:—Refd. Willis v. Shepherd (1621), Cro. Jac. 619.

520. — Papist.]—It is actionable to say of a Privy Councillor: "He arrested me because I would not give my consent to him to bring in popery."—How v. PRINNE (1702), as reported in 2 Ld. Raym. 812; 7 Mod. Rep. 107; 92 E. R. 42; *sub nom.* HOWE v. PERRY, 2 Lut. 1293, Ex. Ch.; *affd. sub nom.* PRINN v. HOWE (1704), 1 Bro. Parl. Cas. 64, H. L.

Annotations:—Refd. Onslow v. Horne (1771), 3 Wils. 177; *Booth v. Arnold* (1895), 64 L. J. Q. B. 443. *Mentd. Alexander v. Jenkins*, [1892] 1 Q. B. 797.

521. Deputy lieutenant — Papist.] — CUTLER'S CASE, No. 509, *ante*.

522. —.]—(1) To say of an officer, as a deputy lieutenant that he is a Papist, is actionable:

(2) Words, not actionable formerly, may become so by acquiring a worse acceptation by usage.—CLARGES v. ROWE (1683), Freem. K. B. 280; 3 Lev. 30; 89 E. R. 201; *sub nom.* ROE v. CLARGIS, 3 Mod. Rep. 26; Skin. 88; *sub nom.* ROW v. CLARGIS, T. Raym. 482; 2 Show. 250.

Annotations:—As to (1) Consd. How v. Prin (1702), Holt, K. B. 652. *Refd. Walmsley v. Russel* (1704), 6 Mod. Rep. 200.

523. —.]—How v. PRIN, No. 479, *ante*.

524. Chancellor of diocese—Subornation of perjury.]—Qu.: whether to say of the chancellor of a diocese, "There goes your rare chancellor, to suborn witnesses to swear against the parson," is actionable.—WALMSLEY v. RUSSEL (1704), 6 Mod. Rep. 200; 2 Salk. 696; 87 E. R. 955.

Annotation:—Refd. Galloway v. Marshall (1853), 2 W. R. 106.

525. Member of Parliament—Lack of sincerity.]—Charging a Member of Parliament with want of

PART IV. SECT. 2, SUB-SECT. 1.—E. (c) III.

of integrity in exercise of office.]—MINCHIN v. SAMIS (1913), 24 W. L. R. 739; 4 W. W. R. 891; Atla. L. R. 157.—CAN.

sincerity, no ground for an action for words.—**ONSLow v. HORNE** (1771), 2 Wm. Bl. 750; 3 Wils. 177; 96 E. R. 439.

Annotation:—**Consd.** Lumby v. Allday (1831), 1 Cr. & J. 301. **Refd.** Holt v. Scholefield (1796), 6 Term Rep. 691; Miller v. David (1874), L. R. 9 C. P. 118; Alexander v. Jenkins, [1892] 1 Q. B. 797.

526. Town councillor—Drunkenness—Unfitness for office.—**ALEXANDER v. JENKINS**, No. 463, ante.

527. — Malversation in office.—**BOOTH v. ARNOLD**, No. 464, ante.

SUB-SECT. 2.—STATEMENTS IMPUTING CRIME.

A. Statement Must Impute Crime.

(a) In General.

528. General rule.—Words are not actionable, if they are so general that they would not subject the party to punishment, if true.—**GEORGE'S CASE** (1588), Cro. Eliz. 95; 78 E. R. 354; *sub nom.* GORGES CASE, Moore, K. B. 261.

529. ——Words not importing a certain charge of some offence, are not actionable.—**FOWLER v. ASTON** (1592), Cro. Eliz. 268; 78 E. R. 523.

530. ——**MALE v. KET** (1617), Hob. 184; Het. 172; 80 E. R. 331; *sub nom.* MAY v. KETT, Poph. 129.

531. ——**PALMER v. EDWARDS** (1739), Cooke, Pr. Cas. 160; 125 E. R. 1021.

532. ——Action on the case for saying of a merchant, "he has brought a false bill of lading for half the cargo, meaning the lading of a particular ship, already," whereby he was injured as such merchant, & lost the confidence of several persons, without naming them, was held not maintainable, & judgment accordingly arrested, because the words did not of themselves impute any crime.—**FEISE v. LINDER** (1803), 3 Bos. & P. 372; 127 E. R. 203.

533. ——An action for slander will lie for spoken words imputing to pltf. that he has brought a blackmailing action although no special damage is alleged.

"It is just one of those cases in which spoken words are not actionable unless they are spoken words which impute or might impute a crime, that is to say, words which, in the opinion of the tribunal which ultimately deals with the matter, appear to have been not necessarily intended by the speaker to impute a crime, but capable of being understood by the hearers as imputing a crime" (**VAUGHAN WILLIAMS, L.J.**).—**MARKS v. SAMUEL**, [1904] 2 K. B. 287; 73 L. J. K. B. 587; 90 L. T. 590; 53 W. R. 88; 20 T. L. R. 430; 48 Sol. Jo. 415, C. A.

534. Imputation must be certain—Ambiguity—Words referable to trespass.—Words importing a trespass only are not actionable.

It may be intended he took it as a trespasser, for he chargeth him not with a felony (*per CUR.*).—**LYNE v. BACKHOUSE** (1594), Cro. Eliz. 352; 78 E. R. 600.

PART IV. SECT. 2, SUB-SECT. 2.— A. (a).

h. Felony committed in a foreign country.—It is actionable to charge a man with the commission of felony in a foreign country.—**SMITH v. COLLINS** (1840), 3 U. C. R. 1.—**CAN.**

k. Crime punishable by British Law.—Commission in other
An action will lie for words spoken here imputing the commission

in a colony subject to the British criminal law of a crime punishable by that law.—**MALLOCH v. GRAHAM** (1832), 2 O. S. 375.—**CAN.**

l. Crime must be recognisable by particular court.—In an action for oral slander the words spoken imputed to pltf. that he had committed incest & adultery with his daughters, & alleged as grounds of special damage the loss of the society of friends &

535. ——**BROWN v. ST. JOHN** (1602), Cro. Eliz. 889; 78 E. R. 1113.

536. ——**ANON.** (1639), March, 59; 82 E. R. 411.

537. — Or breach of contract.—Words actionable in themselves as containing a charge of felony, if spoken in reference to a trespass or breach of contract, are not so.—**CRISTIE v. COWELL** (1790), Peake, 4, N. P.

Annotation:—**Expld. & Distd.** Williams v. Stott (1833), 3 L. J. Ex. 110.

538. — "Thou art a clipper."—**WALTER v. BEAVER** (1684), 3 Lev. 166; 83 E. R. 632.

539. ——**NABEN v. MIECOCK** (1684), Skin. 183; 90 E. R. 84.

540. ——**SMITH v. WATKINS** (1792), 1 Hag. Con. 467; 161 E. R. 620.

541. ——If words *prima facie* imputing felony, have been used in a different sense, they are not actionable.—**THOMPSON v. BERNARD** (1807), 1 Camp. 48, N. P.

542. — Words referable to fraud.—In an action for words which may be understood to convey a charge either of felony or fraud; although they would be actionable in the latter sense as well as in the former, if the declaration contains an innuendo that deft. thereby meant to impute felony to pltf., this is material, & must be made out in evidence.—**SMITH v. CAREY** (1813), 3 Camp. 461, N. P.

Annotations:—**Refd.** Williams v. Stott (1833), 1 Cr. & M. 675; West v. Smith (1836), Tyr. & Gr. 825.

543. — Words referable to tort.—Averment that A. before a magistrate maliciously charged B. with felony; the information contained a mere charge of tortious conversion upon which a warrant for felony was improperly founded; the variance is fatal.

Words imputing felony, but spoken with reference to such warrant, & not intended to convey a substantive charge, are not actionable.—**TEMPEST v. CHAMBERS** (1815), 1 Stark. 67, N. P.

Annotations:—**Consd.** Hankinson v. Bilby (1847), 16 M. & W. 442. **Refd.** Kennedy v. Hilliard (1859), 1 L. T. 78.

544. — Sense understood by bystanders.—The use of words imputing an indictable offence is actionable or not according to the sense in which they may fairly be understood by bystanders not acquainted with the matter to which they relate, or which may render them a privileged communication, & the secret intent of the speaker in uttering them in the presence of such bystanders is immaterial.—**HANKINSON v. BILBY** (1847), 16 M. & W. 442; 2 Car. & Kir. 440; 153 E. R. 1262.

545. — Plaintiff "worse than" specified kind of criminal.—**PALMER v. EDWARDS** (1739), Cooke, Pr. Cas. 160; 125 E. R. 1021.

546. ——"He is worse than a sodomite":—**Held**: these words spoken were not actionable *per se*.—**WETHERFIELD v. WINGFIELD** (1848), 12 L. T. O. S. 216.

547. — "He belonged to a den of thieves."—**POULTON v. WILSON** (1858), 1 F. & F. 403, N. P.

548. Offence made a felony by statute.—Words imputing an offence made felony by statute

illness & expenses consequent thereon:—**Held**: the words were not actionable without proof of special damage, incest not being a crime cognisable in our cts.—**PALMER v. SOLMES** (1880), 30 C. P. 481; 45 U. C. R. 15.—**CAN.**

m. Words imputing indictable offence.—In slander, if the words charged are capable of imputing an indictable offence, they are actionable without attaching any innuendo;

Sect. 2.—Statements actionable per se: Sub-sect. 2, A. (a), (b), (c) & (d), & B. (a), (b) & (c).]

are actionable.—*SMITH v. FLYNT* (1612), Cro. Jac. 300; 1 Bulst. 181; 79 E. R. 256; cited *sub nom.* *FLYNT v. SMITH*, W. Jo. 68; cited *sub nom.* *SPLINT v. SMITH*, Lat. 2.

549. Description of crime in technical terms unnecessary.]—Words imputing a crime are actionable, although they describe it in vulgar language, & not in technical terms.—*COLMAN v. GODWIN* (1782), 3 Doug. K. B. 90; 99 E. R. 554.

550. Crimes not confined to indictable offences.]—Words imputing that pltf. has been guilty of a criminal offence will support an action for slander, without special damage; & it is not necessary to allege in the statement of claim that they impute an indictable offence.—*WEBB v. BEAVAN* (1883), 11 Q. B. D. 609; 52 L. J. Q. B. 544; 49 L. T. 201; 47 J. P. 489.

*Annotations:—*Consd. *Hellwig v. Mitchell*, [1910] 1 K. B. 609; *Wiffen v. Bailey & Romford U. C.*, [1914] 2 K. B. 5. *Refd.* *Michael v. Spiers & Pond* (1909), 101 L. T. 352.

(b) Crime Punishable by Imprisonment.

551. General rule.]—Slander which, if true, would endanger corporal punishment, is actionable.—*SPENCER v. SHORY* (1599), Cro. Eliz. 709; 78 E. R. 944.

552. Imputation of crime punishable only by fine—Special damage necessary.]—An imputation made against a person in a licensed house that he is drunk is not actionable without proof of special damage, as it is an imputation, not of an indictable offence, or of an offence in respect of which the person could be made to suffer corporally by way of punishment, but of the offence of being drunk on licensed premises, which under Licensing Act, 1872 (c. 94), s. 12, is punishable by fine only; & a mere threat that unless he can clear his character against the charge he will be dismissed from his employment is not special damage which will support an action.—*MICHAEL v. SPIERS & POND, LTD.* (1909), 101 L. T. 352; 25 T. L. R. 740.

*Annotations:—*Folld. *Ormiston v. G. W. Ry.*, [1917] 1 K. B. 598. *Refd.* *Hellwig v. Mitchell*, [1910] 1 K. B. 609; *Wiffen v. Bailey & Romford U. C.*, [1914] 2 K. B. 5.

553. ———.]—Words imputing that pltf. has been guilty of a criminal offence, punishable by fine only, but which involves a liability to summary arrest, will not support an action for slander without special damage.—*HELLWIG v. MITCHELL*, [1910] 1 K. B. 609; 79 L. J. K. B. 270; 102 L. T. 110; 26 T. L. R. 214.

*Annotations:—*Folld. *Ormiston v. G. W. Ry.*, [1917] 1 K. B. 598. *Refd.* *Wiffen v. Bailey & Romford U. C.*, [1915] 1 K. B. 600.

554. ———.]—Pltf., the holder of a first-class season ticket between certain stations on defts.' railway, travelled to & alighted at one of these stations, &, after showing his ticket to a collector, was proceeding to the station exit when one of defts'. porters took him by the arm, & in the presence of a number of other persons accused him of having travelled first class with a third

class ticket. Pltf. then brought an action against defts. for assault, false imprisonment, & slander:—*Held*: as a first offence of travelling without the proper fare, with intent to avoid payment thereof, was not punishable by imprisonment, the action for slander would not lie in the absence of proof of special damage.—*ORMISTON v. GREAT WESTERN Ry. Co.*, [1917] 1 K. B. 598; 86 L. J. K. B. 759; 116 L. T. 479; 33 T. L. R. 171.

(c) Impossible Crimes.

555. Murder of person still living.]—Pltf. declared that deft. had a wife who was still living, & that deft. said of him "Thou hast killed my wife," held not actionable. *Secus*, if she had been dead.—*SNAG v. GEE* (1597), 4 Co. Rep. 16 a; 76 E. R. 896.

*Annotations:—*Distd. *Heming v. Power* (1842), 10 M. & W. 561. *Refd.* *Crofts v. Brown* (1616), 3 Bulst. 167.

556. ———.]—*BILLING v. KNIGHT* (1612), 2 Bulst. 42; 80 E. R. 944.

557. ———.]—*REYNOR v. HALLET* (1626), Poph. 187; 79 E. R. 1281.

558. Stealing own property—Theft of bell-ropes by churchwarden.]—The property of the bell-ropes of a parish church is in the churchwardens of the parish: it is not actionable therefore, to say of a churchwarden, that he stole the bell-ropes of his own parish.—*JACKSON v. ADAMS* (1835), 2 Bing. N. C. 402; 1 Hodg. 339; 2 Scott, 599; 5 L. J. C. P. 79; 132 E. R. 158.

*Annotations:—*Apld. *Lemon v. Simmons* (1888), 57 L. J. Q. B. 260. *Refd.* *Heming v. Power* (1842), 10 M. & W. 561; *Alexander v. Jenkins* (1892), 66 L. T. 391. *Menid.* *Moss v. Thorniley* (1856), 27 L. T. O. S. 101; *Cooper v. Law* (1859), 5 Jur. N. S. 1263.

(d) Particular Instances.

See Sub-sect. 2, E., *post*.

B. Commission of Crime Must be Imputed.

(a) In General.

559. General rule.]—Words are not actionable if they do not import a certain charge.—*HAWKES v. AUGE* (1619), Cro. Jac. 531; 79 E. R. 155.

*Annotation:—*Refd. *George v. Harvey* (1633), Cro. Car. 324.

560. ———.]—*GILBERT v. post.*

561. ———.]—The declaration, after reciting that A. & B., pltf.s., were lawful husband & wife, & that B. was the lawful sister of one C. alleged that deft. spoke of & concerning pltf. B. & her inter-marriage, & of & concerning C. the false, etc., words following: "It has been ascertained beyond doubt that C. & B. are not only not brother & sister, but man & wife":—*Held*: (1) pltf.s. were not bound to prove the introductory averment that B. was the lawful sister of C.; (2) the declaration was not bad in arrest of judgment.

(3) If at the time the words are uttered, there are circumstances which clearly show the words are not used in the sense of imputing a felony, then the charge falls to the ground & no action will lie (*PARKE, B.*).—*HEMING v. POWER* (1842),

& if an innuendo be attached, it is sufficient to say: "thereby meaning that pltf. had been guilty of an indictable offence," without specifying what particular indictable offence is meant.—*KINAHAN v. McCULLAGH* (1877), 11 C. L. 1.—*IR.*

PART IV. SECT. 2, SUB-SECT. 2.—A. (b).

552 i. Imputation of crime punishable only by fine—Special damage necessary.]—Words imputing merely an offence punishable by a fine only, though in de-

fault of payment imprisonment may result, do not give rise to a right of action for slander without proof of special damage.—*ROBERTSON v. ROBERTSON* (Alta.), [1921] 1 W. W. R. 1151; 67 D. L. R. 496.—*CAN.*

552 ii. ———.]—*MCDONALD v. N* (1922), 53 O. L. R. 191.—*CAN.*

n. Imputation of crime punishable by fine & imprisonment—Actionable.]—*MYCHAJLUK v. KOLISNYK* (Man.), [1923] 4 D. L. R. 724.—*CAN.*

PART IV. SECT. 2, SUB-SECT. 2.—B. (a).

559 i. General rule.]—No action will lie for words spoken when they only refer prospectively to some act which if committed would be a crime.—*CONKEY v. THOMPSON* (1857), 6 C. P. 238.—*CAN.*

559 ii. ———.]—Words which impute nothing more than a suspicion of crime do not give a cause of action for slander *per se.*—*PERRIN v. RAINBOW*, [1922] 1 W. W. R. 592; 66 D. L. R. 299; 17 Alta. L. R. 470.—*CAN.*

10 M. & W. 564; 11 L. J. Ex. 323; 6 Jur. 858; 152 E. R. 595.

Annotations:—*As to* (3) *Refd.* Barnett v. Allen (1858), 27 L. J. Ex. 412. *Generally, Mentd.* Atkinson v. Raleigh (1842), 3 Q. B. 79.

562. "I have served thee with the Queen's writ"—For stealing goods.—Slander must be expressly alleged.

Action for words: "I have served you with the Queen's letter, for stealing of goods out of my mother's house." It was adjudged that the action did not lie; for deft. does not say expressly, that he had stolen the goods, but that he had served him, etc., which may be, though he did not steal them, so it is only a charge by implication.—ATKINSON v. ATKINSON (1591), Cro. Eliz. 235; 78 E. R. 490.

563. Complicity in crime.—MORDANT (LORD) v. BRIDGES (1587), Cro. Eliz. 67; Moore, K. B. 686; 78 E. R. 328.

Annotation:—*Refd.* Townsend v. Hughes (1676), Freem. K. B. 222.

564. "Thou wast arraigned."—Action for these words: "Thou art a false knave: thou wast arraigned for two bullocks." Adjudged that the words were not actionable; for he said not he was arraigned for stealing two bullocks: & if the words had been so, yet the words had not been actionable; for a man may be arraigned for felony, & yet be no felon.—BAYLY v. CHURINGTON (1592), Cro. Eliz. 279; 78 E. R. 534.

Annotation:—*Distd.* Halley v. Stanton (1632), Cro. Car. 268.

565. To charge plaintiff with felony—"I arrest you upon felony."—SERLE v. MANDER (1620), Poph. 150; 79 E. R. 1249; *sub nom.* SEARLE v. MAUNDER, 2 Roll. Rep. 141.

566. ——"I charge him with felony."—POLAND v. MASON (1620), Hob. 305; 80 E. R. 448.

Annotation:—*Folld.* Harrison v. King (1817), 4 Price, 46.

567. ——"MASON v. THOMPSON (1620), Hut. 38; 123 E. R. 1084.

568. ——"I lay flat felony to him."—PAINE v. PRESTNY (1650), Sty. 235; 82 E. R. 673.

569. ——"WOOD v. MERRICK (1627), 1 Roll. Abr. 73, pl. 21.

Annotation:—*Refd.* Harrison v. King (1817), 7 Taunt. 431.

570. ——"SAUNDERS v. EDWARDS (1662), 1 Sid. 95; 82 E. R. 991.

Annotation:—*Mentd.* Aldridge v. Drake (1686), 2 Show. 493.

571. "I have matter enough against thee."—POWELL v. WARD (1620), Hut. 41; 123 E. R. 1086.

572. "I will take him to Bow Street on a charge of forgery."—These words, "I will take him to Bow Street, on a charge of forgery" are not actionable, because they do not amount to charge the person of whom they are spoken with felony.—HARRISON v. KING (1817), 4 Price, 46; 7 Taunt. 431; 146 E. R. 389, Ex. Ch.

(b) Words merely of Suspicion.

573. Whether actionable.—"I think he is a horse-stealer" are actionable words.—STICH v. WISDOME (1594), Cro. Eliz. 348; 78 E. R. 596; *sub nom.* WISDOME'S CASE, Owen, 18; *sub nom.* STICH v. WISDOM, Gouldsb. 186.

574. ——"BRINSBY v. BALGY (1607), Yelv. 113; 80 E. R. 77.

575. ——"Words that denote the suspicion only of him who speaks them, are not actionable.—FRANK v. ALSOP (1608), Cro. Jac. 215; 79 E. R. 187.

576. ——"BLAND'S CASE (1618), Hut. 18; 123 E. R. 1070.

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577. ——"Words merely conveying suspicion will not sustain an action for slander. Where such words admit fairly, & in their natural sense, of two meanings, the one being an imputation of suspicion only, the other of guilt, the sense in which they were uttered should be left to the jury. The innuendoes not declaring that the words were spoken with the intention of imputing to pltf. a felony, & not importing to enlarge the meaning of those words:—*Held*: the prefatory averments which only professed to give the motives of deft. could not be substituted for those innuendoes whereby pltf. undertook to give the meaning of the words spoken.—SIMMONS v. MITCHELL (1880), 6 App. Cas. 156; 50 L. J. P. C. 11; 43 L. T. 710; 45 J. P. 237; 29 W. R. 401, P. C.

578. ——"Intention to impute felony.—A declaration in slander, after stating by way of inducement that deft. used the words—"I have a suspicion that you robbed my house," for the purpose of expressing, & that the words were understood as expressing, that pltf. had feloniously stolen certain goods of deft.'s set out the slanderous words as follows:—"I, meaning deft., have a suspicion that you, meaning pltf., & B. have robbed my house, meaning thereby that pltf. had feloniously stolen & carried away certain goods & chattels of deft., & therefore I take you into custody":—*Held*: the pltf. was not entitled to a verdict unless the jury found the words spoken by deft. imputed to pltf. a direct charge of felony.—TOZER v. MASHFORD (1851), 6 Exch. 539; 20 L. J. Ex. 225; 17 L. T. O. S. 65; 155 E. R. 657.

(c) Intent to Commit.

579. Whether actionable.—It is slander to charge a man with an intent to do an unlawful act.—EDWARDS' CASE (1582), Cro. Eliz. 6; 78 E. R. 272.

580. ——"It is slander to charge another with an intent to do an unlawful act.—TIBBOTT v. HAYNES (1590), Cro. Eliz. 191; 78 E. R. 446.

581. ——"Action for these words: "You have sought to murder me, & I can prove it."—Adjudged that it lay.—PRESTON v. PINDER (1593), Cro. Eliz. 308; 78 E. R. 559.

582. ——"Action for these words: "Weeks assaulted me & others, to have robbed us; but we were too strong for them, & escaped."—Adjudged actionable, for if one said that S. lay in wait to do a robbery or murder, an action lies, though no felony was done.—WEEKS' CASE (1594), Cro. Eliz. 349; 78 E. R. 597; *sub nom.* WEEKS v. TAYLOR, Moore, K. B. 409.

Annotation:—*Refd.* Lewknor v. Cruchley (1628), Cro. Car. 140.

583. ——"He is a brabler, & a quarreller, for he gave his champion counsel to make a deed of gift of his goods, to kill me, & then to fly out of the country, but God preserved me," is not actionable, for the mere intent without an act is not punishable by the law.

But it is actionable to say "My Lady C. offered to give poison to one to kill the child within her body;" "T. & another did agree to hire one to kill S.;" "If I had consented to C., T. had not been alive;" or "My Lord L. had gone about to take away my life against all Christian dealing."—EATON v. ALLEN (1598), 4 Co. Rep. 16 b; Cro. Eliz. 684; 76 E. R. 896.

Annotation:—*Appld.* Mayne v. Digle (1672), Freem. K. B. 46.

584. ——"Words which import an intent only to do the act imputed, are actionable.—

Sect. 2.—Statements actionable per se: Sub-sect 2, B. (c) & (d), C. (a), (b) & (c), D. & E. (a) & (b).]

LEVERSAGE v. SMITH (1599), Cro. Eliz. 710; 78 E. R. 944.

585. —.]—These words "Thou wouldest have taken my purse from me on the high way" are not actionable; but "Thou hast taken my money, & I will carry thee before a justice, lay felony to thy charge" are actionable (COKE, C.J.).—ANON. (1612), Godb. 202; 78 E. R. 123.

586. —.]—DEANE v. ETON (1612), 1 Bulst. 201; 80 E. R. 888.

587. —.]—MURREY v. — (1614), 2 Bulst. 206; 80 E. R. 1071.

588. —.]—GILPIN v. SHINE (1614), 2 Bulst. 227; 80 E. R. 1081.

589. —.]—LANGLY v. CLARK (1658), 2 Sid. 76; 82 E. R. 1266.

590. —.]—Words, charging a criminal intent without any indictable act done in pursuance of it, are not actionable.—MAYNE v. DIGLE (1672), Freem. K. B. 46; 89 E. R. 37.

591. —.]—In an action for slanderous words, imputing dishonesty to pltf., the declaration is not supported by proving words which may import such a meaning, but are equivocal, & may have a different import.

The words imputed rather an inclination to the pltf. to do that which was wrong than the actual doing of it; & that imputing evil inclinations to a man which were never brought into action, was not actionable (LORD ELLENBOROUGH, C.J.).—HARRISON v. STRATTON (1802), 4 Esp. 218, N. P.

(d) Statement that Plaintiff has Undergone Punishment.

592. "Thou hast sitten upon the pillory."—ANON. (1587), Cro. Eliz. 62; 78 E. R. 322.

593. Statement that plaintiff has been in gaol—For specific crime.]—ANON. (1616), Moore, K. B. 866; 72 E. R. 959.

594. —.]—An action upon the case for words "Thou wert in the gaol for robbing such a one the highway."

If one says of another, thou art as very a thief as any is in Warwick Gaol, none being then there in prison, these words are not actionable, but otherwise it had been, if a felon had been there in prison at the time (FENNER, J.).—ANON. (1610), 1 Bulst. 40; 80 E. R. 744.

595. —.]—STEWART v. BISHOP (1616), Hob. 177; Hut. 2; 1 Brownl. 16; Noy, 24; 80 E. R. 324.

Annotations:—Distd. Brown v. Audley (1619), Palm. 68. Refd. Blands Case (1618), Hut. 18; Beaver v. Hides (1766), 2 Wils. 300.

596. Statement that plaintiff is a returned convict.]—An action will lie for saying of pltf. "He is a returned convict," though the words import that the punishment has been suffered.—FOWLER v. DOWDNEY (1838), 2 Mood. & R. 119, N. P.

C. Whether Allegation Must be Direct.

(a) In General.

See, generally, Part IV., Sect. 1, sub-sect. 2, B. (c), ante.

597. Words used interrogatively.]—THIMBLETHORPS CASE (1595), Moore, K. B. 418; 72 E. R. 667.

598. — Coupled with affirmative words.]—

NEWLYN v. FASSET (1609), Yelv. 154; 80 E. R. 103.

599. —.]—Words imputing felony, though spoken interrogatively, & not affirmatively, are actionable.—MAY v. GYBBONS (1620), Cro. Jac. 568; 79 E. R. 486.

600. —.]—GIBBON v. MAGOT (1620), Palm. 66; 81 E. R. 981.

601. —.]—APPLETONS CASE (1639), March, 7; 82 E. R. 387.

602. —.]—ANON. (1639), March, 58; 82 E. R. 410.

603. Words used adjectively.]—To say of a churchwarden that he perjuredly presented a person to the official, does not import a certain charge of perjury.—STYLE v. HEATH (1606), Cro. Jac. 80, 120; 79 E. R. 68, 103; sub nom. STILE v. HEAPE, Yelv. 72.

604. —.]—STEENEMAN v. RICHARDSON, No. 194, ante.

605. —.]—To call another "a long-shag-haired-murdering rogue," is actionable.—GREEN v. LINCOLN (1633), Cro. Car. 318; W. Jo. 326; 79 E. R. 878.

Annotation:—Refd. Chappel v. Goodhouse (1618), Aleyn, 61.

606. —.]—CHAPPEL v. GOODHOUSE (1618), Aleyn, 61; 82 E. R. 916.

607. Words used potentially—Importing act done.]—I know what I am, I know what Snell is, I never buggered a mare; actionable by implication.—SNEEL v. WEBLING (1675), 2 Lev. 150; 3 Keb. 516; 1 Vent. 276; 83 E. R. 493.

Annotation:—Appld. Beaver v. Hides (1766), 2

608. Repetition of alleged complaint.]—Slanderous words must be understood by the ct. in the same sense as the rest of mankind would ordinarily understand them. Therefore where one said of another that his character was infamous, that he would be disgraceful to any society, that those who proposed him as a member of any society must have intended an insult to it, that he would publish his shame & infamy, that delicacy forbade him from bringing a direct charge, but it was a male child who complained to him; such words were understood to mean a charge of unnatural practices, & sufficiently certain in themselves to be actionable, without the aid of an innuendo to that purpose, which it was admitted could not enlarge the sense:—Held: such words could not be justified by any plea naming, for the first time, the person from whom deft. heard the complaint.—WOOLNOTH v. MEADOWS (1804), 5 East, 463; 2 Smith, K. B. 28; 102 E. R. 1148.

Annotations:—Distd. Alexander v. Angle (1830), 1 Cr. & J. 143. Consd. Williams v. Stott (1833), 1 Cr. & M. 675. Appld. Southes v. Denny (1847), 1 Exch. 196. Consd. Capital & Counties Bank v. Henty (1882), 7 App. Cas. 741.

(b) Allegation that Plaintiff Deserves Punishment for Crime.

609. Whether actionable.]—LUCAS v. COTTON (1566), Moore, K. B. 79; 72 E. R. 453.

610. —.]—BROWNE v. DAUKES (1582), Cro. Eliz. 11; 78 E. R. 277.

611. —.]—DORNE'S CASE (1587), Cro. Eliz. 62; 78 E. R. 322.

Annotations:—Distd. Hancock v. Winter (1816), 7 Taunt. 205. Consd. Curtis v. Curtis (1834), 10 Bing. 477.

612. —.]—Action for these words: "Pltf. deserved to have his ears nailed to the pillory."—Adjudged that the action lies.—JENKINSON v. MAYNE (1595), Cro. Eliz. 384; 78 E. R. 630; sub nom. JENKINSON v. WRAY, Moore, K. B. 401.

PART IV. SECT. 2, SUB-SECT. 2.—B. (d).

Ex-penitentiary bird.]—DAVIS v. STEWART (1869), 29 U. C. R. 441.—CAN.

613. —.] — HALLAND *v.* MABBS (1596), Cro. Eliz. 471; 78 E. R. 723.

614. —.] — REDFERN *v.* TODD (1597), Cro. Eliz. 589; 78 E. R. 832.

615. —.] — WILLYMOTTE *v.* WETTON (1602), Cro. Eliz. 904; 78 E. R. 1127.

616. —.] — BROWN *v.* AUDLEY (1620), Palm. 68; 81 E. R. 982.

617. —.] — GODSEL'S CASE (1624), Win. 90; 124 E. R. 76.

618. —.] — FLOYD *v.* JONES (1731), 2 Barn. K. B. 101; 94 E. R. 382.

619. —.] — The words "C. was in W. gaol & tried for his life, & would have been hanged had it not been for L., for breaking open the granary of farmer A. & stealing his bacon":—*Held*: actionable. Averments of the falsity of the charge not necessary, the gist of the action being, whether the words were spoken falsely & maliciously.—CARPENTER *v.* TARRANT (1736), Lee temp. Hard. 339; 95 E. R. 219.

Annotation:—*Refd.* Roberts *v.* Camden (1807), 9 East, 93.

620. —.] — "You have committed an act for which I can transport you":—*Held*: actionable.—CURTIS *v.* CURTIS (1834), 10 Bing. 477; 4 Moo. & S. 337; 3 L. J. C. P. 158; 131 E. R. 980.

621. —.] — Declaration in slander stated that pltf. had been & was clerk to a certain mining co.; that deft., intending to cause it to be believed that he had been guilty, in the course of his employment, of grave crimes & felonies, heretofore, to wit, on July 1, 1836, in a discourse of & concerning pltf., & of & concerning his having acted as such clerk, spoke of & concerning pltf., etc. these words: "You have done things with the co. for which you ought to be hanged, & I will have you hanged before Aug. 1" (thereby meaning that pltf. had been guilty of felonies punishable by law with death by hanging:—*Held*: good, on motion in arrest of judgment.—FRANCIS *v.* ROOSE (1838), 3 M. & W. 191; 1 Horn & H. 36; 7 L. J. Ex. 66; 150 E. R. 1111.

(c) Statement of Ability to Prove Plaintiff's Guilt.

622. Whether actionable.] — NORMAN'S CASE (1586), Gouldsb. 56; 75 E. R. 992.

623. —.] — Words: "I will prove him to be a perjured knave," are actionable.—FERMOR *v.* DORRINGTON (1591), Cro. Eliz. 222; 78 E. R. 478; *sub nom.* FARMER & DORINGTON'S CASE, 3 Leon. 151.

Annotations:—*Mentd.* Wray *v.* Thorn (1741), Willes, 488; R. *v.* Tremearne (1826), 5 B. & C. 254; R. *v.* Mellor (1858), 7 Cox, C. C. 454.

624. —.] — To say, "I will prove him forsworn," imports that he was forsworn; & to add, "before such a judge," is tantamount to saying he was perjured.—IRELAND *v.* GOODALE (1599), Cro. Eliz. 730; 78 E. R. 963.

625. —.] — WEBLIN *v.* MAYER (1609), Yelv. 153; 80 E. R. 103.

626. —.] — STAVERTON *v.* RELSE (1609), Yelv. 160; 80 E. R. 107.

627. —.] — HITCHAM *v.* BROOK (1625), Hut. 75; Win. 123; 123 E. R. 1111.

628. —.] — DAVIES' CASE (1636), Hut. 127; 123 E. R. 1149.

629. —.] — ANON. (1639), March, 19; 82 E. R. 393.

D. Imputation on Pardoned Criminal or Criminal having Served Sentence.

630. Action lies.] — CUDDINGTON *v.* WILKINS (1615), Hob. 81; Moore, K. B. 863, 872; Owen,

150; 80 E. R. 231; *sub nom.* CODDINGTON *v.* WILKIN, 1 Brownl. 10.

Annotations:—*Refd.* Leyman *v.* Latimer (1878), 3 Ex. D. 352. *Refd.* Searle *v.* Williams (1618), Hob. 288; Alexander *v.* N. E. Ry. (1865), 34 L. J. Q. B. 152; Monson *v.* Tussauds, Monson *v.* Tussaud (Louis), [1894] 1 Q. B. 671. *Mentd.* R. *v.* Reilly (1787), 1 Leach, 454; *Re* Barber (1850), 15 L. T. O. S. 500; Hay *v.* Tower Division of London JJ. (1890), 24 Q. B. D. 561.

631. —.] — SEARLE *v.* WILLIAMS (1618), Hob. 288; 80 E. R. 433.

Annotations:—*Refd.* Leyman *v.* Latimer (1878), 3 Ex. D. 352. *Mentd.* Philips *v.* Bury (1694), Skin. 447; R. *v.* Burridge (1735), 3 P. Wms. 439; Martin *v.* Mackonochie (1878), 3 Q. B. D. 730.

632. —.] — WICKS *v.* SMALBROOKE (1661), as reported in 1 Sid. 51; 82 E. R. 964.

Annotations:—*Mentd.* R. *v.* Hinks (1845), 2 Car. & Kir. 462; R. *v.* Williams (1845), 1 Cox, C. C. 289.

633. —.] — FOWLER *v.* DOWDNEY, No. 596, *ante*.

634. —.] — In an action by the editor of a newspaper for libel by printing & publishing of him in another newspaper that he was "a convicted felon" & also a "felon editor," defts. justified, alleging that pltf. had been convicted of felony & sentenced to twelve months' hard labour. Pltf. replied that the conviction had taken place many years previously, that he had endured the punishment & had thereby become in the same situation as if a pardon under the great seal had been granted to him. At the trial the judge held the alleged libels merely meant pltf. had been convicted of felony, & this being true pltf. could not recover:—*Held*: upon demurrers to the justification & to the reply pltf. was entitled to judgment.

It was thought a matter of public policy a person leading a reputable life should not be reproached with his former misfortune; this doctrine is distinctly laid down in *Cuddington v. Wilkins*, No. 630, *ante*, & no case has been cited to the contrary. It follows that in law pltf. cannot be stigmatised as a felon (COTTON, L.J.).—LEYMAN *v.* LATIMER (1878), 3 Ex. D. 352; 47 L. J. Q. B. 470; 37 L. T. 819; 26 W. R. 305; 14 Cox, C. C. 51, C. A.

Annotations:—*Refd.* Monson *v.* Tussauds, Monson *v.* Tussaud (Louis), [1894] 1 Q. B. 671. *Mentd.* Hay *v.* Tower Division JJ. (1890), 59 L. J. M. C. 79; Yates *v.* Kyffin-Taylor & Wark, [1899] W. N. 141; *In the Estate of Crippen*, [1911] P. 108.

E. Particular Crimes.

(a) Embezzlement.

635. Words spoken of chamberlain of commonable lands—Holding office for one year & without salary.] — WILLIAMS *v.* STOTT, No. 953, *post*.

636. What words impute embezzlement—Welsher.] — Declaration in slander for calling a man "a welsher," meaning thereby a person who dishonestly appropriates & embezzles money deposited with him. The evidence was, that "a welsher" is a person who receives money which had been deposited to abide the event of a race, & who has a predetermined intention to keep the money, & not to part with it in any event:—*Held*: as the term does not necessarily impute the offence of embezzlement, it does not imply an indictable offence, & so is not actionable.—BLACKMAN *v.* BRYANT (1872), 27 L. T. 491.

(b) Forgery.

637. General charge of forgery.] — ANON. (1589), 3 Leon. 231; 74 E. R. 652.

Annotation:—*Overd.* Jones *v.* Herne (1759), 2 Wills. 87.

638. —.] — Words imputing forgery, must import that it was of a punishable kind, if true,

Sect. 2.—Statements actionable per se: Sub-sect. 2, E. (b), (c), (d) & (e) i.]

or they are not actionable.—VENARD v. WOTTON (1590), Cro. Eliz. 166; 78 E. R. 423.

Annotations:—N.F. Baker v. Pierce (1703), 2 Ld. Raym. 959. *Consd. R. v. Ward* (1727), 2 Ld. Raym. 1461.

639. —.] — MUNDAY v. CORDAL (1593), Cro. Eliz. 296; 78 E. R. 548.

640. —.] — [The words] "You are a rogue, I will prove you a rogue, for you forged my name." are actionable.—JONES v. HERNE (1759), 2 Wils. 87; 95 E. R. 701.

641. Charge of forging "writings." — To charge a man with being "a forger of writings," is actionable.—GOODALE v. CASTLE (1597), Cro. Eliz. 554; 78 E. R. 799.

642. —.] — PERKINSON v. BOWMAN (1601), Cro. Eliz. 853; 78 E. R. 1079.

643. —.] — If one saith to another, "Thou hast stolen," no action lieth for these words; but if he do add these words, "For which thou shouldst be hanged," an action upon the case then well lieth; so here, "Thou hast forged writings," no action lieth for these words; but add these other words, "For which thou shouldst lose thy ears," these words then will bear an action; as in the other case, "For which thou shouldst be hanged" (CROOK, J.).—FROST v. EYRE (1616), 3 Bulst. 265;

—*Refd.* Kennedy v. Hilliard (1859), 1 L. T. 78.

644. —.] — THORNE'S CASE (1624), Win. 76; 124 E. R. 64.

645. —.] — CASSABILLY v. BRIT (1660), 1 Sid. 16; 82 E. R. 943.

646. Certificate.] — TOPLIFFE v. WILSON (1587), Cro. Eliz. 72; 78 E. R. 332.

647. —.] — MONDAY v. MILLS (1663), 1 Sid. 155; 82 E. R. 1029.

648. Writ.] — HUNGERFORD & WATTS (1584), 4 Leon. 181; 74 E. R. 807.

649. —.] — To accuse another of having forged a writ of *quare impedit* is actionable.—SALE v. MARSH (1590), Cro. Eliz. 178; 78 E. R. 435.

650. —.] — WILSHIRE v. — (1608), Yelv. 116; 80 E. R. 98.

651. Bond.] — To say "Thou hast made a forged bond," is actionable.—AUSTIE v. MASON (1597), Cro. Eliz. 551; 78 E. R. 800.

652. —.] — *Held*: for saying, "Thou hast made a false bond," an action lieth not; for that may be upon false instructions.—WADE v. BUSARD (1598), Cro. Eliz. 607; 78 E. R. 849.

653. —.] — THORNE'S CASE (1624), Win. 76; 124 E. R. 64.

654. Warrant.] — LINCOLN (EARL) v. MICHELBORN (1598), Gouldsb. 115; 75 E. R. 1033.

655. —.] — If a man, on being arrested, charge pltf. in the action with having counterfeited the warrant, it is actionable.—STONE v. SMALCOMBE (1622), Cro. Jac. 648; 79 E. R. 560.

656. —.] — CASSABILLY v. BRIT (1660), 1 Sid. 16; 82 E. R. 943.

657. Recognisance.] — CHICHELY v. BARKER (1602), Cro. Eliz. 883; 78 E. R. 1107.

PART IV. SECT. 2, SUB-SECT. 2.—E. (b).

641 i. Charge of forging "writings." — Declaration for slander averred that deft. used & published the words, "Old G. made false writings," meaning that pltf. forged writings, & was guilty of forgery:—*Held*: good, as showing a good cause of action for accusing pltf. of forgery.—GHOFF v. BRICKER

(1855), 4 C. P. 154 —CAN.

663 i. Will.] — Deft. in an action for slander accused pltf. of writing the will of an illiterate person contrary to his instructions, & reading it to him inaccurately, for the purpose of getting the testator's property into pltf.'s hands for his own benefit, whereby the testator was induced to execute the will:—*Held*: this was a charge of

658. Deed.] — REYNILL v. SACKFIELD, No. 181, ante.

659. —.] — REYNOLDS v. BURTON (1660), T. Raym. 4; 83 E. R. 2.

660. —.] — CASSABILLY v. BRIT (1660), 1 Sid. 16; 82 E. R. 943.

661. —.] — Procuring forgery.] — ANDREWS v. BIRD (1628), Het. 31; 124 E. R. 319.

662. Licence.] — GREGORY v. WILKS (1613), 2 Bulst. 137; 80 E. R. 1014.

663. Will.] — CARDINAL'S CASE (1619), Hut. 29; 123 E. R. 1077.

664. Commission under Privy Seal.] — To say "Thou hast forged a Privy Seal, & a commission," shall be intended to mean "the King's Privy Seal," & "the King's commission under his Privy Seal."—BAAL v. BAGGERLEY (1633), Cro. Car. 326; W. Jo. 325; 79 E. R. 885.

665. Letter.] — MONDAY v. MILLS (1663), 1 Sid. 155; 82 E. R. 1029.

666. Acquittance.] — ANON. (1670), 1 Sid. 451; 82 E. R. 1212.

667. Power of attorney.] — Words importing a charge of forgery held actionable.—TWAITES v. SHAW (1714), Gilb. 246; 93 E. R. 318.

668. Intention to charge with forgery.] — HARRISON v. KING, No. 572, ante.

(c) Keeping Brothel.

See Slander of Women Act, 1891 (c. 51).

669. Actionable—Reference to present time.] — SIMPSON v. BROOK (1611), 1 Bulst. 138; 80 E. R. 832.

670. —.] — ROBERTS v. BROWNE (1628), Palm. 521; 81 E. R. 1201.

671. —.] — GARLAND v. YARROW (1652), Sty. 326; 82 E. R. 748.

672. —.] — WALLIS v. — (1661), 1 Sid. 61; 82 E. R. 970.

673. —.] — A wife may join with her husband, in an action for saying she keeps a bawdy house.—GROVE v. HART (1752), Say. 33; 96 E. R. 793.

674. —.] — Pltf. brought an action for speaking these words,—"Your house is a bawdy house, & no respectable people will live in it." The words proved were addressed to pltf.'s wife, & were as follows,—"You are a nuisance to live beside of. You are a bawd; & your house is no better than a bawdy house":—*Held*: the words were actionable without special damage, & substantially supported the declaration.—HUCKLE v. REYNOLDS (1859), 7 C. B. N. S. 114; 141 E. R. 758.

Annotation:—Refd. Roberts v. Roberts (1864), 10 Jur. N. S. 1027.

675. —.] — Reference to past time.] — To say of pltf., that "she kept a bawdy house" (in the past tense), is actionable.—ANON. (1678), 1 Freem. K. B. 278; 89 E. R. 199; *sub nom.* NEWTON v. MASTERS, 2 Lev. 233.

(d) Murder.

676. General rule—Words actionable.] — ANON. (1565), Owen, 33; 74 E. R. 879.

677. —.] — SLADE v. ALLEN (1599), Cro. Eliz. 672; 78 E. R. 911.

forgery against pltf.—HALL v. CARTY (1855), 2 N. S. R. (James) 379.—CAN.

PART IV. SECT. 2, SUB-SECT. 2.—E. (d).

p. Child murder — "Done away with it." — A declaration in slander charged deft. with having spoken of pltf., an unmarried woman, the following words: "J. had a bastard child

678. ———.] — To say that "A. killed B." is actionable.—*TOOSE v. ST.* (1612), Cro. Jac. 306; 79 E. R. 261.

*Annotation:—***Refd.** *Dacy v. Clinch* (1661), 1 Sid. 52.

679. ———.]—*COOPER v. SMITH* (1617), Cro. Jac. 423; Poph. 128; J. Bridge. 60; 79 E. R. 362.

*Annotation:—***Refd.** *Banfield v. Lincoln* (1679), Freem. K. B. 278.

680. ———.]—"He is a great rogue, & killed a man, & if he had not given money to have taken himself off, he had suffered for it":—*Held*: actionable words.—*BANFIELD v. LINCOLN* (1679), 1 Freem. K. B. 278; 89 E. R. 199.

681. ———.]—To say of a certain person "that is the man who killed my husband" is actionable.—*BUTTON v. HEYWARD* (1722), 8 Mod. Rep. 24; 11 Mod. Rep. 359; 88 E. R. 18.

*Annotations:—***Refd.** *Curtis v. Curtis* (1834), 3 L. J. C. P. 158; *Miller v. David* (1874), L. R. 9 C. P. 118.

682. ———.]—*RIVERS v. LITE* (1740), 2 Stra. 1130; 93 E. R. 1081.

683. ———.]—**Necessity for averment that party is dead.**—"Thou hast killed my wife," are actionable, though it is not stated *quo animo* he killed her, nor averred that she was dead.—*TALBOT v. CASE* (1601), Cro. Eliz. 823; 78 E. R. 1050.

684. ———.]—In slander, saying that A. murdered B.'s child *modo defuncti*, it must be averred that the child was dead at the time of speaking.—*PRICHARD v. HAWKINS* (1608), Cro. Jac. 215; 13 Co. Rep. 71; 79 E. R. 187; *sub nom.* *PRITCHARD & HAWKINS CASE*, Jenk. 330.

685. ———.]—*BILLING v. KNIGHT* (1612), 2 Bulst. 42; 80 E. R. 944.

686. ———.]—In an action for slander imputing murder, it must be precisely alleged that the person was dead at the time the words were spoken.—*JACOB v. MILLS* (1614), Cro. Jac. 343; 79 E. R. 293; *sub nom.* *MILES v. JACOB*, Hob. 6.

*Annotations:—***Consd.** *Button v. Heyward* (1722), 8 Mod. Rep. 24. **Refd.** *Fleetwood v. Curley* (1619), Hob. 267; *Anon.* (1641), March, 109; *Oates v. Aylett* (1618), Aleyn, 74; *Mayne v. Digle* (1672), Freem. K. B. 46; *R. v. Griepe* (1696), 1 Ld. Raym. 256. **Mentd.** *Cutting v. Wilkins* (1702), 11 Mod. Rep. 24.

687. ———.]—(1) Rogue & rascal are words of heat, but not of scandal.

(2) An action lies for publishing words importing a charge of murder; & it shall be intended, without averment, that the party was dead.—*WILNER v. HOLD* (1637), Cro. Car. 489; 79 E. R. 1023.

688. "Infected of murder & doth smell of it."—"H. is infected of the murder & doth smell of it" are actionable words.—*HAULEY v. SIDENHAM* (1571), 3 Dyer, 317 b; 73 E. R. 719; *sub nom.* *HALLEY v. SIDENHAM*, Dal. 103.

689. Charge of "conspiring the death."—*CHRISTIAN & ADAMS CASE* (1585), 4 Leon. 54; 74 E. R. 726.

690. "Seeks my life."—"For my ground H. seeks my life; & if I could find S. I do not doubt but within two days to arrest him for suspicion of felony":—*Held*: the first words were not actionable; but for the last words the action lay, because for suspicion of felony he may be

imprisoned, & his life drawn in question.—*HEXT v. YEOMANS* (1585), 4 Co. Rep. 15 b; 76 E. R.

*Annotations:—***Refd.** *Sydnam v. May* (1616), 3 Bulst. 260; *Wheeler & Appleton's Case* (1623), Godb. 340; *King v. Merrick* (1627), Poph. 210.

691. Charge of poisoning.]—*BILLING v. KNIGHT* (1612), 2 Bulst. 42; 80 E. R. 944.

692. ———.]—To charge a wife with having poisoned her husband is actionable.—*GARDINER v. SPURDANT* (1617), Cro. Jac. 438; 79 E. R. 374.

693. ———.]—*DAVIS v. OCKHAM* (1650), Sty. 245; 82 E. R. 681.

694. Charge of having "caused death."—*ANON.* (1573), Dal. 89; 123 E. R. 297.

695. ———.]—*GASTRELL v. TOWNSEND* (1591), Cro. Eliz. 239; 78 E. R. 495.

696. ———.]—In this case here, the words [that pltf. was the cause of death of a child] are too general, there being no unjust cause showed of the death of the child; & so these words no ways scandalous unto the pltf., & so, by consequence not actionable (*WILLIAMS, J.*).—*MILER v. BUCKDON* (1612), 2 Bulst. 10; 80 E. R. 917.

*Annotation:—***Refd.** *Peake v. Oldham* (1775), 1 Cowp. 275.

697. ———.]—*REYNOR v. HALLET* (1626), Poph. 187; 79 E. R. 1281.

698. ———.]—*WARD v. REYNOLDS* (1714), Gilb. 243; 93 E. R. 317.

*Annotation:—***Consd.** *Peake v. Oldham* (1775), 1 Cowp. 275.

699. ———.]—*OLDHAM v. PEAKE*, No. 201, *ante*.

700. ———.]—**Improperly administering medicine.**—The words, "I think the present business ought to have the most rigid inquiry, for he (pltf.) murdered his wife; that is, he administered, improperly, medicines to her for a certain complaint, which was the cause of her death," are actionable, & if doubtful, the doubt is cured by the verdict.—*FORD v. PRIMROSE* (1824), 5 Dow. & Ry. K. B. 287; 3 L. J. O. S. K. B. 40.

(c) Perjury.

i. In General.

701. Charge of perjury.]—*SCOREIE v. —* (1615), 1 Roll. Rep. 227; 81 E. R. 450.

702. ———.]—*BOXE & MOUNSLOWE'S CASE* (1586), Godb. 107; 78 E. R. 66.

703. ———.]—*CORRET v. HILL* (1598), Cro. Eliz. 609; 78 E. R. 852.

*Annotations:—***Refd.** *Harvey v. French* (1832), 2 Tyr. 585; *Williams v. Stott* (1833), 3 Tyr. 688; *Hooper v. Truscott* (1836), 2 Scott, 672; *Barrett v. Long* (1851), 3 H. L. Cas. 395. **Mentd.** *R. v. Greepe* (1697), 2 Salk. 513.

704. ———.]—Action for these words: "Thou art thrice perjured in thy answer in Chancery to my bill" (innuendo a bill exhibited there by deft. against pltf., & an answer to that bill). Deft. demurred, because he alleged not any perjury in any particular—& without argument it was adjudged for pltf.—*POULTNEY v. WILKINSON* (1602), Cro. Eliz. 907; 78 E. R. 1129.

705. ———.]—*ANON.* (1610), 1 Bulst. 69; 80 E. R. 770.

706. ———.]—*MEFLYNE v. FARNEDEN* (1617), 3 Bulst. 283; 81 E. R. 239.

707. ———.]—"Thou wast perjured" is actionable; & if alleged to have been spoken *in præsenti*,

at the factory, & done away with it; & I can prove it." The factory was in the state of Maine; and the innuendo in the declaration stated the meaning of the words "done away with it" to be, that pltf. had destroyed the child's life:—*Held*: the words "done away with it" imputed a criminal offence, & were actionable *per se* without any innuendo.—*PORTER v. McMAHON* (1885), 25 N. B. R. 211.—**CAN.**

PART IV. SECT. 2, SUB-SECT. 2.— E. (e) i.

q. Charge of perjury—Before magistrates—Magistrates without jurisdiction.—In an action for defamation, in alleging that pltf. was guilty of perjury on the trial of a case before two justices of the peace, pltf. cannot recover if the justices had no jurisdiction in the case although the words were spoken in reference to the trial where

pltf. had given his testimony before the justices.—*M'ADAM v. WEAVER* (1843), 4 N. B. R. (2 Kerr) 176.—**CAN.**

r. ———.]—In an action for slander for stating that pltf. had sworn falsely, it appeared that the proceedings in which the alleged false swearing was done were before two justices, on an information for unlawfully killing cattle:—*Held*: this being

Sect. 2.—Statements actionable per se: Sub-sect. 2, E. (e) i., ii. & iii., (f) & (g).]

it shall be intended, after verdict, *in auditu complurimorum*.—*SMART v. EASDALE* (1630), Cro. Car. 199; 79 E. R. 775.

708. —.]—*HOGG v. VAUGHAN* (1646), Sty. 6; 82 E. R. 487.

709. —.]—*ORTON v. FULLER* (1662), 1 Lev. 65; 1 Keb. 293, 302; T. Raym. 51; 83 E. R. 299.

710. "Disproved in his oath."—*BROWNE v. BRINKLEY* (1595), Owen, 58; 74 E. R. 898.

711. "Swore a false oath."—To say that A. "swore a false oath," is actionable with a *colloquium* concerning the proof of a will before the bishop.—*HARTWELL v. COLE* (1672), 1 Freem. K. B. 55; 89 E. R. 43.

712. "Under a prosecution for perjury."—*ROBERTS v. CAMDEN*, No. 958, *post*.

ii. Charge of being Forsworn.

713. Must have reference to judicial proceedings.]—To say of another, "he is forsworn" is not actionable, unless it be added in a judicial proceeding. *Secus*, if it be said "he is perjured."—*STANHOPE v. BLITH* (1585), 4 Co. Rep. 15 a; 76 E. R. 891.

Annotation:—*Refd.* *Brook's Case* (1613), Godb. 241.

714. —.]—To say of another that "he was forsworn in the Ct. of Requests," imports perjury.—*BROOKE v. DOUGHTY* (1589), Cro. Eliz. 135; 78 E. R. 391.

Annotations:—*Refd.* *Venard v. Wotton* (1590), Cro. Eliz. 166; *Myan v. Okey* (1671), 1 Freem. K. B. 17.

715. —.]—Words actionable.—"Thou hast taken a false oath in a consistory ct.," import perjury.—*PLAKE v. HOWE* (1590), Cro. Eliz. 185; 78 E. R. 441.

716. —.]—*LEE v. SECOMBE* (1593), Cro. Eliz. 297; 78 E. R. 549.

717. —.]—Action for these words: "Thou art falsely forsworn in Bell-ct.," innuendo, a ct. baron held at Bell: & with this innuendo the action did lie, otherwise not (*per CUR.*).—*GREEN v. DANCY* (1593), Cro. Eliz. 297; 78 E. R. 549.

718. —.]—*CARTER'S CASE* (1593), Owen, 13; 74 E. R. 864.

719. —.]—*WOODROFF v. VAUGHAN* (1595), Cro. Eliz. 429; 78 E. R. 669; *sub nom.* *WOODLIFE v. VAUGHAN*, Moore, K. B. 365.

720. —.]—"Thou art forsworn" is slanderous, although the oath is not alleged.—*BANKS v. STACY* (1591), Cro. Eliz. 348; 78 E. R. 596.

721. —.]—There is a great difference betwixt the words "forsworn" & "perjured." For "forsworn" is where he swears against the truth in ordinary discourse; but *perjurium est quando jus alterius pervertitur*. . . . To say "he was forsworn in such a ct.," or betwixt such parties an action lies (*ANDERSON, J.*).—*ANON.* (1595), Cro. Eliz. 395; 78 E. R. 640.

722. —.]—*WILD v. COPEMAN* (1596), Moore, K. B. 404; 72 E. R. 657; *sub nom.* *WYLD v. COOKMAN*, Cro. Eliz. 492.

Annotation:—*Folld.* *Marshal v. Dean* (1599), Cro. Eliz. 720.

723. —.]—[The words] "Thou art a forsworn fellow" are not actionable, except by subsequent words it appears that the forswearing

would be perjury.—*BATE v. ROOKWOOD* (1597), Cro. Eliz. 572; 78 E. R. 817.

724. —.]—Action for these words: "Thou hast forsworn thyself at London, & there it appeareth upon record":—Upon demurrer it was ruled, that it well lay.—*HARRISON'S CASE* (1597), Cro. Eliz. 583; 78 E. R. 826.

725. —.]—*SHAW v. TOMPSON* (1598), Cro. Eliz. 609; 78 E. R. 851.

726. —.]—To accuse a man of having forsworn himself in a ct. leet is actionable.—*MARSHAL v. DEAN* (1599), Cro. Eliz. 720; 78 E. R. 954.

727. —.]—*WYSON v. FENTON* (1600), Cro. Eliz. 788; 78 E. R. . . .

728. —.]—Charging a man with being forsworn in an inferior ct. is not actionable.—*GORE v. MOORTON* (1602), Cro. Eliz. 905; 78 E. R. 1128; *sub nom.* *CORE v. MORTON*, Yelv. 28.

729. —.]—To say another is forsworn is not actionable, unless it appear to have been in a ct. of record.—*SKINNER v. TROBE* (1607), Cro. Jac. 190; 79 E. R. 166.

Annotations:—*Distd.* *Walmsley v. Russel* (1704), 6 Mod. Rep. 200. *Refd.* *Robodham v. Venleek* (1634), Cro. Car. 378.

730. —.]—To accuse another of being forsworn, & having taken a false oath judicially, is actionable.—*COLOME'S CASE* (1608), Cro. Jac. 204; 79 E. R. 178.

731. —.]—This rule is to be observed, as touching words which are actionable, that is to say, where the words spoken do tend to the infamy, discredit, or disgrace of the party, there the words shall be actionable (*WILLIAMS, J.*).—*SMALE v. HAMMON* (1610), 1 Bulst. 40; 80 E. R. 743.

Annotation:—*Dbtd.* *Holt v. Scholefield* (1706), 6 Term Rep 691.

732. —.]—If the words were, that he was forsworn *dando evidentiam ad exitum* this is good, & so if in a judicial ct. forsworn (*COKE, C.J.*).—*CROFORD v. BLISSE* (1613), 2 Bulst. 150; 80 E. R. 1024.

Annotation:—*Mentd.* *R. v. Griepe* (1697), 1 Ld. Raym. 256.

733. —.]—If one man say of another he was forsworn before the bishop of S., this is not actionable, but if one say of another, that he was forsworn before the bishop of S. upon examination by him by virtue of a commission issuing out of the Chancery, this is actionable (*HUTTON, J.*).—*KING v. BOWEN* (1621), Win. 2; Hut. 44; 124 E. R. 2.

Annotation:—*Refd.* *R. v. Greepe* (1697), 2 Salk. 513.

734. —.]—*KILVERT v. ROE* (1625), Benl. 155; 73 E. R. 1022.

735. —.]—(1) If one saith of another that he is forsworn, these words are not actionable, but if the words go further & saith in such a ct., then these words are actionable (*JONES, J.*).

(2) If one saith of another, that he is indicted, no action lieth for these words, but if he saith, that he was indicted & convicted, for these words an action well lieth (*JONES, J.*).—*GILBERT v. RODDE* (1625), 3 Bulst. 304; 81 E. R. 252.

736. —.]—In an action upon the case brought by K., for saying, "He is falsely forsworn before the justices of assize between A. & B." Adjudged that it lies.—*KEENE v. COX* (1628), Het. 119; 124 E. R. 390.

a mere trespass, the parties had no jurisdiction to administer an oath, & plff. should be nonsuited.—*GANONG v. . . .* (2)

711 f. "Swore a false oath."—Where a declaration in slander charged that

deft. had accused plff. of having taken a false oath, meaning thereby that he was guilty of wilful & corrupt perjury:—*Held*: sufficient, & no allegation of the oath having been made in a judicial proceeding was necessary. In such a case it is a question for the jury whether

such meaning existed, or was intended to be conveyed; & it is not necessary to show the actual existence of the suit or proceeding in which the oath was alleged to have been taken.—*MCDONALD v. MOORE* (1876), 26 Q. P.

737. —.]—JONES & BALLARD'S CASE (1632), Godb. 444; 78 E. R. 261.

738. —.]—In an action for these words, "You are forsworn," the omission of stating in what ct. the oath was taken is aided by a justification that the false oath was taken at sessions.—DRAKE v. CORDEROY (1632), Cro. Car. 288; W. Jo. 307; 79 E. R. 853.

Annotation:—Mentd. Hyde v. Watts (1843), 12 M. & W. 254.

739. —.]—To accuse another of having "forsworn himself in his answer to a bill in Chancery" is actionable, without alleging the materiality of the perjury; or that there were not other bills than the one stated.—SNOWDE v. — (1633), Cro. Car. 321; 79 E. R. 881.

740. —.]—[The words] "Thou art forsworn in a ct. of record" are actionable, without stating in what ct.; &, after reversal, the Ct. of Error will give judgment.—CEELY v. HOSKINS (1638), Cro. Car. 509; 79 E. R. 1039.

Annotation:—Mentd. Greene v. Cole (1670), 2 Saund. 252.

741. —.]—OSBORNE v. BROOKE (1646), Aleyn, 7; 82 E. R. 885.

742. —.]—BRUMRIG v. HANGER (1659), Hard. 151; 145 E. R. 426.

743. —.]—MARSHALL v. CHICKALL (1661), 1 Sid. 50; 82 E. R. 963.

744. —.]—STABLE v. SAYLE (1699), 2 Lut. 1292; 125 E. R. 715.

745. —.]—To say that pltf. "forsook himself," etc., is actionable, if the words appear to be spoken concerning a trial in a ct. of record.—MYAN v. OKEY (1671), Freem. K. B. 17; 89 E. R. 15; *sub nom.* MAYN v. OKEY, T. Jo. 5.

746. —.]—Saying of pltf. that he has forsworn himself, & that deft. had three evidences that would prove it, is not actionable without showing that the words were spoken with reference to some judicial proceeding in which pltf. had been sworn.—HOLT v. SCHOLEFIELD (1796), 6 Term Rep. 691; 101 E. R. 775.

Annotations:—Refd. Goldstein v. Foss (1827), 5 L. J. O. S. K. B. 84; Tomlinson v. Brittlebank (1833), 2 L. J. K. B. 105. Mentd. Leach v. Thomas (1837), 5 Dowl. 612.

747. —.]—H.'s oath ought not to be taken, for he has been a forsworn man, & I can bring people to prove it; & them that know him will not sit on a jury with him":—*Held*: to be not actionable, unless it appears that the words were spoken with reference to some previous conduct of pltf. as a jurymen, or to some oath taken by him in a judicial proceeding; &, for want of an averment that they were so spoken, judgment arrested.—HALL v. WEEDON (1826), 8 Dow. & Ry. K. B. 140; 4 L. J. O. S. K. B. 204.

iii. Subornation of Perjury.

748. Statement actionable.]—Words charging another with subornation of perjury are actionable.—PROWSE v. CARY (1588), Cro. Eliz. 93; 78 E. R. 351.

Annotation:—Expld. Walmsley v. Russel (1704), 6 Mod. Rep. 200.

749. —.]—GUERDON v. WINTERFLUD (1593), Cro. Eliz. 308; 78 E. R. 559.

750. —.]—CLERK v. PENKEVEN (1602), Cro. Eliz. 899; 78 E. R. 1122, Ex. Ch.

751. —.]—The words "drawn a man to perjury," shall, after verdict, be intended "suborned him to perjury."—DAG v. PENKEVEN (1602), Cro. Eliz. 906; 78 E. R. 1129, Ex. Ch.

752. —.]—It is actionable to accuse a man of having paid money to another as hire to forswear himself in Chancery; & it is not necessary to state that he did forswear himself.—ANON. (1633), Cro. Car. 337; 79 E. R. 895.

753. —.]—A declaration in slander, "A. got a witness to forswear himself in such a cause; you or he (innuendo pltf.) hired one B. to forswear himself"—& "Two dyers are gone off (innuendo become bkpt.), & for aught I know A. will be so too," is good.

The rule therefore that has now prevailed is, that words are to be taken in that sense that is most natural & obvious, & in which those to whom they are spoken will be sure to understand them (*per cur.*).—HARRISON v. THORNBOROUGH (1713), Gilb. 114; 10 Mod. Rep. 196; 93 E. R. 277.

(f) Receiving Stolen Goods.

754. Allegation of plaintiff's knowledge of theft.]—DAWES v. BOLTON (1602), Cro. Eliz. 888; 78 E. R. 1112; *sub nom.* DAWSON'S CASE, Yelv. 5.

755. —.]—Action for the case for words, you have bought a roan stolen horse, knowing him to be stolen. It was adjudged, that the words were actionable.—BRIGG'S CASE (1608), Godb. 157; 78 E. R. 95.

756. —.]—TABBE v. MATTHEW (1612), 1 Bulst. 109; 80 E. R. 806.

757. —.]—HINACRE v. LEMON (1646), Aleyn, 5; 82 E. R. 885.

758. —.]—GAMBLE v. DANA (1669), 1 Sid. 413; 82 E. R. 1188.

759. —.]—ALFRED v. FARLOW, No. 185, ante.

760. Statement that goods in plaintiff's possession.]—BACON v. — (1562), Dal. 42; 123 E. R. 258.

761. —.]—KING v. BAGG (1613), Cro. Jac. 331; Jenk. 339; 79 E. R. 283, Ex. Ch.; *reusg.* S. C. *sub nom.* KING & LONG v. LORKING (1612), 1 Bulst. 147.

Annotation:—Refd. Somers v. Howe (1693), Comb. 232.

762. —.]—At the trial of an action by A. against B. for slander, A. proved the words used to be, "You're a thief, & robbed C. of his money," while B. proved the words to be, "You've got C.'s brass." The fact was, C. had lost money, & it was thought A. had found it:—*Held*: the judge rightly told the jury they were to consider whether A.'s version or B.'s version was correct, &, if they believed A., they were to find a verdict for him; & he was not bound to tell them that the finding of C.'s money was no felony in itself, &, if they were of opinion that B. intended not to impute a felony, but merely the circumstances of C.'s money being found, then they were to find for deft.

It is not the sense of the person using the words that is the guide, but the sense which the bystanders put upon it (PARKE, B.).—ATKINSON v. NEWTON (1854), 24 L. T. O. S. 82; 3 W. R. 14.

(g) Robbery.

763. Charge of taking purse in highway.]—BALL v. ROANE (1594), Cro. Eliz. 342; 78 E. R. 591.

764. —.]—GOLD v. ROBINS (1608), Yelv. 145; 80 E. R. 98.

PART IV. SECT. 2, SUB-SECT. 2.—E. (f).

760 l. Statement that goods in plaintiff's possession.]—The declaration charged as a libel the following words "You have stolen goods in your house,

& you know it." Innuendo, that deft. knew the goods were in his house, & were stolen:—*Held*: not actionable, though spoken of & to an innkeeper.—PATERSON v. COLLINS (1853), 11 U. C. R. 63.—CAN.

PART IV. SECT. 2, SUB-SECT. 2.—E. (g).

t. Allegation of dismissal for robbery.]—HEA v. M'BEATH (1843), 4 N. B. R. (2 Kerr) 301.—CAN.

Sect. 2.—Statements actionable per se: Sub-sect. 2, E. (g), (h) & (i).]

765. ———.]—*STOWE v. HOLLAND* (1612), 1 Bulst. 112; 80 E. R. 808; *sub nom.* *HOLLAND v. STONER*, Cro. Jac. 315, Ex. Ch.

Annotation:—*Distd. Lawrance v. Woodward* (1632), Cro. Car. 277.

766. ———.]—To say that another “violently & by threats took a purse on the highway,” imports a charge that he took it “feloniously & by robbery.”—*LAWRANCE v. WOODWARD* (1632), Cro. Car. 277; 79 E. R. 842.

767. ———.]—*Scandalum magnatum* for saying I met my lord’s servant, who I know not, but my lord sent to take my purse.—*PETERBOROUGH (EARL) v. MORDANT* (1669), 1 Lev. 277; 2 Keb. 537, 559; 1 Sid. 434; 1 Vent. 59; 83 E. R. 405.

768. Charge of being “privy to robbery.”—*REDFREIN v. I. S.* (1601), Gouldsb. 137; 75 E. R. 1049.

769. “You are infected & smell of robbery.”—*REDFREIN v. I. S.* (1601), Gouldsb. 137; 75 E. R. 1049.

770. Assault with intent to rob.—To charge another with an assault with intent to rob is actionable, although the words import that no felony was in fact committed.—*LEWKNOR v. CRUCHLEY* (1628), Cro. Car. 140; W. Jo. 195; 79 E. R. 723.

Annotation:—*Refd.* *Mayne v. Digle* (1672), Freem. K. B. 46.

771. Promising robbery.—He would have A. rob the house of B., & he (innuendo A.) did rob him; actionable.—*FROUDE v. FROUDE* (1677), 2 Lev. 205; 83 E. R. 520; *sub nom.* *FROWDE v. FROWDE*, T. Jo. 84.

772. “You robbed me, for I found the thing you did it with.”—A declaration for the following words, alleged to have been spoken by deft.’s wife, of pltf.:—“You robbed me, for I found the thing you have done it with.”—*Held*: the words were actionable *per se*, without any *colloquium* or innuendo to explain the sense in which they were used.—*ROWCLIFFE v. EDMONDS* (1840), 7 M. & W. 12; 9 L. J. Ex. 278; 4 Jur. 684; 151 E. R. 658.

Annotation:—*Refd.* *Brown v. Thurlow* (1846), 16 M. & W. 36.

(h) Theft.

773. General charge of theft.—*RUSSELL’S CASE* (1537), 1 Dyer, 26 b; 73 E. R. 59.

774. ———.]—An action will lie for saying a man was a thief, & stole gold.—*BOSTON v. TATAM*, (1621), Cro. Jac. 623; 79 E. R. 536.

775. ———.]—*ATKINSON v. NEWTON*, No. 762, ante.

776. ———.]—*Petty larceny only.*—It has been recently adjudged that an action lies, though the charge be of petty larceny, for the discredit is not in the value, but in the taking of that with a felonious intent (*HOBART, C.J.*).—*WETHERLY v. WELLS* (1621), Win. 6; 124 E. R. 5.

777. ———.]—*CROMPTON v. PHILPOT* (1624), Win. 102; 124 E. R. 86.

778. ———.]—*“Of everything.”*—*MORGAN v. WILLIAMS* (1719), 1 Stra. 142; 93 E. R. 436.

Annotation:—*Refd.* *Burnett v. Allen* (1858), 4 Jur. N. S. 488.

779. ———.]—*Against husband of stealing wife’s goods—Husband & wife living together.*—In an action for slander the words complained of were

to the effect that pltf. robbed his wife of £75 before her removal to a lunatic asylum, & was anxious to get rid of her in order that he might take the remainder of her money:—*Held*: as such words did not impute to pltf. that he stole his wife’s money while living apart or when he was about to leave or desert her, they were not actionable, inasmuch as they did not, even under Married Women’s Property Act, 1882 (c. 75), impute an indictable offence.—*LEMON v. SIMMONS* (1888), 57 L. J. Q. B. 260; 36 W. R. 351; 4 T. L. R. 306.

Annotations:—*Mentd.* *R. v. James*, [1902] 1 K. B. 540; *R. v. Creamer*, [1919] 1 K. B. 564.

780. Theft of thing which may be part of freehold—Wood, trees, etc.—“Thou hast feloniously taken wood,” held actionable.—*ANON.* (1596), Cro. Eliz. 471; 78 E. R. 723.

781. ———.]—Wood is intended to be of that which is cut down, according to the ancient rule, *arbor dum crescit, lignum dum crescere nescit* (*per CUR.*).—*LO v. SANDERS* (1607), Cro. Jac. 166; 79 E. R. 145.

Annotations:—*N.F.* *Baker v. Pierce* (1703), 2 Ld. Raym. 959. *Refd.* *Alsop v. Taylor* (1666), 2 Keb. 261.

782. ———.]—An action upon the case brought for these words, “He is a thief, & stole a tree”: adjudged that the action would lie; for the later words do not extenuate the former: but, “Thou art a thief, for thou has robbed my orchard,” are not actionable.—*COLT & GILBERT’S CASE* (1613), Godb. 241; 78 E. R. 140; *sub nom.* *COOTE v. GILBERT*, Hob. 77.

Annotation:—*Refd.* *Clark v. Gilbert* (1620), Hob. 331.

783. ———.]—*WHITACRE v. HILLIDELL* (1647), Aleyn, 11; Sty. 27; 82 E. R. 888.

784. ———.]—*EDWARDS v. FALLOWES* (1649), Sty. 213; 82 E. R. 655.

785. ———.]—*Semble*:—to say of one “He is a thieving rogue, for he carried away boards & timber,” etc., is actionable.—*DORRELL v. GROVE* (1681), Freem. K. B. 279; 89 E. R. 200.

786. ———.]—To charge a man with stealing wood is actionable.—*BAKER v. PIERCE* (1703), 2 Ld. Raym. 959; 6 Mod. Rep. 23; Holt, K. B. 654; 2 Salk. 695; 92 E. R. 130.

787. ———.]—*Corn.*—An action lies for saying, “Thou art a thief, & hast stolen my corn”; & may be alleged to be spoken of pltf., *in praesentia*, etc., without saying *in auditu*, etc.—*KELLAN v. MANESBY* (1604), Cro. Jac. 39; 79 E. R. 32.

788. ———.]—*ANON.* (1616), Moore, K. B. 883; 72 E. R. 973.

789. ———.]—*SMITH v. WARD* (1623), Cro. Jac. 674; Benl. 137; 79 E. R. 583.

Annotation:—*Mentd.* *Gregory v. R.* (1848), 15 Q. B. 957.

790. ———.]—In an action upon the case for these words: “I dealt not so unkindly with you when you stole a stack of my corn”:—*Held*: the action lies.—*COOPER v. HAWKESWELL* (1675), 2 Mod. Rep. 58; 86 E. R. 939.

791. ———.]—*Lead from church.*—“Thou hast robbed the church, & stolen lead from it,” are actionable words.—*BENSON v. MORLEY* (1607), Cro. Jac. 153; 79 E. R. 134.

Annotations:—*Refd.* *Sybothorp’s Case* (1635), Cro. Car. 417; *Beavor v. Hides* (1766), 2 Wils. 300.

792. ———.]—*Orchard.*—*COLT & GILBERT’S CASE*, No. 782, ante.

793. ———.]—*Apples.*—*SMITH v. WARD* (1623), Cro. Jac. 674; Benl. 137; 79 E. R. 583.

Annotation:—*Mentd.* *Gregory v. R.* (1848), 15 Q. B. 957.

PART IV. SECT. 2, SUB-SECT. 2.—E. (h).

7781. General charge of theft.—*LEE v. RITCHIE* (1901), 6 F. (Cl. of

642; 41 Sc. L. R. 509; 12 S. L. T. 35.—*SCOT.*

a. ———.]—*Three years after offence.*—In an action for slander the evidence in support of one of the pleas of justifi-

fication of a charge of theft was very strong, sufficient to have warranted a conviction if pltf. had been on his trial. The charge, however, was made three years after the alleged offence,

794. — Turnips & grass.]—BYNION *v.* TROTTER (1650), Sty. 231; 82 E. R. 670.

795. — Bricks.]—The words "he is a thief, & has robbed me of my bricks":—*Held*: slanderous. Larceny Act, 1827 (c. 29), s. 6, having given a legal definition to (& thereby having removed all ambiguity of meaning from) the word "rob"; & "bricks" being, in the ordinary sense, considered as chattels, & severed from the freehold.—SLOWMAN *v.* DUTTON (1834), 10 Bing. 402; 4 Moo. & S. 174; 131 E. R. 960; *sub nom.* SLOMAN *v.* DUTTON, 3 L. J. C. P. 109.

Annotations:—*Refd.* Curtis *v.* Curtis (1834), 4 Moo. & S. 337; Day *v.* Robinson (1834), 1 Ad. & El. 554.

See, now, Larceny Act, 1916 (c. 50), ss. 1, 8.

796. Charge with words of abuse—Rogue & thief.]—For the word "thief" it [action] is maintainable, unless it be coupled with other words, which prove it to be no felony intended.—ROBINS *v.* FRANKS (1601), Cro. Eliz. 857; 78 E. R. 1083.

797. — Thievish knave or pirate.]—ADAMS'S CASE (1625), Lat. 47; 82 E. R. 268.

798. —.]—If one call another "thief," together with many other names of general abuse not imputing crime, & no other evidence being given to explain the sense in which the word "thief" was used, the jury find for pltf., the ct. will not set the verdict aside, for the action may be maintained for the word "thief."

The manner in which the words were pronounced & various other circumstances might explain the meaning of the word (MANSFIELD, C.J.).—PENFOLD *v.* WESTCOTE (1806), 2 Bos. & P. N. R. 335; 127 E. R. 656.

799. Pocket picking.]—DROMANT *v.* WESTOFER (1608), Yelv. 136; 80 E. R. 92.

800. —.]—"Pickpocket" not actionable.—WATTS *v.* RYMES (1671), 2 Lev. 51; 1 Vent. 213; 83 E. R. 445; *sub nom.* WATTS *v.* GRIMES, 3 Keb. 34.

801. Charge of "maintaining thieves."]—The fact which constitutes the gist of the action must be directly averred.—BALL *v.* BRIDGES (1600), Cro. Eliz. 746; 78 E. R. 978, Ex. Ch.

Annotation:—*Mentd.* Paine *v.* Partrich (1691), Carth. 191.

802. —.]—To say "Thou art a maintainer of thieves to steal my master's goods," is actionable.—BENNET *v.* TABRAM (1622), Cro. Jac. 629; 79 E. R. 541; *sub nom.* BENNET'S CASE, Palm. 278.

803. Charge of having been "arraigned" for theft.]—"He was arraigned for stealing hogs" are actionable words.—HALEY *v.* STANTON (1632), Cro. Car. 268; 79 E. R. 833; *sub nom.* HALEY *v.* STANTON, W. Jo. 299.

Annotation:—*Appld.* Carpenter *v.* Tarrant (1736), Lee temp. Hard. 339.

804. Charge of having been imprisoned for theft.]—Words, "He was put in the roundhouse for stealing ducks at C." are actionable.—BEAVOR *v.* HIDES (1706), 2 Wils. 300; 95 E. R. 822.

(i) Treason.

805. Harboursing & maintaining traitors.]—ANON. (1586), Gouldsb. 48; 75 E. R. 986.

806. Traitorous knave.]—For the words "rebellious knave," action lieth not; but "traitorous" being joined with it, action lieth (*per* CUR.).—WARD *v.* THORNE (1590), Cro. Eliz. 171; 78 E. R. 429.

Annotation:—*Refd.* Glanvill *v.* Gully (1663), 1 Sid. 132.

807. Enemy to the State.]—[The words] "Thou art an enemy to the State," are action-

able.—CHARTER *v.* PETER (1598), Cro. Eliz. 602; 78 E. R. 844.

Annotations:—*Mentd.* Meriton *v.* Stevens (1741), Willes, 271; Giles *v.* Grover (1832), 9 Bing. 128; Hughes *v.* Rees (1838), 8 L. J. Ex. 46.

808. "A rebel."]—To say "Thou art a rebel," is not actionable.—WELLS *v.* HEMMERSON (1598), Cro. Eliz. 621; 78 E. R. 862.

Annotation:—*Refd.* Glanvill *v.* Gully (1663), 1 Sid. 132.

809. —.]—"Thou art a rebel, & all that keep thee company," are actionable words.—REDSTON *v.* ELIOT (1598), Cro. Eliz. 638; 78 E. R. 878.

810. —.]—[The words] "Thou art a rebel," are not actionable.—FOUNTAIN *v.* ROGERS (1602), Cro. Eliz. 878; 78 E. R. 1103.

811. —.]—GLANVILL *v.* GULLY (1663), 1 Sid. 132; 82 E. R. 1014.

812. "Not a true subject."]—WALDEGRAVE *v.* AGAS (1590), Cro. Eliz. 191; 78 E. R. 447; *sub nom.* WALGRAVE & AGUR'S CASE, 1 Leon. 335.

Annotations:—*Expld. & Distd.* Smith *v.* Turnor (1608), Cro. Jac. 202. *Consd.* Lewes *v.* Walter (1616), 3 Bulst. 225. *Refd.* Hitcham *v.* Brooks (1625), Win. 123; Clarges *v.* Rowe (1681), Freem. K. B. 280; How *v.* Priune (1702), 2 Ld. Raym. 812.

813. —.]—To say that a man is not a true subject, does not import a charge sufficiently certain to support an action.—SMITH *v.* TURNOR (1608), Cro. Jac. 202; Yelv. 104; 79 E. R. 176.

Annotations:—*Refd.* Townsend *v.* Hughes (1676), Freem. K. B. 222; Clarges *v.* Rowe (1681), Freem. K. B. 280; How *v.* Priune (1702), 2 Ld. Raym. 812.

814. Accusation of speaking words of treason.]—An action upon the case was brought for these words, viz. "Thou hast spoken words that are treason, & I will hang thee for them":—*Held*: the words were actionable.—BLANCHFLOWER *v.* ATWOOD (1607), Yelv. 107; 80 E. R. 73; *sub nom.* ANON., Godb. 153.

Annotations:—*Consd.* Berisford *v.* Press (1611), Cro. Jac. 275. *Refd.* Hitcham *v.* Brooks (1625), Win. 123.

815. —.]—To accuse a person of having spoken treason is slanderous & actionable.—BERISFORD *v.* PRESS (1611), Cro. Jac. 275; Yelv. 197; 79 E. R. 236; *sub nom.* BEREFOORD *v.* PRESSE, 1 Bulst. 147.

816. —.]—Slander, in saying "that L. did say that there is no prince in England":—*Held*: actionable, it being averred that L. never did say so.—LEWIS *v.* WALTER (1617), Cro. Jac. 413; 79 E. R. 352; *sub nom.* LEWES *v.* WALTER, 3 Bulst. 225; 1 Roll. Rep. 444.

817. —.]—FRY *v.* CARNE (1724), 8 Mod. Rep. 283; 88 E. R. 201.

818. "Traitor."]—SMITH *v.* WHITBROOK (1616), J. Bridg. 59; 123 E. R. 1199.

819. —.]—It is actionable to call another traitor (DODDERIDGE, J.).—SMITH *v.* CRASHAW (1625), Benl. 152; 2 Bulst. 271; Cro. Car. 15; Lat. 79; Palm. 315; 2 Roll. Rep. 258; W. Jo. 93; 73 E. R. 1019.

Annotations:—*Refd.* Savill *v.* Roberts (1698), 12 Mod. Rep. 208; Ashby *v.* White (1703), 2 Ld. Raym. 938. *Mentd.* Barnardiston *v.* Soame (1674), 6 State Tr. 1063; R. *v.* Sudbury (1698), 1 Ld. Raym. 484; Jones *v.* Gwynn (1712), 10 Mod. Rep. 214; Parker *v.* Langly (1712), 10 Mod. Rep. 209.

820. "Committed treason beyond the seas."]—"Thou hast committed treason beyond the seas" are actionable words.—LEWIS *v.* COKE (1617), Cro. Jac. 424; 79 E. R. 362.

821. Brought the King to death.]—LEWES *v.* ROBERTS (1661), Hard. 203; 145 E. R. 453.

822. "Seen in rebellion."]—DALTON *v.* SADD (1668), 1 Sid. 381; 82 E. R. 1169.

for which there had been no prosecution, & deft. had no special interest in the matter. The jury having found

for pltf., & \$150 damages, the ct. refused to interfere.—EDGAR *v.* NEWELL (1865), 24 U. C. R. 215.—CAN.

*b. Charge with words of added.]—*HUNTER *v.* HUNTER (1865), 25 U. C. R. 145.—CAN.

Sect. 2.—Statements actionable per se: Sub-sect. 2, E. (i) & (j); sub-sects. 3 & 4. Sects. 3 & 4: Sub-sect. 1.]

823. A disaffected person.]—He is a Presbyterian, & designs & practises against the King & his interest:—*Held*: not actionable.—**PAINE v. VERDAIN** (1672), 1 Freem. K. B. 31; 89 E. R. 25; sub nom. **PAYN v. VERDON**, T. Jo. 23.

824. —.]—**DUVALL v. PRICE** (1694), Show. Parl. Cas. 12; 1 E. R. 8, II. L.

Annotations:—**Reid**. **Onslow v. Horne** (1771), 2 Wm. Bl. 750. **Mentd**. **Norfolk Earldom** (1906), 23 T. L. R. 114.

(j) *Miscellaneous Crimes.*

825. Attempt to procure abortion.]—**READING'S CASE** (circa 1629), Het. 18; 124 E. R. 306.

826. Action endangering life.]—Words imputing an action which endangers life are actionable.—**PASSIE v. MONDFORD** (1600), Cro. Eliz. 747; 78 E. R. 979.

827. Piracy.]—**ADAMS'S CASE** (1625), Lat. 47; 82 E. R. 268.

828. —.]—**ANON.** (1586), Godb. 89; 78 E. R. 55.

829. Extortion—Plaintiff not public official.]—**LYNSEIS' CASE** (1584), Moore, K. B. 182; 72 E. R. 518.

830. Coining.]—**BLAKE v. STANLEY** (1598), Cro. Eliz. 629; 78 E. R. 809.

831. —.]—To say that pltf. was in gaol for coining is malicious, & actionable.—**GAINFORD v. TUKE** (1619), Cro. Jac. 536; 79 E. R. 460.

832. Rape.]—**BRIDGES & MILL'S CASE** (1623), Godb. 287; 78 E. R. 168.

833. —.]—**LENTALL'S CASE** (1630), Litt. 337; 124 E. R. 274.

834. Unnatural offence.]—**POTURITE v. BARREL** (1664), 1 Sid. 220; 82 E. R. 1068.

835. — Between man & woman.]—*Qu.*: whether words imputing an unnatural offence between a man & woman supports an innuendo of felony.—*C—* **v. LINDSELL** (1847), 9 L. T. O. S. 24; 11 J. P. 352.

836. Sacrilege.]—Words charging pltf. with sacrilege:—*Held*: not actionable.—**STUKELY'S (LADY) CASE** (1672), Freem. K. B. 67; 89 E. R. 51.

837. Heresy.]—Words, charging heresy, not actionable, without special damage.—**DUDLEY v. SPENCER** (1678), 1 Freem. K. B. 277; 89 E. R. 198.

838. Bribery at election.]—If, during the election of a member of Parliament, a voter, in the presence of the candidate, hold up money in his hand, & say, "These guineas are A.'s (the candidate); they were given to me to vote for him; he has bought my vote; & he shall have it"; the words are actionable.—**BENDISH v. LINDSEY** (1708), 11 Mod. Rep. 193; 88 E. R. 983.

PART IV. SECT. 2, SUB-SECT. 2.—
E. (i).

839 i. Arson.]—Words spoken imputing the crime of arson, where the burning of the building of which pltf. was accused would not have constituted such crime, are not actionable.—**MENAB v. MAGRATH** (1837), 5 O. S. 516.—**CAN.**

c. Abortion.]—The words alleged in the declaration were, "it's my soul's opinion that nothing else kept that girl in the house last winter but taking medicine to banish the young baker." Innuendo, that pltf. took medicine to procure abortion:—*Held*: the declaration charged a good cause of action.—**MILLER v. HOUGHTON** (1853), 10 U. C. R. 348.—**CAN.**

d. Blackmailing.]—The word "blackmailing" is libellous *per se*, requiring no innuendo, & it does not lie upon pltf. to prove the falsity of the

charge; for the purposes of the trial it is presumed in his favour, & the onus is on deft. to prove it to be true, if justification be pleaded.—**MACDONALD v. MAIL PRINTING CO.** (1901), 21 C. L. T. 495; 2 O. L. R. 278.—**CAN.**

e. Malicious injury to property.]—In an action of slander:—*Held*: any defamatory charge referable to wrongdoing under R. S. C., c. 168, ss. 26, 58, relating to malicious injury to property, is actionable, without proof of special damage.—**ROUTLEY v. HARRIS** (1889), 18 O. R. 405.—**CAN.**

f. Offence against Fishery Acts.]—To say of a person that he drew a river at night, thereby imputing an offence against the Fishery Acts, is not an imputation of such an offence as is sufficient to make the words actionable *se.*—**M'CABE v. FOOT** (1866), 15 T. 115.—**IR.**

839. Arson.]—Declaration stated, that deft. intending to cause it to be believed that pltf. had been guilty of wilfully setting his house & premises on fire, said of pltf., that he had set fire to his own premises, meaning that he had been guilty of wilfully setting fire to the premises, which, while in his occupation, had been destroyed by fire: After verdict for pltf., the judgment was arrested, on the ground that wilfully setting his own premises on fire was not, except under special circumstances, a crime punishable by law; & the ct. would presume only such circumstances as it was essentially necessary for pltf. to have proved in support of his declaration.—**SWEETAPPLE v. JESSE** (1833), 5 B. & Ad. 27; 2 Nev. & M. K. B. 36; 2 L. J. K. B. 181; 110 E. R. 702.

Annotations:—**Reid**. **Rigby v. Heron** (1837), 1 Jur. 558; **Evans v. Gwyn** (1844), 5 Q. B. 844; **Barnett v. Allen** (1858), 3 H. & N. 376.

840. Bigamy.]—**HEMING v. POWER**, No. 561, *ante*.

841. Bringing blackmailing action.]—**MARKS v. SAMUEL**, No. 533, *ante*.

SUB-SECT. 3.—IMPUTATION OF DISEASE.

842. Charge of having disease.]—**LYM v. HOCKLEY** (1667), 1 Sid. 324; 82 E. R. 1134.

843. —.]—**VILLERS v. MONSLEY**, No. 9, *ante*.

844. — Venereal disease.]—**BOXE'S CASE** (1582), Cro. Eliz. 2; 78 E. R. 268.

845. —.]—(1) In actions for slander two things are requisite: that the person scandalised be certain & that the scandal be apparent from the words themselves. The office of an innuendo is to designate a person who has been named in certain before, & in effect it stands in place of *prædictus*; but it cannot make a person certain who was before uncertain. Nor can it alter or extend the meaning of the words themselves.

(2) "Hang him, hang him, he is full of the pox; I marvel you will eat or drink with him. I will prove that he is full of the pox," innuendo the French pox:—*Held*: this innuendo did not do its proper office; for it endeavoured to extend the general words "the pox" to the French pox, & by imagining an intent which was not apparent by any precedent words to which the innuendo should refer; & the words themselves should be taken *in meliori sensu*.—**JAMES v. RUTLECH** (1599), 4 Co. Rep. 17 a; Moore, K. B. 573; 76 E. R. 900.

Annotations:—*As to* (1) **Reid**. **R. v. Gripe** (1697), 1 Ld. Raym. 256; **Holt v. Scholefield** (1796), 6 Term Rep. 691; **Gregory v. R.** (1850), 15 Q. B. 957. *Generally*, **Reid**. **Blackham v. Pugh** (1846), 15 L. J. C. P. 290. **Mentd**. **Attree v. Scutt** (1805), 2 Smith, K. B. 449.

846. —.]—Action for these words: "Thou art rotted with the pox":—*Held*: the

g. Incest.]—*Held*: words imputing the crime of incest to a paid preacher or lay exhorter of the Methodist Church, are of themselves actionable, without special damage, on the ground that the tendency of the slander is to occasion the loss of pltf.'s employment or office, even though it was not spoken with reference to the office.—**STARR v. GARDNER** (1842), 6 O. S. 512.—**CAN.**

PART IV. SECT. 2, SUB-SECT. 3.

844 i. Charge of having disease—Venereal disease.]—In slander, for that deft. used language importing that pltf. was suffering from venereal disease, variously described by deft. to various persons by the use of vulgar English words:—*Held*: the imputation was actionable without special damage.—**FRENCH v. SMITH**, [1923] 3 D. L. R. 902; 53 O. L. R. 28.—**CAN.**

words were actionable.—**DAVIES v. TAYLOR** (1599), Cro. Eliz. 648 ; 78 E. R. 887.

Annotation :—**Folld. Miller's Case** (1617), Cro. Jac. 430.

847. ———.]—**MILNER v. REEVES** (1617), 1 Roll. Abr. 43, pl. 3.

848. ———.]—**CRITTALL v. HORNER** (1618), Hob. 219 ; 80 E. R. 366.

849. ———.]—**SHREWSBURY'S (COUNTESS) CASE** (1625), Benl. 155 ; 73 E. R. 1021.

850. ———.]—**SMITH v. HOBSON** (1648), Sty. 112 ; 82 E. R. 571.

851. ———.]—**ELYOTT v. BLAGUE** (1651), Sty. 283 ; 82 E. R. 713.

852. ———.]—**MARSHALL v. CHICKALL** (1661), 1 Sid. 50 ; 82 E. R. 963.

853. ———.]—Prohibition granted to the Spiritual Ct. to stay a suit there for calling a woman "a pocky whore."—**WHITFIELD v. POWEL** (1698), 12 Mod. Rep. 248 ; 88 E. R. 1297.

854. ———.]—Saying a person has the French pox is actionable.—**GRIMES v. LOVEL** (1699), 1 Ld. Raym. 446 ; 12 Mod. Rep. 242 ; Holt, K. B. 593 ; 91 E. R. 1197.

Annotation :—**Refd. Evans v. Gwyn** (1844), 8 Jur. 643.

855. ———.]—**CLIFTON v. WELLS** (1702), 1 Ld. Raym. 710 ; 12 Mod. Rep. 634 ; 91 E. R. 1373.

856. ———.]—To say of a person that he has the venereal disease, is actionable *per se*.—**BLOODWORTH v. GRAY** (1844), 7 Man. & G. 334 ; 8 Scott, N. R. 9 ; 3 L. T. O. S. 56 ; 135 E. R. 140.

857. ———.]—**Leprosy**.—"Thou art a leprous knave," are actionable words.—**TAYLOR v. PERKINS** (1607), Cro. Jac. 144 ; 79 E. R. 126.

Annotation :—**Folld. Miller's Case** (1617), Cro. Jac. 430.

858. Charge of having had disease.]—These words spoken of a woman, "I have kept her common these seven years ; she hath given me the bad disorder, & three or four other gentlemen," are not actionable, because they may refer to a time past ; & no prohibition will be granted to a spiritual ct., in which a sentence has been pronounced on a libel for this charge. Charging a person with having had a contagious disorder is not actionable, because it is no reason why the company of a person so charged should be avoided.—**CARSLAKE v. MAPLEDORAM** (1788), 2 Term Rep. 473 ; 100 E. R. 255.

Annotation :—**Refd. Ex p. Evans** (1813), 7 Jur. 420.

PART IV. SECT. 2, SUB-SECT. 4.

h. General rule.]—In an action for damages for words spoken imputing unchastity to a woman :—**Held** : the words in question were such as to constitute actionable slander, & although there was no actual proof of damage, it is a case where substantial punitive damages should be allowed.—**MITCHELL v. CLEMENT** (Alta.), [1919] 1 W. W. R. 183.—**CAN.**

k. Charge during judicial proceedings.]—In an action for using words of pltf. imputing unchastity, it appeared that the words in question were used while deft. was conducting a prosecution before a magistrate against pltf. for an assault :—**Held** : the occasion was privileged.—**HENDERSON v. SCOTT** (1892), 24 N. S. R. (12 R. & G.) 232.—**CAN.**

l. Woman not party.]—In judicial proceedings, a rash & unnecessary charge of adultery against a woman not a party to the process :—**Held** : defamation.—**M'VANE v. M'ALPINE** (1805), Hume, 625.—**SCOT.**

m. Imputation by slang.]—In slander, for imputing unchastity to pltf., a married woman, it was proved at the trial that the language set out in the statement of claim was used by

deft. concerning pltf., but no special damages was proved :—**Held** : although one of the vulgar words used by deft. was not to be found in English dictionaries, & the other not in the sense of sexual intercourse, yet the words were commonly used with a defamatory meaning & were so understood by those to whom they were spoken. Pltf. was entitled to succeed without proof of special damage.—**FRENCH v. SMITH**, [1923] 3 D. L. R. 904 ; (1922) 53 O. L. R. 31.—**CAN.**

n. Advertisement in newspaper—"Wet nurse wanted immediately."—**Within five months of marriage.**]—**WOOD v. EDINBURGH EVENING NEWS, LTD.**, [1910] S. C. 895 ; 47 Sc. L. R. 786 ; 2 S. L. T. 93.—**SCOT.**

o. Allegation that unmarried woman married & mother of son.]—Deft. knowing that pltf. passed as an unmarried woman, stated to several persons who also believed her to be unmarried, that K., who lived in the same house as pltf., was her son by one M. & that she was married to him :—**Held** : the statement, if false, was defamatory.—**K. v. T.** (1903), 21 S. C. 177.—**S. AF.**

p. Meaning of expression used.]—In an action of defamation for calling

859. Venereal disease.]—Action for these words : "Thou wert laid of the French pox" :—**Held** : actionable.—**AUSTIN v. WHITE** (1591), Cro. Eliz. 214 ; 78 E. R. 470.

Annotations :—**Dbtd. Carslake v. Mapledoram** (1788), 2 Term Rep. 473. **Mentd. Gwynne v. Burnell** (1835), 4 L. J. Ex. 340.

860. ———.]—If one should say of another that he was laid of the pox, these words are actionable, & it shall be intended to be the French pox (**FENNER, J.**).—**STOWE v. HOLLAND** (1612), as reported in 1 Bulst. 112 ; 80 E. R. 808, Ex. Ch.

Annotation :—**Mentd. Lawrance v. Woodward** (1632), Cro. Car. 277.

861. ———.]—To charge a woman with having had the pox is actionable.—**MILLER'S CASE** (1617), Cro. Jac. 430 ; 79 E. R. 368.

862. ———.]—**DUTTON v. EATON** (1647), Aleyn, 30 ; 82 E. R. 899.

863. ———.]—**HOBSON v. HUDSON** (1650), Sty. 219 ; 82 E. R. 660.

864. ———.]—**MARSHALL v. CHICKALL** (1661), 1 Sid. 50 ; 82 E. R. 963.

865. ———.]—Not actionable to say A. has had the pox.—**TAYLOR v. HALL** (1742), 2 Stra. 1189 ; 93 E. R. 1118.

866. ———.]—**CARSLAKE v. MAPLEDORAM**, No. 858, *ante*.

SUB-SECT. 4.—IMPUTATION OF UNCHASTITY IN FEMALE.

See, now, Slander of Women Act, 1891 (c. 51).

SECT. 3.—STATEMENTS ACTIONABLE ON PROOF OF SPECIAL DAMAGE.

See Part VIII., Sect. 4, post.

SECT. 4.—MEANING OF THE STATEMENT.

SUB-SECT. 1.—IN GENERAL.

867. Sense reasonably understood by hearers.]—**FLEETWOOD v. CURLE**, No. 451, *ante*.

a woman a whore, it is sufficient to aver in the declaration that deft. intended to impute unchastity.—**MARTINDALE v. MURPHY** (1835), 2 N. B. R. (Ber.) 161.—**CAN.**

PART IV. SECT. 4, SUB-SECT. 1.

867 i. Sense reasonably understood by hearers.]—The use of words imputing an indictable offence is actionable or not according to the sense in which they may be fairly understood by bystanders not acquainted with the matter to which they relate.—**YOUNG v. SLOAN** (1852), 2 C. P. 284.—**CAN.**

867 ii. ———.]—In an action for slander, if the words used by deft. are capable of being reasonably understood in a slanderous sense, it should be left to the jury to find whether or not they were so used.—**CAMERON v. OVEREND** (1905), 15 Man. L. R. 408.—**CAN.**

867 iii. ———.]—**C. v. D.**, [1925] 1 D. L. R. 734 ; 43 Can. Crim. Cas. 235 56 O. L. R. 209, 506.—**CAN.**

867 iv. ———.]—**INGLIS v. INGLIS** (1866), 4 Macph. (Ct. of Sess.) 491 ; 38 Sc. Jur. 227.—**SCOT.**

867 v. ———.]—**HUNTER v. FERGUSON & CO.** (1906), 8 F. (Ct. of Sess.) 574.—**SCOT.**

Sect. 4.—Meaning of the statement: Sub-sects. 1, 2 & 3.]

868. — Words used ironically.] — R. v. BROWNE (1706), Holt, K. B. 425; 11 Mod. Rep. 86; 90 E. R. 1134.

*Annotation:—*Reid. *Boydell v. Jones* (1839), 7 Dowl. 210.

869. —.]—HARRISON v. THORNBOROUGH, No. 753, *ante*.

870. —.]—Pltf. & deft. being present in a public-house where there had been a raffle, deft. said "I am surprised at R. allowing a blackleg in this room." A witness being asked what he understood by "blackleg" said, "a person in the habit of cheating at cards." The question was objected to, but allowed. The judge told the jury that if pltf. meant to charge deft. with being a gambler simply the action would not lie, but if he meant to impute that he was a cheating gambler they would find for pltf.:—*Held*: (1) it is not actionable without special damage to call a man a blackleg, because it does not necessarily mean a cheating gambler. (2) the evidence as to the meaning of the word "blackleg" was not admissible.

In considering questions of this kind we have to ascertain not exactly the sense in which words are understood by the hearers but in what sense they would be reasonably understood (BRAMWELL, B.).—BARNETT v. ALLEN (1858), 3 H. & N. 376; 27 L. J. Ex. 412; 31 L. T. O. S. 88, 217; 6 W. R. 648; 157 E. R. 516; *sub nom.* BURNETT v. ALLEN, 4 Jur. N. S. 488.

Annotation:—Generally, Mentd. Hills v. London Gas Light Co. (1860), 5 H. & N. 312.

871. —.]—CAPITAL & COUNTIES BANK v. HENTY, No. 121, *ante*.

872. —.]—(1) In an action for damage to a business caused by malicious falsehoods where the words are not defamatory nor actionable *per se*, pltf. must prove actual loss of customers to whom the words were spoken, & cannot as a rule give evidence of a general decline of business.

Qu.: whether on proof of actual loss the jury might award damages in excess of such actual

(2) Treating the action as one of slander he did not think it would be enough to prove that the words rendered the pltf. obnoxious to a limited class like the bakers of B., it should be proved that the words produced a bad impression on the minds of average reasonable men (FARWELL, L.J.).—LEETHAM v. RANK (1912), 57 Sol. Jo. 111, C. A.

Annotation:—As to (2) Consd. Myroft v. Sleight (1921), 90 L. J. K. B. 883.

873. —.]—MYROFT v. SLEIGHT, No. 346, *ante*.

874. — Regard had to known opinions.]—On the issue whether a document is libellous, regard must be had to the known opinions of those to whom it is addressed.—R. v. MALATESTA (1912), 7 Cr. App. Rep. 273, C. C. A.

875. Words must be capable of defamatory meaning.]—BEAMISH v. DAIRY SUPPLY CO., LTD. (1897), 13 T. L. R. 484, C. A.

876. —.]—NEVILL v. FINE ART & GENERAL INSURANCE CO., No. 1010, *post*.

877. — Not decided on interlocutory application.]—On an application to strike out a statement of claim in a libel action on the ground that it discloses no reasonable cause of action, the ct.

will not strike it out on the ground that the words are incapable of a defamatory meaning, but will leave the question whether they are capable of such a meaning to be dealt with by the judge at the trial.—MOORE v. LAWSON (1915), 31 T. L. R. 418, C. A.

SUB-SECT. 2.—WORDS CONSTRUED IN ORDINARY SENSE.

878. General rule.]—In slander, words shall be construed according to their common acceptation.—JEFFRYES v. PAYHEM (1638), Cro. Car. 510; 79 E. R. 1040.

879. —.]—ASTON v. BLAGRAVE (1724), Fortes. Rep. 206; 2 Ld. Raym. 1369; 1 Stra. 617; 92 E. R. 820; *sub nom.* ASHTON v. BLAGRAVE, 8 Mod. Rep. 270.

Reid. Kent v. Pocock (1741), 2 Stra. 1168; *Onslow v. Horne* (1771), 2 Wm. Bl. 750.

880. —.]—Words are to be construed by the ct. as they are generally understood.—GARDINER v. ATWATER (1756), Say. 265; 96 E. R. 875.

881. —.]—WOOLNOTH v. MEADOWS, No. 608, *ante*.

882. —.]—ROBERTS v. CAMDEN, No. 958, *post*.

883. Unless special circumstances proved.]—(1) In an action for words spoken or written, the ordinary sense of those words is to be taken as the meaning of the speaker or writer, unless something be shown to have taken place which may give a peculiar character to the expressions used. (2) In the absence of any such evidence, a witness cannot be asked the question, "What did you understand by the words?" The proper course to be adopted is first to lay the foundation by giving such evidence, & then the question becomes admissible.—DAINES & BRADDOCK v. HARTLEY (1848), 3 Exch. 200; 18 L. J. Ex. 81; 12 Jur. 1093; 154 E. R. 815; *sub nom.* DANES v.

t. r. Allen (1858), 3 H. & N. 376. *Consd. Simmons v. Mitchell* (1880), 6 App. Cas. 156.

884. —.]—CAPITAL & COUNTIES BANK v. HENTY, No. 121, *ante*.

885. —.]—Pltfs. were dealers in motor cars. Deft. assocn. was a trade union certified as such under Trade Union Act, 1913 (c. 30), s. 2 (3), & other defts. were respectively the chairman & members of the council of the assocn. The assocn. consisted of manufacturers of motor vehicles & motor goods, & the manufacturers fixed certain prices for their goods, above or below which they deemed it undesirable that their goods should be sold. In order to enforce this object, the bye-laws of the assocn. provided that on proof to the satisfaction of the council that any person has offered or advertised or sold any proprietary price-maintained article at a price above or below the price fixed in the protected list, the council might place the name of that person on a list called the "stop list," & give notice thereof to all members of the assocn., with an exception in the case of contracts existing at the date of admission of the proprietor to membership; & the council might

875 i. Words must be capable of defamatory meaning.]—McDOUALL v. GUTHRIE (1853), 1 W. R. 535.—SCOT.

(1883), 10 R. (Ct. of Sess.) 867; 20 Sc. L. R. 580.—SCOT.

875 iii. —.]—CAMPBELL v. RITCHIE

& Co., HAY v. RITCHIE & Co., [1907] S. C. 1097; 44 Sc. L. R. 766; 15 S. L. T. 165.—SCOT.

875 iv. —.]—BALLANTYNE & SON v. YOUNG, [1913] E. D. L. 538.—S. AF.

PART IV. SECT. 4, SUB-SECT. 2.

878 i. General rule.]—On demurrer

to a declaration in libel, the ct. will not construe the words complained of *mitiori sensu*, but will see if there be anything which by reasonable intentment conveys an imputation.—MAWK v. PIGOTT (1869), 1 R. 4 C. L. 54.—IR.

also place on the stop list the name of any person who should supply proprietary price-maintained articles to, or have any trade relations in regard to those articles with, any person whose name was on the stop list. The bye-laws further provided that no member of the assocn. should supply any proprietary price-maintained article to, or have any trade relations in regard thereto with, any person whose name was on the stop list. Pltfs., who were not members of the assocn., on behalf of a customer advertised for sale a new motor-car, which was being manufactured by a member of the assocn. & was to be delivered shortly, at a price exceeding the price fixed by the manufacturer. The council of the assocn., after hearing pltfs., decided to place their name on the stop list, & published the stop list with pltfs.' name, among others, on it in the trade journals. Pltfs. thereupon brought an action for an injunction to restrain defts. from publishing pltfs.' name in the stop list, or from publishing any libel of pltfs. injuriously affecting them in their business. The libel complained of was the publication of the stop list, which stated that "In pursuance of its policy of conserving the fixed retail prices scheduled in its protected lists, the Motor Trade Assocn. issues the subjoined stop list under power of its bye-laws. . . . Until further notice the following parties are not to be supplied directly or indirectly with any of the articles on the protected lists of this assocn." Then followed the names & addresses:—*Held*: as to the alleged libel, in the absence of evidence that the words would be understood in a meaning other than their ordinary meaning, they were not capable of a defamatory meaning.—*WARE & DE FREVILLE, LTD. v. MOTOR TRADE ASSOCN.*, [1921] 3 K. B. 40; 90 L. J. K. B. 949; 125 L. T. 265; 37 T. L. R. 213; *sub nom. WAKE & DE FREVILLE, LTD. v. MOTOR TRADE ASSOCN.*, 65 Sol. Jo. 239, C. A. *Annotation*:—*Mentd.* *Sorrell v. Smith*, [1925] A. C. 700.

SUB-SECT. 3.—STATEMENT CONSIDERED WITH CONTEXT.

886. General rule.—In *scandalum magnatum* for saying "You like not of me since you like those that maintain sedition against the Queen's proceedings," deft. justified by showing the occasion of speaking the words, & that pltf. encouraging men to preach against the Common Prayer, he only meant that he liked of those who maintained sedition *innuendo seditiosam istam doctrinam* against the Queen's proceedings:—*Held*: this was a sufficient extenuation of the words.—*CROMWELL'S (LORD) CASE* (1578), 4 Co. Rep. 12 b; 76 E. R. 877.

Annotations:—*Refd.* *Birchley's Case* (1585), 4 Co. Rep. 16 a; *Davis v. Gardiner* (1593), 4 Co. Rep. 16 b; *Brittidge's Case* (1602), 4 Co. Rep. 18 b; *Frost v. Eyre* (1616), 3 Bulst. 265; *Wright v. Gerrard* (1618), Hob. 306; *Wheeler & Appleton's Case* (1623), Godb. 339; *Say & Seal v. Stephens* (1628), Cro. Car. 135; *Barnardiston v. Soame* (1674), 6 State Tr. 1063; *Townsend v. Hughes* (1676), Freem. K. B. 222; *How v. Prin* (1702), 7 Mod. Rep. 107; *Edsall v. Russell* (1812), 4 Man. & G. 1090; *Bremridge v. Latimer* (1864), 4 New Rep. 285. *Mentd.* *Traverse v. Daws* (1673), Freem. K. B. 324; *Shaftsbury v. Digby* (1676), Freem. K. B. 429; *Oldroyd v. Crampton* (1837), 7 L. J. C. P. 57.

887. —.]—*SHREWSBURY (EARL) v. STANHOP* (1594), Poph. 66; 79 E. R. 1181.

PART IV. SECT. 4, SUB-SECT. 3.

886 i. General rule.—Deft. said of a married woman to her husband that C. speaks very lightly of her:—*Held*: these words were defamatory, having

regard to the whole conversation in which they were spoken.—*LAMB v. WEST* (1894), 15 N. S. W. L. R. 120; 10 N. S. W. W. N. 209.—*AUS.*

886 ii. —.]—*KIMPTON v. RHODESIAN NEWSPAPERS, LTD.*, [1924] App.

888. —.]—In slander, the meaning of equivocal words may be ascertained by the import of their context.—*BROOK v. WISE* (1602), Cro. Eliz. 878; 78 E. R. 1103.

889. —.]—Slanderous words shall be expounded by their context.—*ROBINS v. HILDREDON* (1605), Cro. Jac. 65; 79 E. R. 55.

Annotations:—*Refd.* *Calford v. Knight* (1618), Cro. Jac. 514. *Mentd.* *Gainsford v. Griffith* (1667), 2 Keb. 201.

890. —.]—Equivocal words shall be explained from the context according to the common sense, & not taken *in mitiori sensu*.—*TURNER v. CHAMPION* (1617), Cro. Jac. 442; 79 E. R. 378.

891. Statement must be considered as a whole.—(1) It is not libellous for a writer who allows the Sovereign to be solicitous for the welfare of his subjects, & who has no intention of calumniating him or of bringing his personal govt. into public odium, to express regret that he has taken an erroneous view of any question of foreign or domestic policy. (2) On the trial of an information for a libel in a newspaper deft. has a right to have read in evidence any extracts from the same paper connected with the subject of the passage charged as libellous although disjoined from it by extraneous matter & printed in a different character.—*R. v. LAMBERT & PERRY* (1810), 2 Camp. 398; 31 State. Tr. 335.

Annotations:—*As to* (2) *Folld.* *Thornton v. Stephen* (1837), 2 Mood. & R. 45. *Refd.* *R. v. O'Connell* (1844), 5 State Tr. N. S. 1. *Generally, Mentd.* *R. v. Grant, Ranken & Hamilton* (1848), 7 State Tr. N. S. 507.

892. —.]—In an action for a libel, deft. has a right to have the whole of the publication read, from which the passages charged are extracts.—*COOKE v. HUGHES* (1824), Ry. & M. 112, N. P.

893. —.]—A count for a libel stated that deft. published a false libel of & concerning pltf., containing amongst other things, the false, etc., matter of & concerning pltf., that is to say "Threatening letters. The Middlesex Grand Jury have returned a true bill against a gentleman of some property, named French" meaning pltf. "with this, that pltf. will verify that deft. thereby then & there meant to insinuate & have it understood, that pltf. had been suspected to have been & had been guilty of the offence of sending a letter without any name or signature thereto subscribed, directed to T., threatening to kill & murder T., a subject of the realm, with a view & intent to extort":—*Held*: (1) the innuendo at the conclusion of the count was bad, (2) the matter was libellous without such innuendo, which might be rejected as surplusage.—*HARVEY v. FRENCH* (1832), 1 Cr. & M. 11; 2 Moo. & S. 591; 2 Tyr. 585; 1 L. J. Ex. 231; 149 E. R. 293, Ex. Ch.

Annotations:—*As to* (1) *Refd.* *Williams v. Stott* (1833), 1 Cr. & M. 675; *Barrett v. Long* (1851), 3 H. L. Cas. 395. *As to* (2) *Appld.* *Williams v. Gardiner* (1836), 1 M. & W. 245. *Refd.* *Wakley v. Healey* (1849), 7 C. B. 591.

894. —.]—In an action for a libel, on not guilty pleaded, it appeared that the libel, which was contained in a newspaper, purported to be the account of a trial of a former action, brought by pltf. for a libel against third parties, & after stating the libel in the original action, & the facts proved by defts., & the summing up of the judge, stated that the jury found a verdict for pltf. with £30 damages. No evidence was given as to any such trial having, in fact, taken place, or whether the report was fair or not. The judge left it to the jury to say, whether the report, although it

D. 755.—*S. AF.*

q. *Defamatory meaning—Interpreting alleged libel by other publication.*—Although one publication in a newspaper has been found by the jury not to be libellous of pltf., it may properly

Sect. 4.—Meaning of the statement: Sub-sects. 3,

contained some allegations injurious to pltf. was, if taken altogether with the statement of the verdict being in his favour, injurious to pltf. on the face of it; & the jury having found for deft., the ct. refused to grant a rule for a new trial.—**CHALMERS v. PAYNE** (1835), 2 Cr. M. & R. 156; 1 Gale. 69; 5 Tyr. 766; 4 L. J. Ex. 151; 150 E. R. 67.

Annotation :—**Refd.** *Parmiter v. Coupland* (1840), 6 M. & W. 105.

895. —.]—**DICAS v. LAWSON** (1835), 1 Gale 69, n.

Annotations :—**Refd.** *Chalmers v. Payne* (1835), 2 Cr. M. & R. 156. **Mentd.** *Dicas v. Brougham* (1835), 1 Gale, 14.

896. —.]—(1) A man has a right to communicate to any other any information he is possessed of in a matter in which they have a mutual interest; & it is a perfectly legal & justifiable object for one to induce another to become a party to a suit as to a subject-matter on which both have an interest; & it is not because strong or angry language is used in such a communication that it will be a libel, but the jury must go further, & see, not merely whether expressions are angry, but whether they are malicious.

(2) In an action of slander for words, some of which, if spoken, & understood in their ordinary sense, would certainly be actionable, the jury may consider whether, taking the whole of the conversation together, the particular words are so qualified by the other parts of the conversation as to show that they were not intended to convey the idea which their primary & ordinary meaning would give.

(3) If a letter containing a libel have the post-mark on it, that is *prima facie* evidence of its having been published.

(4) [In an action for libel & slander] the damages should be separated if you find for pltf. on both (**TINDAL, C.J.**).—**SHIPLEY v. TODHUNTER** (1836), 7 C. & P. 680, N. P.

Annotations :—*As to* (1) **Refd.** *Blackham v. Pugh* (1846), 2 C. B. 611. *Generally*, **Mentd.** *R. v. Tolson* (1889), 58 L. J. M. C. 97.

897. —.]—In an action for a libel contained in a newspaper, deft. has a right to have read, as part of pltf.'s case, another part of the same newspaper referred to in the libel complained of.—**THORNTON v. STEPHEN** (1837), 2 Mood. & R. 45, N. P.

Annotation :—**Refd.** *Darby v. Ouseley* (1856), 1 H. & N. 1.

898. —.]—**R. v. O'BRIEN** (1840), 4 State Tr. N. S. App. 1341.

899. —.]—The right of free discussion on a subject of public interest excuses the publication of defamatory matter, provided it appears to have been published not in that unfair or improper spirit, that is, in the spirit of intemperate & inconsiderate imputation, which implies malice, in a legal sense, but in the spirit of fair discussion. The right of free discussion extends to comments in a journal upon sworn evidence, given on a subject of public interest, even to the extent of imputing that such evidence is unfounded, or even incautious or careless; but if it is imputed, apparently without any fair foundation, that it is wilfully, "maliciously," or "recklessly" false, then there is an excess, which is evidence of what the law deems malice, & which takes away the

protection or excuse arising from the exercise of the right of free discussion.

The subject was one fit for public discussion; for it was one, no doubt, of public interest. It related to the supply of gas, a matter of public importance & utility; & pltf. had given evidence of importance before a Parliamentary committee on the subject; & though I do not read the evidence quite as the learned counsel for deft. has done, as conveying a charge of fraud or dishonesty against the gas cos., yet pltf. appears to have been under the impression that there was an attempt to elude the tests; & he having certainly given somewhat strong evidence on the subject, it was quite fit that it should be discussed in a journal which dealt with such questions; more especially dealing with it, as it seems, in the interest of the gas cos. Parties who give such evidence, in which they express such opinions upon the conduct of others, no doubt must expect to have it criticised & discussed, & perhaps to be now & then dealt with a little roughly. Public men in every position must be prepared to go through this ordeal; & if they meet with comments which are merely unpleasant, they must endure it manfully, without rushing always into actions. The right of public discussion on matters of public interest is important; & it requires for its beneficial exercise that it should be exercised fully & freely, without being subject to too harsh or strict a limitation, & so long as it is exercised fairly & honestly, it is protected or excused, even although it may incidentally involve the publication of defamatory matter. But at the same time the comments must be fair, that is, conceived in a fair spirit—in the spirit of fair discussion—and not to a spirit of reckless or inconsiderate imputation. That which is recklessly defamatory can hardly be deemed fair, & the article, which conveys a charge of recklessness with regard to truth, & therefore, recklessness of truth, certainly is not consistent, in any reasonable sense, with fairness.

Malice does not necessarily mean personal ill-will, though such ill-will may exist without personal ground or enmity. Strong feelings may often arise in the course of the discussion of a public question; & though there must be allowed the fullest freedom in such discussions, yet it is a freedom which must not be abused for the purpose of reckless imputation, & must be confined to fair comments—that is, comments which the jury consider "fair" in spirit & intention, judging from the language used (**COCKBURN, C.J.**).—**HEDLEY v. BARLOW** (1865), 4 F. & F. 224.

900. —.]—Defts. published an article referring to pltf.'s newspaper as the "Evening Ananias." The innuendo alleged was that pltf. was in the habit of publishing false news. The jury found a verdict for defts. :—**Held** : it was for the jury to determine in what sense the words were used, having regard to the context & circumstances of the case, & their verdict ought not to be set aside.

It is not disputed that, whilst it is for the ct. to determine whether the words used are capable of the meaning alleged in the innuendo, it is for the jury to determine whether that meaning was properly attached to them (**LORD HERSCHELL, C.**).

The language used must be looked at as a whole in considering whether the jury could reasonably come to the conclusion that the use of the word was not intended to convey, & that those reading

be read in connection with subsequent publications in the same newspaper upon the same matter,

found by the jury to be libellous of pltf., for the purpose of ascertaining whether the latter are capable of the

libellous meaning attributed to them. —**PILCHER v. KNOWLES** (1900), 19 N. Z. L. R. 368.—N.Z.

the newspaper would not understand it as conveying, the serious imputation suggested (LORD HERSCHELL, C.).—*AUSTRALIAN NEWSPAPER CO. v. BENNETT*, [1894] A. C. 284; 63 L. J. P. C. 105; 70 L. T. 597; 58 J. P. 604; 6 R. 484, P. C.

SUB-SECT. 4.—INTENTION OF DEFENDANT NOT MATERIAL.

901. Words in fact injurious to plaintiff.]—Where the necessary effect of a publication complained of as a libel is to injure pltf., the action is maintainable in point of law, although deft. did not intend by the publication to injure pltf.

In an action for a libel, the judge left it to the jury to say, whether deft. intended to injure pltf.:—*Held*: the direction was wrong, inasmuch as if the tendency of the libel was injurious to pltf. deft. must be taken to have intended the consequences of his own act.—*HAIRE v. WILSON* (1829), 9 B. & C. 643; 4 Man. & Ry. K. B. 605; 109 E. R. 239; *sub nom.* *HARRIS v. WILSON*, 7 L. J. O. S. K. B. 302.

Annotations:—*Refd.* *Baylis v. Lawrence* (1840), 3 Per. & Dav. 526; *Capital & Counties Bank v. Henty* (1882), 7 App. Cas. 741; *R. v. Munslow*, [1895] 1 Q. B. 758; *Nevill v. Fine Arts & General Insce.*, [1898] 2 Q. B. 156.

902. —.]—In an action for a libel, where the language is ambiguous, & it is doubtful whether it imputes any injurious matter to pltf.; the proper question for the jury is not whether the intention of the publisher be to injure pltf., but whether the tendency of the matter published be injurious to him.—*FISHER v. CLEMENT* (1830), 10 B. & C. 472; 5 Man. & Ry. K. B. 730; 8 L. J. O. S. K. B. 176; 109 E. R. 526.

Annotations:—*Consd.* *Capital & Counties Bank v. Henty* (1882), 7 App. Cas. 741. *Refd.* *Baylis v. Lawrence* (1840), 3 Per. & Dav. 526; *O'Brien v. Salisbury* (1889), 54 J. P. 215.

903. —.]—The question in an action for words is not what the party using them considered their meaning, by any secret reservation in his own mind, but what he meant to have understood as their meaning by the party to whom he uttered them.—*READ v. AMBRIDGE* (1834), 6 C. & P. 308, N. P.

904. —.]—In an action of slander the question is, in what sense did deft. speak the words

uttered? If he intended to impute a felony, he is liable to an action, although the words used do not directly charge the commission of any such offence; if he did not intend such an imputation, he is not liable, although the words used in their natural meaning would convey such an imputation. Where therefore deft. used these words: "I never set my premises on fire" or "I was never accused of setting my premises on fire":—*Held*: he was liable in slander, if he meant to imply that pltf. had feloniously set his premises on fire.

But where the words were "I never stole any nails":—*Held*: he was not liable unless he meant to imply that pltf. had in the strict technical meaning of the term, been guilty of stealing nails.—*CUTLER v. CUTLER* (1846), 10 J. P. 169, N. P.

905. —.]—*HANKINSON v. BILBY*, No. 544, *ante*.

906. —.]—*ATKINSON v. NEWTON*, No. 762, *ante*.

907. —.]—*CAPITAL & COUNTIES BANK v. HENTY*, No. 121, *ante*.

SUB-SECT. 5.—EVIDENCE.

908. Question to witnesses—What questions may be asked.]—If a libel, purporting to be a circular, written by the secretary of a society for the protection of trade against swindlers, impute certain specific facts to pltf.: a witness cannot be asked what he understands by finding a person's name inserted in such a circular; but he may be asked whether there is any meaning in such a circular, beyond what appears on the face of it.—*HUMPHREYS v. MILLER* (1829), 4 C. & P. 7, N. P.

909. —.]—The words of an alleged libel were, "we would suggest to him the propriety of withdrawing into his own natural & sinister obscurity":—*Held*: a witness could not be asked what he thought was the meaning to be given to the word "natural" in that sentence.

The main ground of the motion is the refusal to allow a witness to be asked what in his opinion was the meaning to be given to the word natural; & as that was the very question which the jury were to determine, the learned judge was quite right in not allowing it to be put, although he was

PART IV. SECT. 4, SUB-SECT. 4.

901 i. Words in fact injurious to plaintiff.]—On the facts:—*Held*: what should have been left to the jury was whether or not the circumstances were such that all the bystanders would understand that deft. did not mean to charge pltf. with the commission of the crime according to what he actually said, the undisclosed intention of deft. in this respect having nothing to do with the question & being wholly immaterial.—*JOHNSTON v. EWART* (1893), 24 O. R. 116.—*CAN.*

901 ii. —.]—*WYMAN v. BANKS* (1872), 10 B. L. R. 71; 18 W. R. 516.—*IND.*

r. Evidence of motive.]—In an action by pltf. claiming damages for libel, evidence was tendered on behalf of deft. to show the motive with which the letter complained of was written:—*Held*: the evidence was improperly excluded.—*MILLER v. GREEN* (1899), 32 N. S. R. 129.—*CAN.*

t. Examination as to intention—Whether questions need be answered.]—Upon the examination of deft. for discovery in an action for defamation, deft. is entitled to refuse to answer the question as to whether or not he intended certain of the expressions

complained of, in which pltf. was not mentioned by name, to include or apply to him.—*CLARKE v. STEWART* (1916), 34 W. L. R. 571; 10 W. W. R. 684.—*CAN.*

PART IV. SECT. 4, SUB-SECT. 5.

908 i. Question to witness—What questions may be asked.]—In an action of slander a witness cannot be asked what he understood to have been meant by the words used unless it is first shown that there was something to prevent the words from conveying the meaning they would ordinarily convey.—*WOOD v. MACKEY* (1881), 21 N. B. R. 109.—*CAN.*

908 ii. —.]—*CURRIE v. STAIRS* (1885), 25 N. B. R. 4.—*CAN.*

908 iii. —.]—It is proper to ask witnesses in a libel action who, in their opinion, is aimed at by the libel in question. It is not proper in such an action to ask a witness whether, in his opinion, the alleged libel is likely to cause injury to pltf.'s business.—*JOURNAL PRINTING CO. v. MACLEAN* (1896), 23 A. R. 324.—*CAN.*

908 iv. —.]—As the defamatory words imputed a crime & were actionable in themselves, the clerk could not be asked what she under-

stood by them, unless there were some circumstances proved which would or might give a meaning to them different from what they ordinarily have.—*MORAN v. O'REGAN* (1908), 38 N. B. R. 399; 4 E. L. R. 573.—*CAN.*

908 v. —.]—It is incompetent to ask a witness what remark he made on hearing a defamatory expression.—*CLELAND v. MACK* (1829), 5 Murr. 70.—*SCOT.*

908 vi. —.]—Where pltf., as one of a class, sued for damages for defamation, alleged to have been published in a newspaper article by deft. in reference to all persons of such class, & a witness, who had read the article, was asked to whom he thought it referred:—*Held*: apart from whether such question was admissible as the opinion of the witness as to whom the article referred, it was admissible to prove that the pltf. had suffered damages.—*SHEPARD v. SUNDAY TIMES SYNDICATE, LTD.*, [1911] W. L. D. 108.—*S. AF.*

a. Evidence of rumours—Rumours establishing defamatory sense of statement—Rumours unknown to defendant.]—The only evidence adduced by way of foundation for the question as to

Sect. 4.—Meaning of the statement: Sub-sect. 5.
Sect. 5: Sub-sects. 1 & 2, A.]

of course at liberty to assist the jury by the expression of his own opinion, when he was summing up the case (COLERIDGE, J.).—BRUNSWICK (DUKE) v. HARMER (1850), 16 L. T. O. S. 123; *previous proceedings*, 1 L. M. & P. 505.

910. ———.]—In an action of slander any question may be asked as to the conversation when the supposed slanderous words were spoken, or any thing that the witness had at any other time said about that conversation, but not as to the subsequent conversations between the witness & deft. unconnected with that communication.—SUTTON v. SHAW (1850), 15 L. T. O. S. 163.

911. ———.]—An expert witness cannot give evidence as to the meaning of a document until the existence of circumstance is proved showing special knowledge.—GALLAGHER v. MURTON (1888), 4 T. L. R. 304, D. C.

SECT. 5.—THE INNUENDO.

SUB-SECT. 1.—FUNCTIONS OF.

912. To explain statement.]—In slander, when the introductory matter is sufficiently shown, an innuendo may explain the doubtful words.—ROBODHAM v. VENLECK (1634), Cro. Car. 378; 79 E. R. 929.

913. ———.]—If the words in an advertisement are not libellous, without the help of an innuendo, the advertisement is not a libel.

It is the nature of an innuendo to explain doubtful words where there is matter sufficient in the declaration to maintain the action; but no words produced by the innuendo shall make the action maintainable (DENISON, J.).—R. v. ALDERTON (1756), Say. 280; 96 E. R. 880.

Annotations:—Consd. R. v. Horne (1777), 2 Cowp. 672; Jones v. Hulton, [1909] 2 K. B. 444. *Refd.* Holt v. Scholefield (1796), 6 Term Rep. 691; R. v. Marsden (1815), 4 M. & S. 164.

914. ———.]—(1) The declaration in an action for libel or slander may set out the words complained of, & put any construction upon them by innuendo.

(2) Whether the words were spoken with such meaning, is for the jury.

(3) When the libel or slander is, *prima facie*, a privileged communication, it is open to pltf. to put in evidence statements made by deft. subsequently to the libel, as tending to show malice in deft. at the time of publication of such libel.

(4) The judge ought, especially if there be a considerable interval between such statements & the publication, to direct the jury to consider whether such subsequent statements might not refer to something which happened subsequently to the libel, so as not to show malice in deft. at the time of the publication of the libel charged.—HEMMINGS v. GASSON (1858), E. B. & E. 346; 27 L. J. Q. B. 252; 31 L. T. O. S. 176; 4 Jur. N. S. 834; 6 W. R. 601; 120 E. R. 537.

Annotation:—As to (3) Refd. Hughes v. Dinorben 32 L. T. O. S. ———

the sense in which the words used were understood, was that of rumours in the neighbourhood that pltf. had committed the alleged crime, but it was not shown that these rumours were known to deft.;—*Held*: the evidence had been improperly admitted.—GRANT v. SIMPSON (1878), 12 N. S. R. (3 R. & C.) 141.—CAN.

b. Circumstances in which words

uttered.]—All the circumstances immediately attending & preceding the speaking of the words may be given in evidence under a plea of not guilty.—KEEGAN v. ROBSON (1850), 6 U. C. R. 375.—CAN.

PART IV. SECT. 5, SUB-SECT. 1.

c. To explain statement—Articles in newspaper—Identification of innu-

915. ——— By reasonable or necessary inference.]—STUBBS, LTD. v. RUSSELL, No. 292, *ante*.

916. Not to complete libel.]—R. v. ALDERTON, No. 913, *ante*.

917. Not to alter or extend meaning—By addition of new facts.]—An innuendo cannot alter the common intendment of the words spoken by the addition of a new fact.—CASTLEMAN v. HOBBS (1595), Cro. Eliz. 428; Owen. 57; Moore, K. B. 596; 78 E. R. 669.

918. ———.]—An innuendo in an action of slander, cannot superinduce a fact, which, if true, would alter the nature of the offence imputed to pltf.—LOVET v. HAWTHORN (1601), Cro. Eliz. 834; 78 E. R. 1060.

919. ———.]—JAMES v. RUTLECH, No. 845, *ante*.

920. ———.]—“B. did burn my barn, innuendo a barn with corn, with his own hands, & none but he”:—*Held*: not actionable, it not being felony to burn a barn which has no corn in it, unless it be parcel of a dwelling house; & the innuendo will not avail, when the words themselves are not actionable.—BARHAM v. NETHERSAL (1602), 4 Co. Rep. 20 a; Yelv. 22; 76 E. R. 908; *sub nom.* BARCHAM v. NETHERSALE, Noy, 155.

Annotations:—Consd. R. v. Alderton (1756), Say. 280; R. v. Horne (1777), 2 Cowp. 672; Hawkes v. Hawkey (1807), 8 East, 427. *Distd.* Williams v. Gardiner (1836), 5 L. J. Ex. 280. *Refd.* Gardiner v. Spurdant (1617), Cro. Jac. 438; Gompertz v. Levy (1838), 9 Ad. & El. 282. *Mentd.* Holmes's Case (1634), Cro. Car. 376.

921. ———.]—HARVEY v. DUCKIN (1615), Hob. 45; 80 E. R. 195; *sub nom.* HARVEY v. BUCKING, 1 Brownl.

Annotations:—Refd. Fleetwood v. Curley (1619), Hob. 267; R. v. Greepe (1696), 2 Salk. 513.

922. ———.]—FLEETWOOD v. CURLE, No. 451, *ante*.

923. ———.]—KING v. BOWEN (1621), Hut. 44; Win. 2; 123 E. R. 1088.

Annotation:—Refd. R. v. Greepe (1696), 2 Salk. 513.

924. ———.]—ANON. (1603), 1 Freem. K. B. 506; 89 E. R. 382.

925. ———.]—An action for saying “he fired his house,” innuendo voluntarily is bad; for an innuendo cannot enlarge the sense.—ANON. (1700), 11 Mod. Rep. 220; 88 E. R. 1001.

926. ———.]—In an action for a libel, the declaration—after reciting that divers persons had been associated together, under the name of “The Society of Guardians for the Protection of Trade against Swindlers & Sharpers”; & that deft., under colour of being the secretary of the society, had, from time to time, published, & was accustomed to publish, certain printed reports, for the purpose of denoting to the members of the society the names of such persons as were deemed swindlers & sharpers, & improper persons to be proposed to be ballotted for as members of the said society;—set out the following libel, of & concerning pltf.: “Society of Guardians for the Protection of Trade against Swindlers & Sharpers; I, meaning deft., am directed to inform you, that G., meaning pltf., & Co., are reported to this society, as improper to be proposed to be ballotted for as members thereof, meaning that pltf. was a swindler & sharper, & an improper person to be a member of the society.” After

*endo with defamatory portions—Whether necessary.]—In an action for damages for defamation the declaration, after setting out in their entirety two lengthy articles appearing in a newspaper, alleged that they were libellous:—*Held*: it was not obligatory for the innuendo to be identified with any particular portions of the libellous matter, provided the matter regarded*

verdict for pltf., & writ of error brought:—*Held*: the innuendo was not warranted by the libel; & the words of the libel, unexplained by introductory matter, were not actionable.—*GOLDSTEIN v. FOSS* (1828), 4 Bing. 489; 1 Moo. & P. 402; 2 Y. & J. 146; 130 E. R. 856, Ex. Ch.

Annotations:—*Consd.* Tuam (Archbp.) v. Robson (1828), 5 Bing. 17; *Hearne v. Stowell* (1841), 12 Ad. & El. 719; *Capital & Counties Bank v. Henty* (1882), 7 App. Cas. 741. *Refd.* *Getting v. Foss* (1827), 3 C. & P. 160; *Humphreys v. Miller* (1829), 4 C. & P. 7; *Gompertz v. Levy* (1838), 9 Ad. & El. 282; *Capel v. Jones* (1847), 4 C. B. 259; *Frost v. London Joint Stock Bank* (1906), 22 T. L. R. 760.

927. —.]—Deft. stated in a letter, “He (ptf.) has become so inflated with self-importance by the few hundred pounds made in my service (God only knows whether honestly or otherwise).” Upon action for libel, & verdict for pltf.:—*Held*: the innuendo, that deft. by such words meant to insinuate that ptf. conducted himself in a dishonest manner in deft.’s service, was good; inasmuch as such innuendo served only to explain, not to add to, the sense or meaning of the words imputed to deft.—*CLEGG v. LAFFER* (1833), 10 Bing. 250; 3 Moo. & S. 727; 3 L. J. C. P. 56; 131 E. R. 900.

Annotation:—*Refd.* *Griffiths v. Lewis* (1846), 8 Q. B. 841.

928. —.]—In libel, one of the counts set forth the following passage of a letter from deft. to P.—“I have reason to suppose that many of the flowers of which I have been robbed, are growing upon your premises,” thereby meaning that ptf. had been guilty of larceny, & had stolen from deft. certain plants, roots, & flowers, of deft. & had unlawfully disposed of them to P., & unlawfully placed them in P.’s garden. The previous part of the letter stated, that ptf., whom P. had taken into his employ as a gardener, had been in deft.’s service in the same capacity, & had been discharged for dishonesty:—*Held*: the innuendo was not too large, & the count was good.—*WILLIAMS v. GARDINER* (1836), 1 M. & W. 245; 1 Gale. 458; Tyr. & Gr. 578; 5 L. J. Ex. 280; 150 E. R. 425, Ex. Ch.; *affg.* S. C. *sub nom.* *GARDINER v. WILLIAMS* (1835), 2 Cr. M. & R. 78.

Annotation:—*Refd.* *Hoare v. Silverlock* (1848), 12 Jur. 695.

929. —.]—Declaration for slander stated that, at the time of the speaking, etc., ptf. worked for & was employed by A. in his barn, in & about thrashing A.’s corn, & that deft., intending to cause it to be believed that ptf. had been guilty of felony, falsely & maliciously spoke of & concerning ptf. the words, “I saw B. coming across A.’s barton with some barley, & my son said ‘What art going to do with that?’ B. said he was going to feed pheasants with it, & said, where he had that he could have more, & that he had it at farmer A.’s barn,” meaning the barn belonging to A., wherein ptf. was so at work & employed as aforesaid, & that the barley so alleged by deft. to have been in the possession of B. was the property of the said A., & that ptf. had stolen the same from the said A., & given the same to the said B. Averment of special damage:—*Held*: bad, the innuendo not being borne out by the other parts of the count; & a demurrer to such count did not imply any admission by which the defect could be aided.—*WHEELER v. HAYNES* (1838), 9 Ad. & El. 286; 1 Per. & Dav. 55; 1 Will. Woll. & H. 645; 8 L. J. Q. B. 3; 112 E. R. 1220.

930. —.]—(1) The declaration stated that

as a whole was capable of supporting the innuendoes alleged.—*SOLOMON v. ROBINSON & Co., LTD.* (1925), 46 N. L. R. 351.—S. AF.

PART IV. SECT. 5, SUB-SECT. 2.—A.

932 i. Words *prima facie* innocent—

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Innuendo necessary.—In an action for damages for slander founded on words not in themselves libellous but innuendoes to be so, the ct. will not allow an issue unless the words founded on will fairly bear the innuendo put on them.—*FRASER v. MORRIS* (1888),

ptf. was a trader & employed by the Board of Ordinance to relay the entrance of their office with new asphalte, & that deft. falsely said of him in his trade & in reference to the work, “The old materials have been relaid by you in the asphalte work executed in the front of the Ordnance Office, & I have seen the work done.” Innuendo, that ptf. had been guilty of dishonesty in the conduct of his trade by laying down again the old asphalte which had been before used at the entrance of the Ordnance Office, instead of new asphalte, according to his contract:—*Held*: the declaration was sufficient, & the innuendo not too large, as it put no new sense on the words, but only imputed intention to the speaker.

(2) At the trial the judge asked the jury “Do you find the words proved?” but did not ask them if they found that the words were used in the sense of the innuendo:—*Held*: he was right.—*BABONNEAU v. FARRELL* (1854), 15 C. B. 360; 24 L. J. C. P. 9; 24 L. T. O. S. 76; 1 Jur. N. S. 114; 3 W. R. 11; 139 E. R. 463; *sub nom.* *BARMEAN v. FARRELL*, 3 C. L. R. 42.

931. —.]—Declaration for a libel published in a Walsall newspaper: “Walsall Science & Art Institute. The public are informed that Mr. M.’s,” ptf.’s, “connection with the Institute has ceased, & that he is not authorised to receive subscriptions on its behalf.” Signed by defts. as officers of the Institute. Innuendo, that ptf. falsely pretended to be authorised to receive subscriptions on behalf of the Institute. At the trial it appeared that ptf. was a certificated art master, & had been master at the Institute. His engagement with defts. ceased in June, 1874, & he got up & became master of another school, which was called “The Walsall Government School of Art,” & was opened in Aug., & in Sept. the advertisement complained of appeared.

The learned judge directed a nonsuit on the ground that the advertisement was not capable of the defamatory meaning attributed by the innuendo:—*Held*: the nonsuit was right: for the advertisement was not capable of a defamatory meaning.

I cannot help thinking that to an ordinary person it would convey no more than the legitimate information, & that no such defamatory meaning as that imputed by the innuendo, nor any other defamatory meaning, was intended to be expressed. It appears also to me that ptf. failed in giving any other meaning to the advertisement than that which it naturally bears, which is perfectly innocent (*MELLOR, J.*).—*MULLIGAN v. COLE* (1875), L. R. 10 Q. B. 549; 44 L. J. Q. B. 153; 33 L. T. 12; 39 J. P.

Annotations:—*Refd.* *Ruel v. Tatnell* (1880), 29 W. R. 172; *Capital & Counties Bank v. Henty* (1882), 7 App. Cas. 741. *Mentd.* *R. v. Bradlaugh & Besant* (1878), 48 L. J. M. C. 5.

SUB-SECT. 2.—NECESSITY FOR.

A. In General.

932. Words *prima facie* innocent—Innuendo necessary.]—In slander, where the words laid are not *per se* defamatory in their ordinary sense, or have no meaning at all in ordinary acceptation, there must be an innuendo in order to admit

15 R. (Ct. of Sess.) 454; 25 Sc. L. R. 331.—SCOT.

932 ii. —.]—*RAE v. SCOTTISH SOCIETY FOR PREVENTION OF CRUELTY TO CHILDREN*, [1924] S. C. 102.—SCOT.

LIBEL AND SLANDER.

Sect. 5.—The innuendo: Sub-sect. 2, A., B. & C.; sub-sects. 3 & 4, A. & B.]

evidence that in a peculiar sense they are defamatory.—*RAWLINGS v. NORBURY* (1858), 1 F. & F. 341, N. P.

933. ———.]—In an action of libel for words which have no tendency in themselves to disparage pltf., the innuendoes must contain such averments as, when read together with the words, will show a tendency to disparage pltf., & an innuendo which amounts merely to an averment of an intention on the part of deft. to disparage pltf. will not be sufficient.

In an action for libel, since C. L. P. Act, 1851 (c. 76), s. 61, it is not sufficient to aver that words used, which are not in themselves actionable, were used for the purpose of creating an impression unfavourable to pltf., or meant that pltf. ought to be regarded with suspicion of being guilty of something wrong or blamable, but the declaration must attach to the words used some specific meaning which is in itself actionable.—*COX v. COOPER* (1863), 3 New Rep. 72: 3 L. T. 329; 12 W. R. 75.

Annotations:—Consd. Capital & Counties Bank v. Henty (1880), 4 C. P. D. 514. *Refd. Miller v. David* (1874), L. R. 9 C. P. 118.

934. ———.]—*JACOBS v. SCHMALTZ* (1890), 62 L. T. 121; 6 T. L. R. 155, N. P.

935. Words defamatory—Innuendo unnecessary.]—*RUEL v. TATNELL*, No. 938, *post*.

936. Words used ironically.]—*BOYDELL v. JONES*, No. 149, *ante*.

937. Innuendo must allege specific meaning—Itself actionable.]—*COX v. COOPER*, No. 933, *ante*.

938. ———.]—Pltf. alleged in his statement of claim that deft. falsely & maliciously spoke & published of pltf. the words. "His shop is in the market," meaning thereby that pltf. was going away, & was guilty of fraudulent conduct in his business, inasmuch as he had received subscriptions from members of a certain club, well knowing that they would be unable to obtain any benefit therefrom:—*Held*: the words, not being in themselves defamatory, & there being no evidence to wholly support the innuendo, deft. was entitled to judgment.

In an action of slander, where pltf., in his statement of claim, annexes a meaning to the words complained of, & fails to sustain such meaning, he cannot discard that & adopt another. Where words which are not slanderous in their primary sense, are taken in a secondary sense distinct from their primary sense, there must be evidence of facts which would reasonably make them defamatory in their secondary sense.

It is very true that if the words were defamatory in themselves you might discard the innuendo; but these words in themselves are harmless (*LINDLEY, J.*).—*RUEL v. TATNELL* (1880), 43 L. T. 507; 45 J. P. 175; 29 W. R. 172, D. C.

B. Words used in Peculiar Sense.

939. Necessity for innuendo—"Man of straw."]—A declaration in libel after alleging that pltf. had been in prison, & had applied for money, to pay his quarter's rent, stated that he was a "mere man of straw," thereby meaning that he was insolvent, & in bad circumstances. On general demurrer to the allegation that pltf. was a "mere man of straw":—*Held*: it was not necessary to explain the meaning of that term by prefatory averment, & as the libellous matter contained but one charge, viz. insolvency, deft. could not plead

or demur to part only.—*EATON v. JOHNS* (1842), 1 Dowl. N. S. 602; 11 L. J. Ex. 150.

940. ——— "**Black sheep.**"—Declaration for libel averred, that before & at the time of the committing of the grievance by deft., deft. used the word "black sheep" for the purpose of expressing & meaning, & it was understood by the persons to whom the libel was addressed as expressing & meaning, a person notorious by reason of bad character, & of stained & sullied reputation; yet deft., intending to cause it to be believed that pltf. had conducted himself dishonestly & improperly, published of & concerning pltf. the libellous matter following: "Black sheep," meaning thereby pltf. was a black sheep, in the sense & meaning in which the word was so used by deft. The declaration then set forth a statement of facts respecting pltf., no part of which was in itself libellous. Deft. pleaded, as to the publishing of the following part of the supposed libel, that is to say, "black sheep," that deft. did not use that word for the purpose of expressing or meaning, nor was it understood by the persons in the declaration mentioned as expressing or meaning, a person notorious by reason of bad character, or of stained & sullied reputation; concluding to the country:—*Held*: the plea was well pleaded to that part only of the libel; & it was rightly pleaded as to the publishing of that part of the libel, & not to the inducement in the declaration as to that part; & it was not bad as amounting to not guilty; the averment in the declaration, as to the word "black sheep," being properly matter of inducement, which it was necessary to traverse specially.

We consider it to be settled that there may be a plea to a part of a libel which is separable from the rest, as the part pleaded to in this case certainly is, for a plea of justification as to this part, & "not guilty" as to the remainder, would not have been inconsistent; a part might be true, & the remainder excused by the occasion of the publication (*PARKE, B.*).—*M'GREGOR v. GREGORY* (1843), 11 M. & W. 287; 2 Dowl. N. S. 769; 12 L. J. Ex. 204; 152 E. R. 811.

Annotations:—Refd. Gregory v. Brunswick (1843), 6 Scott, N. R. 809; *Fleming v. Dollar* (1889), 23 Q. B. D. 388.

941. ———.]—*O'BRIEN v. CLEMENT*, No. 1241, *post*.

942. ——— **Blackleg.**—*O'BRIEN v. CLEMENT*, No. 1241, *post*.

943. ———.]—*BARNETT v. ALLEN*, No. 870, *ante*.

944. ——— **Truckmaster.**—In an action for a libel imputing to pltf. that he was a "truck-master," there being no innuendo to explain the meaning of the word:—*Held*: although the word was not to be found in any English dictionary, yet, as it was composed of two well-known English words, pltf. was not bound to give evidence of its meaning, nor the judge to explain it to the jury; but that it was properly left to them to say whether, under all the circumstances, it was used in a defamatory sense.—*HOMER v. TAUNTON* (1860), 5 H. & N. 661; 29 L. J. Ex. 318; 2 L. T. 512; 8 W. R. 499; 157 E. R. 1344.

C. Words with Local Meaning.

945. Necessity for innuendo—"To strain a mare."]—Words, the meaning of which are peculiar to the place where they are spoken, may be rendered actionable by the interpretation of an innuendo.—*COLES v. HAVELAND* (1591), Cro. Eliz. 250; 78 E. R. 505.

Annotation:—Expld. Goldstein v. Foss (1827), 6 B. & C. 154.

946. ———.]—PRIDHAM *v.* TUCKER (1609), as reported in Yelv. 153 ; 80 E. R. 103.

Annotations :—*Reid*. Action for Welsh Words (1616), Hob. 126 ; McGregor *v.* Gregory (1843), 11 M. & W. 287.

947. ——— “A healer of felons.”]—PRIDHAM *v.* TUCKER (1609), Yelv. 153 ; Noy, 133 ; 80 E. R. 275 ; *sub nom.* ANON., 1 Roll. Abr. 86.

Annotations :—*Reid*. Action for Welsh Words (1616), Hob. 126 ; McGregor *v.* Gregory (1843), 11 M. & W. 287.

948. ——— “An outputter.”]—STEENEMAN *v.* RICHARDSON, No. 194, *ante*.

949. ——— “Mainsworn.”]—SLATER *v.* FRANKS, No. 225, *ante*.

SUB-SECT. 3.—EFFECT OF.

950. Innuendo that plaintiff is of bad character—Defence justifying innuendo—Particulars of acts other than those mentioned in libel.]—In an action for libel pltf. in his statement of claim interpreted the libel by an innuendo which was in substance that the words complained of referred to acts dishonestly done by him & that he was a man of dishonest character & unfit to be a director. Upon this defts., the proprietors of the newspaper in which the article complained of was published, justified & gave particulars of other dishonest acts besides those referred to in connection with pltf.'s arrest, by which they sought to establish that pltf. was a man of dishonest character & unfit to be a director by reason of various things he had done or that had occurred to him. Pltf. moved to have these particulars struck out :—*Held* : inasmuch as by the construction which pltf. himself had placed upon the libel, defts. were sued for charging generally that he, pltf., was a dishonest person, they were entitled to give particulars to show why they said that pltf. was a dishonest person, & the particulars objected to were admissible.—MAISEL *v.* FINANCIAL TIMES, LTD. (1915), 84 L. J. K. B. 2145 ; 112 L. T. 953 ; 31 T. L. R. 192 ; 50 Sol. Jo. 248, H. L. ; *subsequent proceedings*, [1915] 3 K. B. 336, C. A.

Annotation :—*Folld.* MacGrath *v.* Black (1926), 161 L. T. Jo. 444.

951. ———.]—MACGRATH *v.* BLACK (1926), 161 L. T. Jo. 444, C. A.

952. ——— Particulars of acts committed after publication of libel.]—MAISEL *v.* FINANCIAL TIMES, LTD., No. 1323, *post*.

SUB-SECT. 4.—FAILURE TO PROVE.

A. In General.

953. Another innuendo cannot be suggested at trial.]—(1) Slander, for accusing pltf. of felonious embezzlement. It appeared that pltf. had been chosen & sworn in at a court leet held by a corpn., as chamberlain of certain commonable lands. The duties of the chamberlain, who received no remuneration, were to collect moneys from the commoners & other persons using the commonable lands, to employ the moneys so received in keeping the lands in order, to account at the end of the

year to two aldermen of the corpn., & to pay over any balance in his hands to his successors in office :—*Held* : pltf. was not “a servant, or person employed in the capacity of a servant” within 7 & 8 Geo. 4, c. 29, s. 47, as to embezzlement.

(2) If a good innuendo in a declaration, ascribing a particular meaning to alleged slanderous words, be not supported in evidence, pltf. cannot reject it at the trial, & resort to another meaning. *Semble* : a verbal imputation of fraudulent embezzlement in an office of the above description would not be actionable.—WILLIAMS *v.* STOTT (1833), 1 Cr. & M. 675 ; 2 Tyr. 688 ; 3 L. J. Ex. 110 ; 149 E. R. 570.

Annotations :—*As to* (2) *Reid*. Heming *v.* Power (1842), 10 M. & W. 564 ; Barrett *v.* Long (1851), 3 H. L. Cas. 395 ; Lemon *v.* Simmons (1887), 57 L. J. Q. B. 260.

954. ———.]—In an action for libel, where innuendoes are alleged in the declaration, & from the nature of the libel, are necessary, they so far point & confine the declaration that, at all events, if the case is conducted in accordance with them, & if a verdict is, at the close of the case, claimed & obtained on another construction of the libel, it will be a surprise which may warrant a new trial.

A public writer, in commenting upon matters of public interest, is protected & excused if, in writing honestly & with reasonable moderation & self-control, he makes, through mistaken inferences on the matters of fact involved, defamatory statements, the truth of which he cannot substantiate. Publications having been issued by a medical practitioner by way of advertisement, the effect of which was to represent that he was in possession of a specific remedy for a disease hitherto regarded as incurable :—*Held* : (1) to be a matter of public interest, & fair & proper subject for public comment.

A public writer having, in commenting thereon, represented the author as a quack, impostor, & also, by reason of him describing himself as an M.D. on account of a diploma obtained abroad, as like scoundrels who pass bad coin ; & there being evidence that his publications teemed with statements extravagant, & exaggerated, & alarming ; (2) if they were consciously so, & if pltf. did not really believe them, these epithets were justifiable ; (3) even if they were not so in fact, if the jury were satisfied that the writer really believed that they were so, & that he was writing honestly, & with reasonable regard for moderation, he was excused & protected.—HUNTER *v.* SHARPE (1866), 4 F. & F. 983 ; 15 L. T. 421, N. P. ; *previous proceedings*, 13 L. T. 592.

955. ———.]—RUEL *v.* TATNELL, No. 938, *ante*.

956. ———.]—SIMMONS *v.* MITCHELL, No. 577, *ante*.

B. Where Statement of Claim otherwise Sufficient.

957. Innuendo contradictory.]—STRONG *v.* WHITE (1622), Palm. 358 ; 81 E. R. 1123.

958. Innuendo rejected as superfluous.]—(1) The rule of construction as to slanderous words is to construe them in their plain & popular sense, such in which an ordinary hearer would have

PART IV. SECT. 5, SUB-SECT. 4.—A.

d. Innuendo not supported by evidence.]—BLACK *v.* ALCOCK (1862), 12 C. P. 19.—CAN.

e. ———.]—BRUCE *v.* ROSS & Co. (1901), 4 F. (Ct. of Sess.) 171 ; 39 Sc. L. R. 130 ; 9 S. L. T. 270.—SCOT.

f. ———.]—GREEN *v.* REID & Co. (1905), 7 F. (Ct. of Sess.) 891 ; 42

Sc. L. R. 685 ; 13 S. L. T. 228.—SCOT.

g. ———.]—CAMPBELL *v.* RITCHIE & Co., HAY *v.* RITCHIE & Co., [1907] S. C. 1097 ; 44 Sc. L. R. 766 ; 15 S. L. T. 165.—SCOT.

h. ———.]—ROONEY *v.* M'NAIRNEY, [1909] S. C. 90 ; 46 Sc. L. R. 81 ; 16 S. L. T. 483.—SCOT.

PART IV. SECT. 5, SUB-SECT. 4.—B.

958 i. Innuendo rejected as superfluous.]—In an action of slander the words complained of accused pltf. of the commission of an unnatural offence :—*Held* : it was not necessary to give evidence to prove the innuendo, the meaning of the words being perfectly obvious & unmistakable.—GATES *v.* LOHNES (1898), 31 N. S. R. (19 R. & G.) 221.—CAN.

words of the libel to be set out in the declaration, in order that the ct. may judge whether they constitute a ground of action (ABBOTT, C.J.).

For if the jury find the verdict that the libel proved was in substance the same as the charge in the declaration, contrary to the opinion of the judge, that would be binding upon the parties, & deft. could bring no writ of error, even although the whole might be a question of law (HOLROYD, J.).—WRIGHT v. CLEMENTS (1820), 3 B. & Ald. 503; 106 E. R. 746.

Annotations:—**Consd.** Solomon v. Lawson (1846), 8 Q. B. 823; Bradlaugh v. R. (1878), 3 Q. B. D. 607. **Refd.** Flint v. Pike (1825), 4 B. & C. 473; R. v. Duffy (1849), 7 State Tr. N. S. 795; Capital & Counties Bank v. Henty (1882), 7 App. Cas. 741.

969. ———.]—In all actions of slander it is necessary to set out the words in the declaration, whether they be actionable in themselves, or only so by reason of special damage.

The declaration alleged that pltf. being about to sell some tulips deft. falsely represented that the said tulips were stolen property, & also that the said tulips were the property of deft.'s brother, & that whoever bought the said tulips would buy stolen property, by reason whereof pltf. was unable to sell the said tulips:—*Held*: the words should have been set out.—GUTSOLE v. MATHERS (1836), 1 M. & W. 495; 5 Dowl. 69; 2 Gale, 64; Tyr. & Gr. 694; 5 I. J. Ex. 274; 150 E. R. 530.

Annotation:—**Refd.** Solomon v. Lawson (1846), 8 Q. B. 823.

970. ———.]—(1) In an action for libel or slander, when the words, written or spoken, are not in themselves applicable to the individual pltf., no introductory averment or innuendo can give such an application. Therefore, where the declaration in the first count, after reciting that pltf. was employed in supplying fresh water to ships at H., & had, for that purpose, fitted up a schooner with wooden tanks, & that, the ship "M." being at H., pltf. conveyed fresh water to the "M." in the wooden tanks of his schooner, complained that deft. published, of & concerning pltf. in his said employment, & concerning the water so supplied to the "M." a statement, set forth in the count, that persons on board the "M." had become ill soon after leaving H., where they had taken in fresh water; which illness was occasioned by the water; that the water was run into a copper tank whence the casks were filled alongside; that the poison was imbibed from the tank; & that it behoved the authorities to order its removal, & replace it with an iron one: thereby meaning that pltf. had been guilty of supplying bad & unwholesome water to the "M.": judgment on that count was arrested.

(2) Where a declaration for libel sets out a publication which refers to a previous publication, but, unless by reference to the language of the previous publication, contains no libel, such previous publication must be considered as incorporated in the publication complained of, & must appear, in the declaration, to be set out verbatim, & not merely in substance. Therefore judgment was arrested as to the second count of the above declaration, which, after reciting that deft. published a statement "in substance as follows," setting out the publication charged in the first count, charged that deft. afterwards published, of & concerning pltf., etc., & of & concerning the first publication, a statement that

the copper tank was fitted up in a schooner belonging to pltf.—SOLOMON v. LAWSON (1846), 8 Q. B. 823; 15 L. J. Q. B. 253; 7 L. T. O. S. 135; 10 Jur. 796; 115 E. R. 1084.

Annotations:—*As to* (1) **Consd.** Le Fanu v. Malcomson (1848), 1 H. L. Cas. 637. **Distd.** Turner v. Meryweather (1849), 7 C. B. 251. *As to* (2) **Refd.** Bradlaugh v. R. (1878), 3 Q. B. D. 607.

971. ———.]—Notwithstanding R. S. C., Ord. 19, rr. 4, 24, the precise words alleged to be libellous must be set out in a statement of claim for libel.—HARRIS v. WARRE (1879), 4 C. P. D. 125; 48 L. J. Q. B. 310; 40 L. T. 429; 43 J. P. 544; 27 W. R. 461.

Annotations:—**Refd.** Capital & Counties Bank v. Henty (1882), 7 App. Cas. 741; Tournier v. National Provincial & Union Bank of England, [1924] 1 K. B. 461.

972. ———.]—CAPITAL & COUNTIES BANK v. HENTY, No. 121, *ante*.

973. ———.]—There is no doubt that in the case of a document alleged to be a libel the latter part of the rule [R. S. C., Ord. 19, r. 21] would apply, because in that case it is clear that it would not suffice to state the effect of the document, but the precise words must be stated (LORD ESHER, M.R.).—DARBYSHIRE v. LEIGH, [1896] 1 Q. B. 554; 65 L. J. Q. B. 360; 74 L. T. 241; 44 W. R. 452, C. A.

974. Separate libellous passages set out—Must be so described.—TABART v. TIPPER, No. 114, *ante*.

975. ———.]—SOLOMON v. LAWSON, No. 970, *ante*.

976. Libellous entry in index—Passage referred to need not be set out.—In an action for a libel in a review, it is sufficient to set out the contents of an index, referring to an article in the body of the review, which is of itself a libel; & no reference need be made to the article itself, if the index contain, *per se*, *prima facie* libellous matter.—BUCKINGHAM v. MURRAY (1825), 2 C. & P. 46, N. P.

977. Whole document need not be set out—If omissions immaterial.—In an action for a libel, the declaration alleged, "that pltf. had been appointed the surveyor, etc., of a co. or society of persons called 'The New England Co.,' & in such capacity had been & was employed by the said co." The name of incorporation of the Co. was, "A Co. for establishing Christianity in New England & the parts adjacent, in America":—*Held*: (1) this was no variance.

(2) In declaring on a libel, it is not necessary to set out every part of it, provided the sense of the part set out is not varied or altered in its quality or effect, by that which is omitted.—RUTHERFORD v. EVANS (1830), 6 Bing. 451; 4 Moo. & P. 163; 8 L. J. O. S. C. P. 86; 130 E. R. 1354.

978. ———.]—In an action of libel the defamatory words set out in the declaration must be proved as laid, & it is a fatal variance if the words as alleged are materially qualified by evidence of words not contained in the declaration although such words as qualified are still libellous. Deft., after the publication of a libel, & before the action was brought, destroyed the letter containing the libellous words:—*Held*: (1) as the defamatory writing was not in existence, secondary evidence of the contents of the letter by witnesses who heard it read was admissible, but the actual words used as laid in the declaration

libellous words in the form of an innuendo without other averments.—ROBERTS v. PATILLO (1855), 2 N. S. R. (James) 367.—CAN.

o. Particulars of publication — Necessity for clear statement.—In an

action of slander the statement of claim, after alleging that the slanders had been spoken & published to certain named persons, added "& to others at present unknown to pltf.":—*Held*: sufficient. It was also alleged

that during a period of five months deft. spoke & published various slanders to certain named persons & to other, not known to pltf.:—*Held*: bad, for it did not show which of the persons mentioned were present when

Sect. 6.—Pleading and proof of statement: Sub-sects. 1 & 2, A. & B. Sect. 7: Sub-sect. 1, A.]

must be proved, & not the substance or impression the witnesses received of the words, as otherwise the witnesses, & not the court, would be made the judges of what was a libel.

Before the declaration was filed the pltf. gave notice of his intention to move for a rule for the production of the letter containing the words of the libel as set out in the declaration. An affidavit in answer by deft., stated that he, deft., had destroyed the letter, but made no objection to the terms of the alleged libel set out in pltf.'s affidavit:—*Held*: (2) pltf.'s affidavit being merely for the purpose of the production of the letter, was not admissible as evidence to prove the words of the libel.

(3) Where there is a variance between the declaration & proof, the proper time to apply to amend the declaration is at the conclusion of pltf.'s case.—*RAINY v. BRAVO* (1872), L. R. 4 P. C. 287; 9 Moo. P. C. C. N. S. 35; 27 L. T. 249; 38 J. P. 788; 20 W. R. 873; 17 E. R. 427, P. C.

Necessity for innuendo.]—See Sect. 5, sub-sect. 2, ante.

SUB-SECT. 2.—PROOF.

A. In General.

979. Words must be proved as alleged.]—In slander the words must be proved as they are laid.—*LEVERMORE v. MARTIN* (1593), Cro. Eliz. 297; 78 E. R. 550.

980. —.]—In an action for slander *per quod*, it is not sufficient to prove equivalent words of slander, though explained in the same sense by deft. himself.—*ARMITAGE v. DUNSTER* (1785), 4 Doug. K. B. 291; 99 E. R. 887.

981. —.]—Where in an action of slander the whole of the words laid in any one count constitute the slanderous charge, the whole must be proved. *Aliter* where there are distinct slanderous allegations in any count; proof of any of them is sufficient.—*FLOWER v. PEDLEY* (1796), 2 Esp. 489, N. P.

982. —.]—Slanderous words, charged as addressed to pltf. in the second person, are not supported by evidence of words spoken of him in the third person, though so spoken in his presence.

The rule is, that you must prove the precise words laid in the declaration; not indeed all the words which are charged, but so much of them as will constitute a sufficient cause of action (*PARKE, J.*).—*STANNARD v. HARPER* (1829), 5 Man. & Ry. K. B. 295.

983. — Not substance as understood.]—*HARRISON v. BEVINGTON*, No. 38, *ante*.

the different statements were made nor at what times & places they were made.—*TOWNSEND v. O'KEEFE* (1898), 18 P. R. 147.—**CAN.**

PART IV. SECT. 6, SUB-SECT. 2.—A.

979 i. Words must be proved as alleged.]—*M'CONNELL v. M* (1860), 10 I. C. L. R. 511.—**IR.**

p. Proof of publication in newspaper—Failure to read or file.]—In an action of libel for publication in a newspaper, pltf.'s counsel proved the paper containing the publication, but did not file it or read the article containing the alleged libel. Def't.'s counsel opened his case, & said he would call no witnesses. Pltf.'s counsel then moved to have the paper read

& filed, which the judge allowed, reserving leave to deft. to move to enter a nonsuit, if according to strict practice pltf. was not entitled to read the paper:—*Held*: the evidence offered was not admissible, except in the discretion of the judge trying the cause, & a nonsuit was therefore ordered.—*CROSS v. RICHARDSON* (1863), 13 C. P. 433.—**CAN.**

PART IV. SECT. 6, SUB-SECT. 2.—B.

991 i. Variance immaterial.]—The last sentence of the libel as set out was "We supposed that they had become aware of the fact," etc. The sentence as proved was, "We supposed that they had by this time become aware of the fact":—*Held*: variance immaterial.—*SMILEY v. McDUGALL* (1853),

984. —.]—*RAINY v. BRAVO*, No. 38, *ante*.

985. — On material & defamatory part.]—Modern practice is that it is enough to prove the substance of the words alleged or I would add a material & defamatory part of them (*SCRUTTON, L.J.*).—*TOURNIER v. NATIONAL PROVINCIAL & UNION BANK OF ENGLAND*, [1924] 1 K. B. 461; 93 L. J. K. B. 449; 130 L. T. 682; 40 T. L. R. 214; 68 Sol. Jo. 441; 29 Com. Cas. 129, C. A.

Annotation:—*Mentd.* *Waterhouse v. Barker*, [1924] 2 K. B. 759.

986. Two distinct allegations—Proof of one sufficient.]—Though all the actionable words laid in any one count are not proved, yet if some are, pltf. shall have a verdict.—*COMPAGNON v. MARTIN* (1772), 2 Wm. Bl. 790; 96 E. R. 465.

987. —.]—*FLOWER v. PEDLEY*, No. 981, *ante*.

988. Libel in foreign language—Original must be set out.]—In an action for a libel written in a foreign language, pltf. must set forth the libel in the original: & if he only set out a translation of it, the ct. will arrest the judgment.—*ZENOBIO v. AXTELL* (1795), 6 Term Rep. 162; 101 E. R. 489.

Annotations:—*Consd.* *Cook v. Cox* (1814), 3 M. & S. 110. *Refd.* *Bradlaugh v. R.* (1878), 3 Q. B. D. 607. *Mentd.* *R. v. Thomas* (1848), 2 Car. & Kir. 806.

989. — With translation.]—*R. v. PELTIER* (1803), 28 State Tr. 529.

Annotation:—*Mentd.* *Austria (Emperor) v. Day & Kossuth* (1861), 2 Giff. 628.

990. —.]—In an action for words the declaration stated, that deft. said of pltf., "he is a thief, a swindler, & a forger," etc., deft. pleaded not guilty. The words were proved to have been spoken in the Welsh language, but were of the same meaning as the English words stated in the declaration.

The judge at the trial allowed the declaration to be amended by translating the English words in the declaration into Welsh words of the same meaning, & inserting those Welsh words in the declaration.—*JENKINS v. PHILLIPS* (1841), 9 C. & P. 766; 5 Jur. 252, N. P.

B. Variation between Proof and Words Pleaded.

991. Variance immaterial.]—It is sufficient if words of defamation be substantially proved.—*RATCLIFF (LADY) v. SHUBLEY* (1591), Cro. Eliz. 224; 78 E. R. 480.

Annotation:—*Appld.* *Compagnon v. Martin* (1772), 2 Wm. Bl. 790.

992. —.]—If a special verdict find slanderous words as laid in the declaration, but superadd that they were spoken conjecturally, as "I think in my conscience, etc.," yet pltf. shall have judgment.—*SYDENHAM v. MAN* (1618), Cro. Jac. 407; Hob. 180; 79 E. R. 348; *sub nom.* *SYDNAM v. MAY*,

10 U. C. R. 113.—**CAN.**

991 ii. —.]—It is not necessary in slander to prove all the words as laid in the declaration, if the words proved do not qualify those alleged. The words alleged were, "You perjured yourself in the suit between T. & me before L." The words proved were, "You perjured yourself in the suit between your brother T. & me," etc.:—*Held*: No variance.—*VYE v. NEWMAN* (1866), 11 N. B. R. (6 All.) 388.—**CAN.**

991 iii. —.]—In an action for slander, if the words proved convey practically the same meaning as the words laid the variance will be held immaterial or else the judge will amend.—*HAHN v. GETTEL & GETTEL* (1915), 33 W. L. R. 97; 9 W. W. R. 686.—**CAN.**

3 Bulst. 260; *sub nom.* SIDNAM v. MAYO, 1 Roll. Rep. 427, Ex. Ch.

993. ———.] — ROBINSON v. WILLIS (1817), 2 Stark. 194, N. P.

994. ———.] — ORPWOOD v. BARKES, No. 290, *ante*.

995. ———.] — (1) A declaration charged the speaking of the following words—"I will do my best to transport him, as he has been working for me some time, & has been robbing me all the while." The words proved to have been spoken were—"He has worked for me some time; & has been continually robbing me":—*Held*: this was no variance.

(2) Deft. obtained a warrant to search the house of pltf. for goods of deft. suspected to have been stolen by pltf. He accompanied the officer to execute the warrant: & in accompanying him told the officer that pltf. had robbed him:—*Held*: this was not a privileged communication; inasmuch as the speaking of the words was no part of deft.'s business when he accompanied the officer.—DANCASTER v. HEWSON (1828), 2 Man. & Ry. K. B. 176; 6 L. J. O. S. K. B. 311.

996. ——— Addition to charge.] — SYDENHAM v. MAN, No. 992, *ante*.

997. ———.] — BOURKE v. WARREN, No. 75, *ante*.

998. ———.] — In an action of slander declaration stated the *colloquium* to be of & concerning certain meat of one A. which he had before purchased of pltf. who had before then purchased the same of certain other persons & had paid for the same. The declaration then stated that the slanderous words complained of imputing that pltf. had stolen the money with which he paid for the meat was spoken of & concerning the said meat. The part of the inducement which stated that pltf. had purchased the meat & paid for it was not proved:—*Held*: the want of such proof was immaterial.—COX v. THOMASON (1832), 2 Cr. & J. 361; 2 Tyr. 411; 1 L. J. Ex. 128; 149 E. R. 154.

999. Variance material—Words spoken interrogatively.] — A count for slanderous words spoken affirmatively is not supported by proof that they were spoken by way of interrogatory.—BARNES v. HOLLOWAY (1799), 8 Term Rep. 150; 101 E. R. 1316.

1000. ———.] — The words, "She is a great thief; she ought to have been transported," are not in substance proved by evidence of the words "she is a damned bad one; she ought to have been transported." The words "she ought to have been transported," expressing only the opinion of the speaker, are not of themselves actionable. At least, unless connected by innuendo with a *colloquium* of felony.—HANCOCK v. WINTER (1816), 7 Taunt. 205; 2 Marsh. 502; 129 E. R. 82.

1001. ———.] — In an action for slander it is alleged, that the words were spoken of & concerning certain soap, alleged by A. to have been stolen.

1000 i. Variance material.] — Where the words charged were, "You robbed the mail," & those proved, "I am not like you, running about the country with forged deeds, & robbing the mail as you did":—*Held*: the variance was fatal.—MCBEAN v. WILLIAMS (1838), 5 O. S. 689.—CAN.

1002 i. ——— Omission of qualifying words.] — Where the declaration only charged deft. with saying of pltf., "he burnt K.'s barn," & the proof was that deft. added, "because one of the girls would not marry him":—*Qu.*: whether there was not a fatal variance.

—MANLY v. CORRY (1847), 3 U. C. R. 380.—CAN.

1002 ii. ———.] — The words charged were, "He stole wheat last winter." The words proved were, "he, pltf., stole away the wheat in the night, & I was well aware of it, & could have put him in gaol for doing it":—*Held*: a fatal variance.—MCNAUGHT v. ALLEN (1851), 8 U. C. R. 304.—CAN.

1004 i. ——— Power of court to allow amendment.] — TOBIN v. GANNON (1901), 34 N. S. R. 9.—CAN.

q. Trial on words proved—Amend-

The declaration is not supported by evidence that the words were spoken concerning certain soap alleged by A. to have been taken out of his yard.—SHEPHERD v. BLISS (1819), 2 Stark. 510, N. P.

Annotation:—Distd. Cox v. Thomason (1832), 2 Cr. & J. 361.

1002. ——— Omission of qualifying words.] — Where a libellous paragraph, as proved, contained two references, by which it appeared to be in fact the language of a third person speaking of pltf.'s conduct, & the declaration in setting it out had omitted those references:—*Held*: these omissions altered the sense of the remainder, & that the variance was fatal.—CARTWRIGHT v. WRIGHT (1822), 5 B. & Ald. 615; 1 Dow. & Ry. K. B. 230; 106 E. R. 1315.

1003. ———.] — RAINY v. BRAVO, No. 978, *ante*.

1004. ——— Power of court to allow amendment.] — In an action of slander, the words laid in the declaration were "S. has got himself into trouble; he is out on bail for £100, & he is to be tried at the Old Bailey, for buying cocks which have been stolen from P. & Co. by their apprentice, who sold them to W., who sold them to S." The words proved were, "S. has got himself into trouble; he is out on bail for £100, & I have heard he is to be tried, etc.":—*Held*: a variance; but one which might be cured by an amendment at *Nisi Prius*, under 3 & 4 W. c. 42, s. 23, or by a special indorsement on the *Nisi Prius* record under s. 24.—SMITH v. KNOWELDEN (1841), 2 Man. & G. 561; 9 Dowl. 402; Drinkwater, 112; 2 Scott, N. R. 657; 10 L. J. C. P. 126; 5 Jur. 269; 133 E. R. 870.

1005. ———.] — In an action of slander, an amendment of the words laid, refused; the variance being, that what was laid as a charge appeared to have been only the statement of a report.

There is a fatal variance (MARTIN, B.).—PEARSE v. ROGERS (1860), 2 F. & F. 137, N. P.

SECT. 7.—FUNCTIONS OF JUDGE AND JURY.

SUB-SECT. 1.—THE JUDGE.

A. Where No Innuendo Alleged.

See, now, Libel Act, 1792 (c. 60).

1006. Former practice—Libel or no libel—Question for judge.] — On the trial of an indictment for a libel, the only questions for the jury are the fact of publication, & the truth of the innuendos. The question of libel or no libel is, necessarily, a question of law, for the sole consideration of the ct. out of which the record comes, & on which the judge at the trial is not called upon to give his opinion to the jury.

It is no answer to a charge of criminal publication of a libel to show that deft. had been told it was libellous, & not fit to be disseminated generally in the neighbourhood, & that he printed it with

of pleading on appeal.] — Where on an appeal in an action for slander it appears that there is a variance between the words alleged & those proved, but that the trial practically proceeded on the latter, the ct. may permit the pleadings to be amended so that the words alleged will be the same as those proved.—PERSEN v. RAINBOW, [1922] 1 W. W. R. 592; 66 D. L. R. 299; 17 Alta. L. R. 470.—CAN.

r. Proof not supporting declaration.] — VANKEUREN v. GRIFFIS (1846), 2 U. C. R. 423.—CAN.

Sect. 7.—Functions of judge and jury: Sub-sect. 1, A., B. & C.; sub-sect. 2, A.]

a view to disprove the imputation of having intended to promulgate a libel. These facts, if the composition be a libel, are, so far from constituting a defence, in aggravation rather than in mitigation of his guilt.

Circumstances which amount to a lawful excuse, or a justification, are proper upon the trial, & can only be used there. Upon every such defence set up of a lawful excuse or justification, there necessarily arise two questions, one of law, the other of fact; the first to be decided by the ct., the second by the jury. Whether the fact alleged supposing it true, be a legal excuse, is a question of law; whether the allegation be true, is a question of fact; & according to this distinction, the judge ought to direct, & the jury ought to follow the direction; though by means of a general verdict they are intrusted with a power of blending law & fact, & following the prejudices of their affections or passions (LORD MANSFIELD).—*R. v. SHIPLEY* (1784), 4 Doug. K. B. 73; 21 State Tr. 847; 99 E. R. 774; *sub nom.* *R. v. ST. ASAPH* (DEAN), 3 Term Rep. 428, n.

Annotations:— **Consd.** *Capital & Counties Bank v. Henty* (1882), 7 App. Cas. 741. **Refd.** *R. v. Burdett* (1821), 4 B. & Ald. 314; *Huntley v. Ward* (1859), 6 C. B. N. S. 514; *Nevill v. Fine Arts & General Insee.*, [1895] 2 Q. B. 156. **Mentd.** *Campbell v. R.* (1847), 11 Q. B. 814; *Re Pater* (1864), 33 L. J. M. C. 142; *R. v. Tolson* (1889), 23 Q. B. D. 168.

1007. Words capable of two meanings.]—SIMMONS v. MITCHELL, No. 577, *ante*.

1008. Duty to withdraw case from jury—Words incapable of defamatory meaning.]—(1) It is libellous, & affords good cause of action as such to charge another with ingratitude, even though the facts upon which the charge is grounded be stated, & are insufficient to support the charge.

(2) To impute untruly pecuniary embarrassment to another, & the inability to purchase a certain property without the aid of a loan from a third party is libellous; even although it be at the same time stated that the loan was afterwards honourably repaid.

(3) A judge is only justified in withdrawing the question of "libel or no libel" from the jury in cases where he is clearly of opinion that, if they were to find the matter a libel, their verdict would be set aside by the ct. above.—*COX v. LEE* (1869), L. R. 4 Exch. 284; 38 L. J. Ex. 219; 21 L. T. 178.

As to (3) Apld. *O'Brien v. Salisbury* (1889), J. P. 215.

1009. ———.]—When pltf. is suing for slanderous words, & the words he relies upon do not in any sense bear a defamatory & actionable meaning, the judge is justified in withdrawing the case from the jury, but in no other case can the defamatory meaning of words be treated as a matter of law so as to justify him taking that course. It would be misdirection on the part of the judge if he was to tell the jury, in an action for slander, that the question was not what was

the sense reasonably conveyed by the words used to persons of ordinary understanding, but what was deft.'s intention in using those words.—*O'BRIEN v. SALISBURY* (MARQUIS) (1889), 54 J. P. 215; 6 T. L. R. 133, D. C.

1010. ———.]—(1) Applt. acted for some time as agent to an insurance co. at his own offices. After some correspondence as to a change of terms upon which the parties could not agree, the co.'s secretary sent to persons who insured through applt. a circular stating that the agency of applt. at his offices had "been closed by the directors." Applt. having brought an action for libel against the co. the judge ruled that the statement was capable of a defamatory meaning but that the occasion was privileged. The jury found a verdict for pltf., that the statement was a libel, that it was untrue, & that defts. had exceeded the privilege, but did not find actual malice:—*Held*: judgment must be for the co., on the ground that the statement was not capable of a defamatory meaning, that it was true, that the occasion was privileged, that the finding of the jury as to excess of privilege was insufficient, & there was no evidence of malice for the jury.

(2) In an action for libel, where the judge rules that the occasion is privileged, nothing short of evidence of malice will displace the privilege.

(3) To constitute a libel, it is necessary not only that the words should be susceptible of a libellous meaning, but that in the mind of a reasonable man they would constitute an imputation upon the person complaining.—*NEVILL v. FINE ART & GENERAL INSURANCE CO.*, [1897] A. C. 68; 66 L. J. Q. B. 195; 75 L. T. 606; 61 J. P. 500; 13 T. L. R. 97, H. L.

Annotations:— *As to (1) Apld.* *Adam v. Ward*, [1917] A. C. 309. *As to (3) Consd.* *Empire Typesetting Machine Co. of New York v. Linotype Co.* (1898), 79 L. T. 8. **Folld.** *Ware & De Freville v. Motor Trade Assocn.*, [1921] 3 K. B. 40. **Generally, Refd.** *Cornford v. Carlton Bank*, [1899] 1 Q. B. 392; *Dauncey v. Holloway* (1901), 84 L. T. 649; *Mapey v. Baker* (1909), 73 J. P. 289. **Mentd.** *Stollery v. Maskelyne* (1898), 15 T. L. R. 79; *Floyd v. Gibson* (1909), 100 L. T. 761; *Banbury v. Bank of Montreal*, [1918] A. C. 626; *Yorkshire Insee. v. Craine*, [1922] 2 A. C. 541.

Direction to jury.]—See Sub-sect. 1, C., *post*.

B. When Innuendo Alleged.

1011. Duty of judge to decide—Whether words capable of bearing meaning alleged.]—Undoubtedly it is the duty of the judge to say whether a publication is capable of the meaning ascribed to it by an innuendo; but when the judge is satisfied of that, it must be left to the jury to say whether the publication has the meaning he ascribed to it (WILDE, C.J.).—*STURT v. BLAGG* (1847), 10 Q. B. 906; 116 E. R. 343, Ex. Ch.; *affg.* *S. C. sub nom. BLAGG v. STURT* (1846), 10 Q. B. 899.

Annotations:— **Apld.** *Hunt v. Goodlake* (1873), 43 L. J. C. P. 54. **Consd.** *Capital & Counties Bank v. Henty* (1882), 7 App. Cas. 741; *Nevill v. Fine Arts & General Insee.*, [1895] 2 Q. B. 156. **Refd.** *Harris v. Thompson* (1853), 13 C. B. 333; *Harrison v. Bush* (1855), 5 E. & B. 314; *Procter v. Webster* (1885), 53 L. T. 765.

1012. ———.]—*CAPEL v. JONES*, No. 162, *ante*.

words were in fact used with such meaning.—*RAY v. CORBETT* (1883), 16 N. S. R. (4 R. & G.) 407.—**CAN.**

1011 II. ———.]—*HIGGINS v. WALKER* (1889), 17 S. C. R. 225.—**CAN.**

1011 III. ———.]—*TEACY v. M'KENNA* (1869), 1 R. 4 C. L. 374.—**IR.**

1011 IV. ———.]—If at the close of pltf.'s case the innuendo is not borne out by the evidence, & the judge is of opinion that the words cannot be held to be defamatory, he may decide

PART IV. SECT. 7, SUB-SECT. 1.—A.

1007 i. Words capable of two meanings.]—In an action for libel it is the province of the judge to determine whether the words complained of are capable of a defamatory meaning. If he thinks that they are susceptible of a defamatory meaning, but also of an innocent meaning, the proper course is for him to direct the jury to find whether the publication in question amounts to one.—*RICHTER v. MACK*, [1917] App. D. 201.—**S. AF.**

PART IV. SECT. 7, SUB-SECT. 1.—B.

1011 I. Duty of judge to ———.]—*Whether words capable of bearing meaning alleged.]—*Deft. admitted publication of an alleged libel, & denied that the alleged defamatory matter was published of & concerning pltf. with the sense set out in the innuendo:—*Held*: it was the duty of the judge to tell the jury whether the words used were capable of the construction put on them by pltf., & to leave it to the jury whether the

1013. ———.]—*AUSTRALIAN NEWSPAPER CO. v. BENNETT*, No. 900, *ante*.

1014. ———.]—*If not to withdraw case from jury.*—In an action for libel it is the duty of the judge to determine, upon the evidence adduced at the trial, whether the words complained of are reasonably capable of the defamatory meaning ascribed to them by the innuendoes, & if they are not, he is bound to withdraw the case from the jury & to direct either a nonsuit or a verdict for deft.—*HUNT v. GOODLAKE* (1873), 43 L. J. C. P. 54; 29 L. T. 472.

1015. ———.]—*MULLIGAN v. COLE*, No. 931, *ante*.

1016. ———.]—*CAPITAL & COUNTIES BANK v. HENTY*, No. 121, *ante*.

1017. ———.]—*FROST v. LONDON JOINT STOCK BANK, LTD.*, No. 174, *ante*.

1018. *Matters to be considered by judge.*—*CAPITAL & COUNTIES BANK v. HENTY*, No. 121, *ante*.
Direction to jury.—*See C., post*.

C. Direction to Jury.

1019. *What is libel in point of law.*—(1) In an action for libel, the judge is not bound to state to the jury, as matter of law, whether the publication complained of be a libel or not; but the proper course is for him to define what is a libel in point of law, & to leave it to the jury to say whether the publication in question falls within that definition; & as incidental to that, whether it is calculated to injure the character of pltf.

(2) A publication may be a libel on a private person, which would not be any libel on a person in a public capacity; but any imputation of unjust or corrupt motives is equally libellous in either case.

. . . Whether the particular publication is of that character [a libel] . . . is a question upon which a jury is to exercise their judgment, & pronounce their opinion, as a question of fact. The judge, as a matter of advice to them in deciding that question, might have given his own opinion as to the nature of the publication, but was not bound to do so as a matter of law. . . Every subject has a right to comment on those acts of public men which concern him as a subject of the realm, if he do not make his commentary a cloak for malice & slander (*PARKE, B.*).

(3) A publication without justification or lawful excuse, which is calculated to injure the reputation of another by exposing him to hatred, contempt or ridicule, is a libel (*PARKE, B.*).—*PARMITER v. COUPLAND* (1840), 6 M. & W. 105; 9 L. J. Ex. 202; 4 Jur. 701; 151 E. R. 340.

Annotations:—*As to (1) Consd.* *Capital & Counties Bank v. Henty* (1882), 7 App. Cas. 741; *O'Brien v. Salisbury* (1889), 54 J. P. 215. *Refd.* *Baylis v. Lawrence* (1840), 11 Ad. & El. 920; *Hakewell v. Ingram* (1854), 2 C. L. R. 1397; *Paris v. Levy* (1860), 9 C. B. N. S. 342; *Cox v. Lee* (1869), L. R. 4 Exch. 284; *Henwood v. Harrison* (1872), L. R. 7 C. P. 606; *Monson v. Tussauds*, *Monson*

that there is no question to go to a jury.—*BLUNDELL v. GARDINER* (*circa* 1878), 4 N. Z. Jur. N. S. 70.—*N.Z.*

PART IV. SECT. 7, SUB-SECT. 1.—C.

1019 i. *What is libel in point of law.*—*LESLIE v. BLACKWOOD* (1822), 3 Murr. 165.—*SCOT.*

1019 ii. ———.]—*GIBSONS v. MARR* (1823), 3 Murr. 271.—*SCOT.*

1021 i. *Judge's opinion as to libel.*—A judge at *Nisi Prius* may deliver his opinion to the jury, whether in fact a writing is a libel or not.—*HOLROYD v. PARKES* (1886), 10 N. S. W. L. R. 163.—*AUS.*

1021 ii. ———.]—In an action for libel the judge may tell the jury that in his

opinion the words or article complained of are libellous, provided he makes it clear to them that they are free to determine for themselves the issue of libel or no libel upon the evidence, entirely apart from his interpretation.—*KNOTT v. TELEGRAM PRINTING CO., LTD.*, [1917] 3 W. W. R. 335.—*CAN.*

1021 iii. ———.]—In an action for libel the judge may tell the jury whether or not, in his opinion, the article complained of is libellous, but he is not bound to do so.—*MACASSEY v. BELL* (*circa* 1875), 2 N. Z. Jur. 59.—*N.Z.*

t. *What amounts to misdirection.*—In an action of slander, where there is undisputed evidence that the words complained of applied to pltf., it is misdirection to leave to the jury to find

v. Tussaud, [1894] 1 Q. B. 671. *As to (2) Consd.* *Henwood v. Harrison* (1872), L. R. 7 C. P. 606. *Refd.* *Coxhead v. Richards* (1846), 2 C. B. 569; *Sutherland v. Stopes*, [1925] A. C. 47. *As to (3) Consd.* *M'Nally v. Oldham* (1863), 8 L. T. 604. *Refd.* *Capital & Counties Bank v. Henty* (1882), 7 App. Cas. 741.

1020. ———.]—On the trial of an issue of not guilty in an action for libel, it is no misdirection if the judge leaves to the jury the question, whether or not the publication be libellous, without stating his own opinion as to the particular publication, or defining what generally constitutes a libel.—*BAYLIS v. LAWRENCE* (1840), 11 Ad. & El. 920; 3 Per. & Dav. 526; 9 L. J. Q. B. 196; 4 J. P. 443; 4 Jur. 652; 113 E. R. 664.

Annotations:—*Consd.* *Paris v. Levy* (1860), 9 C. B. N. S. 342. *Refd.* *Hearne v. Stowell* (1841), 4 Per. & Dav. 696; *Capital & Counties Bank v. Henty* (1880), 49 L. J. Q. B. 830.

1021. *Judge's opinion as to libel.*—*PARMITER v. COUPLAND*, No. 1019, *ante*.

1022. ———.]—*BAYLIS v. LAWRENCE*, No. 1020, *ante*.

1023. *What amounts to misdirection—Direction to consider intention of defendant.*—*HAIRE v. WILSON*, No. 901, *ante*.

1024. ———.]—*FISHER v. CLEMENT*, No. 902, *ante*.

1025. ———.]—*O'BRIEN v. SALISBURY (MARQUIS)*, No. 1009, *ante*.

1026. ———.]—*Omission to direct no libel on record.*—(1) After verdict for pltf. on the issue of not guilty in an action for libel, the ct. will arrest the judgment if no libel on pltf. appears on the record.

(2) Deft. is not entitled to a new trial for misdirection, on the ground that the judge did not direct the jury that there was no libel on pltf. on the record, where the judge was not requested to do so, & the defence was arrested on a supposed privilege of publication.

(3) The reading of a statement containing libellous matter against an individual, by way of illustration of an argument, in public speaking, is not a privileged communication, & such circumstances do not rebut the presumption of malice.—*HEARNE v. STOWELL* (1841), 12 Ad. & El. 719; 4 Per. & Dav. 696; 11 L. J. Q. B. 25; 6 Jur. 458.

Annotations:—*As to (1) Consd.* *Capel v. Jones* (1847), 4 C. B. 259; *Capital & Counties Bank v. Henty* (1882), 7 App. Cas. 741. *Refd.* *Alfred v. Farlow* (1846), 8 Q. B. 854; *Wakley v. Healey* (1849), 4 Exch. 53. *As to (3) Refd.* *Pearson v. Lemaitre* (1843), 5 Man. & G. 700.

1027. ———.]—*Omission to put innuendo to jury.*—*BABONNEAU v. FARRELL*, No. 930, *ante*.

SUB-SECT. 2.—THE JURY.

A. Construction of Words used.

See Libel Act, 1792 (c. 60).

1028. *Libel or no libel.*—*R. v. BURDETT*, No. 1097, *post*.

whether deft., when he spoke the words, intended pltf., without pointing put such evidence to them.—*GOOD v. GOOD* (1883), 22 N. B. R. 439.—*CAN.*

a. ———.]—In an action claiming damages for slander, the judge directed the jury that if deft. had not used the words complained of in any sense which involved the charge of stealing he was entitled to a verdict.—*Held:* misdirection.—*RHODENIZER v. RHODENIZER* (1919), 52 N. S. R. 234; 50 D. L. R. 344.—*CAN.*

PART IV. SECT. 7. SUB-SECT. 2.—A.

1028 i. *Libel or no libel.*—*DWYER v. MACARTNEY* (1877), 3 V. L. R. L. 296.—*AUS.*

Sect. 7.—Functions of judge and jury: Sub-sect. 2, A. & B.]

1029. —.]—In an action for libel, the declaration stated that pltf. & M. had been duly convicted of conspiring to extort money from C., & received judgment, but that deft. published that the counsel, who moved for judgment, had stated pltf. to be the writer of a letter which was in fact written by M. Issue was joined on a plea of not guilty. Pltf., at the trial, proved the publication & the indictment & sentence, the letter being set out in the indictment as an overt act of the conspiracy, & called the counsel as a witness, who deposed that he had in fact made the statement:—*Held*: on this evidence it was properly left to the jury whether the publication was a libel, & the jury having found a verdict of not guilty, this was not contrary to the evidence.—*STOCKDALE v. TARTE* (1836), 4 Ad. & El. 1016; 111 E. R. 1085.
Annotation:—*Reid*. Greville v. Chapman (1844), 5 Q. B. 731.

1030. —. *Though against opinion of judge.*—In an action of libel, where the meaning of the publication proved is not beyond all question, the jury may put their own construction, & find for deft., although the judge give them his decided opinion that the publication is libellous.—*EMPSON v. FAIRFORD* (1837), Will. Woll. & Dav. 10; 1 Jur. 20.

1031. —.]—*PARMITER v. COUPLAND*, No. 1019, *ante*.

1032. —.]—In actions for libel, although the judge is to leave it to the jury whether, under the circumstances, the publication is a libel, on the general issue, guilty or not guilty, yet if they find a verdict for deft. on that issue, in a case in which no question is made as to the fact of publication, nor as to its application to pltf., the ct. can set aside the verdict. In an article on the subject of the want of some efficient protection for married women, the writer mentioned two cases as showing the necessity for legislation; one case being described as that of a husband who acted towards his wife like "a sot & a brute"; and then the article proceeded, "The other is that of Mrs. H.," meaning the wife of pltf., "who having been restored to her husband's protection by a decree of the Ecclesiastical Ct., found her misery so aggravated by the restitution of her conjugal rights, that she was compelled to resort to the police ct. for the little help the law gives"; & it concluded by saying that the law did not meet such cases; & that "the condition of woman, when the brute intervenes, is more oppressive than that of the negro." Plea, not guilty. It was not disputed that the passage applied to pltf., but no evidence was given as to the matters referred to. The ct. set aside the verdict for deft., & granted a new trial.—*HAKWELL v. INGRAM* (1854), 2 C. L. R. 1397.

1033. —.]—Deft. having said of a trader in his shop, before customers, that wholesale dealers were going to close their accounts with him & to shut him up:—*Held*: it was for the jury, whether these words imputed actual or likely insolvency.—*GOSTLING v. BROOKS* (1860), 2 F. & F. 76.

1034. —.]—*WILSON v. REED*, No. 5, *ante*.

1028 ii. —.]—*HARRIS v. CLAYTON* (1881), 21 N. B. R. 237.—*CAN.*

1028 iii. —.]—It is for the jury to say whether alleged defamatory matter published is a libel or not, & the widest latitude is given to them in dealing with it.—*WILLS v. CARMAN* (1889), 17 O. R. 223.—*CAN.*

1028 iv. —.]—*ARCHIBALD v. CUM-*

MINGH (1893), 25 N. S. R. (13 R. & G.) 555.—*CAN.*

1028 v. —.]—*CAMERON v. OVEREND* (1905), 15 Man. L. R. 408; 1 W. W. R. 545.—*CAN.*

1028 vi. —.]—On the facts:—*Held*: the question of libel or no libel was for the jury, & that the verdict should not be disturbed.—*HEPBURN v. BEATTIE*

1035. —.]—*COX v. LEE*, No. 1008, *ante*.

1036. —.]—Declaration, that pltf. were manufacturers of bags, & manufactured a bag which they called the "Bag of Bags," & deft. printed & published, concerning pltf. in their business, the words following: "As we have not seen the Bag of Bags, we cannot say that it is useful, or that it is portable, or that it is elegant. All these it may be, but the only point we can deal with is the title, which we think very silly, very slangy, & very vulgar; & which has been forced upon the notice of the public *ad nauseam*":—*Held*: it was a question for the jury whether the words did not convey an imputation on pltf.' conduct in their business, & whether the language went beyond the limits of fair criticism.—*JENNER v. A'BECKETT* (1871), L. R. 7 Q. B. 11; 41 L. J. Q. B. 14; 25 L. T. 464; 36 J. P. 38; 20 W. R. 181.
Annotations:—*Reid*. Miller v. David (1874), L. R. 9 C. P. 118; Empire Typesetting Machine Co. of New York v. Linotype Co. (1898), 79 L. T. 8; Griffiths v. Benn (1911), 27 T. L. R. 346.

1037. —.]—The *W. M. N.* & the *W. D. M.* were rival papers published in the same town. On the occasion of an agriculture show at G., the *W. M. N.* published an article saying that in the show yard an audacious attempt to obtain money by false pretences had been detected & exposed, to wit, that a "certain newspaper of limited circulation, published in a town remote from G., has inserted, without any order to do so, columns of advertisements referring to the implements on view, copied from other newspapers to which advertisements have been given, or from papers of a year ago," & alleging that the object was to swell the number of advertisements in the paper & to inveigle the manufacturers into payment by subsequently sending in bills for the spurious advertisements. A week after the publication of this article another appeared, in which the charge of inserting advertisements without orders was made against the *W. D. M.* in terms:—*Held*: (1) although the first article did not refer in express terms to any individual or to any newspaper, evidence might be given to show to whom & to what it had reference, which was a question for the jury; (2) it was for the jury to say whether the alleged libel applied to the management of pltf.'s paper, & if so, whether it was a libel on pltf. personally by means of imputing personal misconduct to him, or as reflecting on the way in which he managed his business; for, although it might not have been meant to charge the pltf. with any actual personal corruption, yet, if it were a charge on the management of his commercial business, that it was being carried on in a disgraceful way, it would be for the jury to say whether it was libellous.

(3) The circulation & position of a newspaper are not matters of general public interest, & a discussion on the subject is not protected if it be libellous.—*LATIMER v. WESTERN MORNING NEWS CO.* (1871), 25 L. T. 44.

1038. —.]—In cases of libel the meaning of the words used, the fairness of a report, & the meaning of comments added by a reporter, are questions entirely for a jury to decide & should not be hastily withdrawn from a jury.—*STREET v.*

(1911), 16 B. C. R. 209.—*CAN.*

1028 vii. —.]—*WILSON v. LONDON FREE PRESS PRINTING CO.* (1919), 44 O. L. R. 12; 45 D. L. R. 503.—*CAN.*

1028 viii. —.]—Whether the statement is defamatory is a question for the jury.—*COUCHTNEY v. EVENING STAR CO., LTD.* (1903), 21 N. Z. L. R. 116.—*N.Z.*

LICENSED VICTUALLERS' SOCIETY (1874), 22 W. R. 553.

1039. ———.]—EYRE v. GARLICK, EYRE v. FRANKLIN (1878), 42 J. P. Jo. 68.

1040. ——— Words capable of two meanings.]—SIMMONS v. MITCHELL, No. 577, *ante*.

1041. ———.]—In directing a jury in an action of libel the libel should be placed before them, & they should be asked what in their opinion it would represent to persons of ordinary intelligence reading it, & if the libel can bear more than one meaning the question is purely one for the jury to decide.—GRANT v. YATES (1886), 2 T. L. R. 368, C. A.

1042. ———.]—Wherever deft.'s words are capable both of a harmless & an injurious meaning, it will be a question for the jury to decide which meaning the readers would, on the occasion in question, have reasonably given to the words; surrounding circumstances may be looked at.—CHURCHILL v. GEDNEY (1889), 53 J. P. 471.

1043. ———.]—COULSON (WILLIAM) & SONS v. COULSON (JAMES) & CO., No. 2232, *post*.

1044. ———.]—LINOTYPE CO., LTD. v. BRITISH EMPIRE TYPE-SETTING MACHINE CO., LTD., No. 113, *ante*.

1045. ———.]—DAKHYL v. LABOUCHERE, No. 1823, *post*.

1046. Whether published by defendant.]—EYRE v. GARLICK, EYRE v. FRANKLIN (1878), 42 J. P. Jo. 68.

1047. Whether words proved substantially those pleaded.]—WRIGHT v. CLEMENTS, No. 968, *ante*.

B. Construction of Innuendo.

1048. Question for jury.]—A declaration for a libel stated that on a certain night, a gentleman was hounded & robbed in a public-house kept by pltf.—innuendo, "that a person had been feloniously drugged & robbed in the said public-house of pltf., & thereby intending to cause it to be believed that the said public-house of pltf. was the resort of, & frequented by felons, thieves, & depraved & bad characters." The jury having returned a verdict for deft., notwithstanding that witnesses called for pltf. stated that they had ceased to frequent pltf.'s house in consequence of the publication, & that they understood the libel as an imputation upon pltf. & upon the character & conduct of his house, the ct. refused to grant a rule for a new trial.—BROOME v. GOSDEN (1845), 1 C. B. 728; 135 E. R. 728.

Annotation:—Consd. O'Brien v. Salisbury (1889), 54 J. P. 215.

1049. ——— If words capable of alleged meaning.]—STURT v. BLAGG, No. 1011, *ante*.

1050. ———.]—Pltfs., vocalists, advertised in a theatrical newspaper as follows: "The Sisters Hartridge have great pleasure in thanking Messrs. Chappell & Co., Messrs. Metzler & Co.," music publishers, "& others, for their kind unhesitating permission to sing any *morceaux* from their musical publications." Deft., who was interested as agent for the proprietors of the "stage-right" of certain songs published by the firms mentioned, wrote to the proprietors of two music halls at which pltfs. were engaged to sing, to the effect that the advertisement, if relied upon in every particular, was calculated to lead them to incur penalties

under the Copyright Act, 1842 (c. 45), inasmuch as the publishers named had in some instances no power to give the alleged permission, & insinuating that music hall singing was not calculated to create a demand for their musical publications. Upon a motion to set aside a nonsuit:—*Held*: inasmuch as the letters were reasonably susceptible of a construction which would make them libellous, the opinion of the jury ought to have been taken upon their meaning.—HART v. WALL (1877), 2 C. P. D. 146; 46 L. J. Q. B. 227; 25 W. R. 373.

Annotation:—*Dbtd*. Capital & Counties Bank v. Henty (1882), 7 App. Cas. 741.

1051. ———.]—The proprietors of a trades gazette called the *Hatters' Gazette*, published, on Dec. 1, 1887, under the heading "County Court Judgments," the following notice: "Williams, Stewart, Leadenhall House, Leadenhall Street, hatter, for £27 1s., Oct. 13." It appeared that, although the judgment had been duly recorded & registered, & there was no entry of satisfaction on the register, yet Williams, deft. in the County Ct. action, had, some time previously to Dec. 1, settled with his opponent out of ct., but had taken no steps to procure an entry of satisfaction on, or a removal of the judgment from, the register. The jury found that the libel meant that there was, on Dec. 1 an unsatisfied judgment against pltf.:—*Held*: (1) the words were capable in law of that meaning; (2) the fact that the words were a correct transcript of the register of county ct. judgments was not a defence to the action in the face of the finding of the jury.—WILLIAMS v. SMITH (1888), 22 Q. B. D. 134; 58 L. J. Q. B. 21; 59 L. T. 757; 52 J. P. 823; 37 W. R. 93; 5 T. L. R. 23, D. C.

Annotation:—*As to* (2) *Expld. & Distd*. Scarles v. Scarlett, [1892] 2 Q. B. 56.

1052. ———.]—Resp., a Member of Parliament, asked a question in the House of Commons implying that C. had been guilty of improper conduct. C. wrote to resp. to complain of the imputation of his character, & subsequently published his letters in a newspaper of which applts. were proprietors. One letter containing the following passage: "Supposing for example, I sent a question . . . based on hearsay evidence to the effect that I heard from a gentleman whom I would not think of doubting, that you were in a state of delirium tremens. . . . Or suppose I had added to that further stories I had heard that you were utterly intoxicated in the streets." Resp. brought an action for libel against the proprietors of the newspaper:—*Held*: the words were capable of being reasonably understood in a libellous sense, & therefore that there was a question to go to the jury.—RITCHIE & CO. v. SEXTON (1891), 64 L. T. 210; 55 J. P. 389; 7 T. L. R. 388, H. L.

Annotation:—*Refd*. Stubbs v. Russell, [1913] A. C. 386.

1053. ———.]—AUSTRALIAN NEWSPAPER CO. v. BENNETT, No. 900, *ante*.

1054. ———.]—STONE v. BREWIS (No. 1) (1902), 47 Sol. Jo. 70, C. A.

1055. ———.]—It is the province of the jury to say what the words mean (JERVIS, C.J.).—PROFERT v. TREGGAR (1851), 17 L. T. O. S. 51.

1056. ——— Words of slang character.]—BARNETT v. ALLEN, No. 870, *ante*.

PART IV. SECT. 7, SUB-SECT. 2.—B.

1048 i. Question for jury.]—JACKSON v. McDONALD (1841), 1 U. C. R. 19.—CAN.

1048 ii. ———.]—Demurrer to two counts of pltf.'s writ in an action of slander, the innuendo in both counts being that pltf. had been guilty of

wilful & corrupt perjury. The demurrer was on the ground that the words were not actionable on themselves, & did not support the innuendo:—*Held*: the counts were good, & it was for the jury to say whether pltf. was warranted in putting the meaning upon them set out.—FERGUSON v. (1870), 8 N. S. R. 135.—CAN.

1048 iii. ———.]—Where the innuendo in a declaration for libel alleges that the words were used in a defamatory sense, the question becomes one for a jury.—BLUNDELL v. GARDINER (circa 1878), 4 N. Z. Jur. N. S. 70.—N.Z.

1048 iv. ———.]—BUTCHER v. PAYTON, 9 N. Z. L. R. 240.—N.Z.

Part V.—Publication.

SECT. 1.—LIBEL.

SUB-SECT. 1.—WHAT AMOUNTS TO.

A. In Civil Cases.

(a) In General.

1057. Meaning of publication.]—PULLMAN v. HILL & Co., No. 1069, *post*.

1058. Delivery to a stranger—Of communication or copy]—CASE DE LIBELLIS FAMOSIS, No. 1167, *post*.

1059. — On request.]—A person who having a copy of a libellous caricature, shows it to another on being requested so to do, is not thereby liable to an action for maliciously publishing it.—SMITH v. WOOD (1812), 3 Camp. 323, N. P.

Annotation.—**Refd.** R. v. Carlile (1845), 1 Cox, C. C. 229.

1060. — — —.]—(1) The first count, in an action for libel, was in respect of a newspaper published more than seventeen years before action brought. Stat. Limitations being pleaded:—**Held:** the plea was negatived by proof that a single copy had been purchased from deft. for pltf. by pltf.'s agent, within the six years.

(2) Other counts were in respect of other libels, alleged to impute to pltf. the libellous matter charged in the first count, which was set out by way of inducement in each count. The libels themselves, in these other counts, did not refer to that in the first count. Stat. Limitations was pleaded to so much of these counts as related to the matter in the first count:—**Held:** the plea was negatived as to these counts also; &, further, it was not necessary to tell the jury, in estimating the damages as to such matter, to take into consideration the fact that the only publication proved had been the sale to the agent.

Deft., who, on the application of a stranger, delivers to him the writing which libels a third person, publishes the libellous matter to him, though he may have been sent for the purpose of procuring the work by that third person (COLERIDGE, J.).—BRUNSWICK (DUKE) v. HARMER (1849), 14 Q. B. 185; 19 L. J. Q. B. 20; 14 L. T. O. S. 198; 14 Jur. 110; 117 E. R. 75; *subsequent proceedings* (1850), 1 L. M. & P. 505.

1061. Delivery by governor of province—To Attorney-General.]—WYATT v. GORE, No. 2062, *post*.

1062. Transmission of letter—To correspondent abroad.]—WARD v. SMITH, No. 1621, *post*.

1063. — Letter read by person other than addressee—Servant in breach of duty—Letter enclosed.]—Deft. sent through the post in an unclosed envelope a written communication which pltf. alleged was defamatory of them. The communication was taken out of the envelope & read by a butler who was a servant at the house to which the envelope was addressed in breach of his duty & out of curiosity. In an action for libel brought by pltf. against deft.:—**Held:** there was no evidence of publication by deft. of the communication, & therefore the action would not lie.—HUTH v. HUTH, [1915] 3 K. B. 32; 84 L. J. K. B. 1307; 113 L. T. 145; 31 T. L. R. 350, C. A.

Annotation.—**Consd.** Roff v. British & French Chemical Manufacturing Co. & Gibson, [1918] 2 K. B. 677.

1064. — — — Not intended by defendant.]—

One H. P., who contemplated purchasing a house from pltf. requested his son F. P., with whom he was staying for a few days, to write to deft. to make certain inquiries respecting pltf. F. P. wrote in his own name & from his own address asking for the information in confidence. Deft. replied by letter which arrived at F. P.'s house during his absence; it was opened & read by H. P. & was not seen or read by F. P. In an action by pltf. against deft. in respect of alleged libellous statements in his letter the jury found that deft. did not know or expect that his letter might probably be opened or seen by a person other than the addressee; that deft. did not *bonâ fide* believe that what he wrote was true; that deft. was actuated by malice in writing the letter; & they assessed the damage at £75:—**Held:** judgment must be entered for deft. as there had been no publication of the libel by him.—POWELL v. GELSTON, [1916] 2 K. B. 615; 85 L. J. K. B. 1783; 115 L. T. 379; 32 T. L. R. 703; 60 Sol. Jo. 696.

See, also, Nos. 1078–1084, *post*.

1065. Mere printing—Whether publication to be inferred.]—WATTS v. FRASER, No. 1160, *post*.

Compare No. 1155, *post*.

1066. Copying a libel.]—R. v. BEARE, No. 1141, *st*.

1067. Telegram.]—WILLIAMSON v. FREER, No. 1482, *post*.

1068. — — —.]—A postcard was sent by deft. to pltf. & a telegram was sent by deft. to her husband, each containing a libel on pltf.:—**Held:** a publication.—CHATELL v. TURNER (1896), 12 T. L. R. 360, N. P.

1069. Letter locked in drawer—Taken & published by thief.]—In an action for libel it appeared that the alleged libel was contained in a letter respecting pltf. two of the members of a partnership, written on behalf of defts. a limited co., & sent by post in an envelope addressed to the firm. The writer did not know that there were other partners in the firm. The letter was dictated by the managing director of defts. to a clerk, who took down the words in shorthand & then wrote them out in full by means of a typewriting machine. The letter thus written was copied by an office boy in a copying press. When it reached its destination, it was in the ordinary course of business opened by a clerk of the firm, & was read by two other clerks:—**Held:** the letter must be taken to have been published both to pltf.' clerk & defts.' clerks, & neither occasion was privileged.

What is the meaning of "publication"? The making known the defamatory matter after it has been written to some person other than the person of whom it is written. If the statement is sent straight to the person of whom it is written, there is no publication of it; for you cannot publish a libel of a man to himself. If there was no publication, the question whether the occasion was privileged does not arise. If a letter is not communicated to any one but the person to whom it is written, there is no publication of it; &, if the writer of a letter locks it up in his own

PART V. SECT. 1, SUB-SECT. 1.—

A. (a).

10591. Delivery to a stranger—On

request.—WILSON v. MUTUAL STORE, LTD. (1899), 25 V. L. R. 262.—**AUS.**

10641. Transmission of letter—Letter

by person other than Not intended by defendant.]—FOX v. BROCKHURST (1864), 14 L. C. L. R. 453.—

& a thief comes & breaks open the desk & takes away the letter & makes its contents known, I should say that would not be a publication. If the writer of a letter shows it to his own clerk in order that the clerk may copy it for him, is that a publication of the letter? Certainly it is showing it to a third person; the writer cannot say to the person to whom the letter is addressed, "I have shown it to you & to no one else." I cannot, therefore, feel any doubt that, if the writer of a letter shows it to any person other than the person to whom it is written, he publishes it (LORD Esher, M.R.).

Moreover, the letter was directed to pltf.'s firm, & was opened by one of their clerks. The sender might have written "Private" outside it, in order to prevent its being opened by a clerk. Defts. placed the letter out of their own control, & took no means to prevent its being opened by pltf.'s clerks. In my opinion, therefore, there was a publication of the letter, not only to the typewriter, but also to the clerks of pltf.'s firm. Assuming, then, that there was publication, the question next arises, whether the occasion was privileged. A confusion is often made between a privileged communication & a privileged occasion. It is for the jury to say whether a communication was privileged; but the question whether an occasion was privileged is for the judge, & that question only arises when there has been publication to a third party (LOPEZ, L.J.).—PULLMAN v. HILL & Co., [1891] 1 Q. B. 524; 60 L. J. Q. B. 299; 64 L. T. 691; 39 W. R. 263; 7 T. L. R. 173, C. A.

Annotations:—**Expld. & Distd.** Boxsius v. Goblet Frères, [1894] 1 Q. B. 842; Edmondson v. Birch & Horner, [1907] 1 K. B. 371; Roff v. British & French Chemical Manufacturing Co. & Gibson, [1918] 2 K. B. 677. **Refd.** Stuart v. Bell, [1891] 2 Q. B. 341; Sharp v. Skues (1909), 25 T. L. R. 336.

1070. Letter directed to plaintiff's firm—Marked "private."—PULLMAN v. HILL & Co., No. 1069, *ante*.

1071. Applying libel written by third party.—Deft. published in a newspaper, under the heading "Parochial Matters at E.," a letter containing the words: "I refer all readers of the letters on this subject to the Primate's speech on the Clergy Discipline Act." The Primate's speech contained serious allegations against an unnamed clergyman. Three paragraphs of the statement of claim in an action for libel brought by the rector of E. against deft. set out deft.'s letter & the portion of the Primate's speech which contained the allegations, & alleged that deft. intended by his letter that pltf. was the object of the Primate's allegations:—**Held:** upon an application to strike out the three paragraphs; the matters therein alleged amounted to a publication of a libel by deft. upon pltf., & disclosed a cause of action.—LAWRENCE v. NEWBERRY (1891), 64 L. T. 797; 39 W. R. 605; 7 T. L. R. 588, D. C.

1073 i. Postcard.—Sending by mail a postcard addressed to pltf. containing libellous matter is a publication of the libel.—MOTHERSILL v. YOUNG, 18 C. L. T. Occ. N. 5.—**CAN.**

1073 ii. —.—The transmission by post of an uncovered postcard containing matter libellous of the person to whom it is addressed is an actionable publication of the libel.—ROBINSON v. JONES (1879), 4 L. R. Ir. 391.—**IR.**

1073 iii. —.—M'CANN v. EDINBURGH, ROPERIE & SAILCLOTH CO. (1889), 28 L. R. Ir. 24.—**IR.**

b. Delivery to former servant's present employer.—JACKSON v. STALEY (1885), 9 O. R. 334.—**CAN.**

c. Preparation of copies of state-

—For circulation to trade association—Publication to copyist.—HARPER v. HAMILTON RETAIL GROCERS' ASSOCN. (1900), 21 C. L. T. 23; 32 O. R. 295.—**CAN.**

d. Letter read by bookkeeper.—Publication is essential to an action for defamation. H. sent a letter containing defamatory statements to Z. The letter was opened by Z.'s bookkeeper. There was nothing to show that H. was responsible for the opening of the letter by the bookkeeper, or that he knew it would be opened by him:—**Held:** this did not constitute publication.—HALL v. ZIETSMAN (1899), 16 S. C. 213; 9 C. T. R. 201.—**S. AF.**

e. Communication to one sufficient.—Publication in regard to libel

1072. Taking round documents for signature—Solicitor.—BROWNE v. HOCH (1893), 9 T. L. R. 550, N. P.

1073. Postcard.—CHATELL v. TURNER, No. 1068, *ante*.

Verbal repetition in presence of others.—See Nos. 1167–1169, *post*.

(b) *Must be to Third Party.*

1074. General rule.—No action on the case lies against one who sends a libel written in a letter sealed & directed to the party libelled, without any other publication: but such offence is indictable.—EDWARDS v. WOOTON (1607), 12 Co. Rep. 35; 77 E. R. 1316.

Annotation:—**Mentd.** R. v. Beere (1698), 12 Mod. Rep. 218.

1075. —.—BARROW v. LEWELLIN (1615), Hob. 62; 80 F. R. 211.

Annotations:—**Mentd.** R. v. Beere (1698), 12 Mod. Rep. 218; Baldwin v. Elphinston (1775), 2 Wm. Bl. 1037.

1076. —.—PHILLIPS v. JANSEN, No. 385, *ante*.

1077. Whether communicated to third party—Question for jury—Letter to party libelled transmitted by means of third party.—In an action for a libel contained in a letter transmitted by deft. to pltf., by means of a third person it is a question for the jury whether there has been any publication of the libel, except to pltf. himself, & if there has not, deft. is entitled to their verdict.—CLUTTERBUCK v. CHAFFERS (1816), 1 Stark. 471, N. P.

(c) *Who is or is not a Third Party.*

i. *Clerk.*

1078. Plaintiff's clerk—Probability of letter being opened by clerk—Knowledge of defendant—Letters usually so opened.—Action for a libel contained in a letter written by deft. to pltf.: proof that deft. knew that the letters sent to pltf. were usually opened by his clerk, is evidence to go to the jury of deft.'s intention, that the letter should be read by a third person.—DELACROIX v. THEVENOT (1817), 2 Stark. 63, N. P.

Annotations:—**Consd.** Huth v. Huth, [1915] 3 K. B. 32. **Refd.** Powell v. Gelston, [1916] 2 K. B. 615.

1079. —.—**Letter opened in course of clerk's business.**—The alleged libel was contained in a letter written by deft. to pltf. & addressed to him at his residence & place of business. The letter was opened & read by a person in the employment of pltf. as clerk. On the jury finding that the letter was opened by a person other than pltf. in the ordinary course of business; that the writer did not expect any one to open the letter but pltf.; but that the probability was that some person in the employment of the receiver might see the letter:—**Held:** there had been a publication of the libel.—GOMERSALL v. DAVIES (1898), 14 T. L. R. 430, C. A.

Annotations:—**Consd.** Huth v. Huth, [1915] 3 K. B. 32.

& slander does not require communication to more persons than one; there need not be anything like publication in the common acceptance of the term.—GOVINDAN NAIR v. ACHUTA MENON (1916), 1 L. R. 39 Mad. 433.—**IND.**

PART V. SECT. 1, SUB-SECT. 1.— A. (b).

1074 i. General rule.—Slanderous statements, either oral or written, concerning the person to whom they are addressed will found an action of damages at his instance although no third party has heard or read them.—MACKAY v. M'CANKIE (1883), 10 R. (Cl. of Sess.) 537; 20 Sc. L. R. 357.—**SCOT.**

Sect.

A. (c)

Reid. Powell v. Gelston, [1916] 2 K. B. 615.
British Co. & Gibson, [1918] 2 K. B. 677.

Pltf. sued deft., claiming libel contained in a letter which his office—that being the only address or place known to deft. The letter was delivered on a Saturday, when pltf. was away on a week end holiday, & was usual in such circumstances, by pltf.'s & read by him & a clerk. At the trial the two following questions were submitted to the jury:—(1) Was the letter sent by deft. likely, according to the ordinary course of business, to be opened by a partner or clerk? Answer.—Yes. (2) Might it, according to deft.'s knowledge, be possible for the letter to be opened by a partner or clerk of pltf.? Answer.—No.—**Held:** on these findings judgment must be entered for deft., as publication was negatived.—**SHARP v. SKUES** (1909), 25 T. L. R. 336, C. A.

Annotations:—**Consd.** Powell v. Gelston, [1916] 2 K. B. 615.
Reid. Roff v. British & French Chemical Manufacturing Co. & Gibson, [1918] 2 K. B. 677.

1081. — Letter not marked private—Opened by clerk in course of business.—**PULLMAN v. HILL & Co.**, No. 1069, *ante*.

1082. Defendant's clerk—Dictation to clerk—By manager of company.—**PULLMAN v. HILL & Co.**, No. 1069, *ante*.

1083. — In course of business—Made in interest of client.—**BOXSIUS v. GOBLET FRÈRES**, No. 1485, *post*.

1084. — As matter of routine.—Pltfs., G. M. & A. W., respectively managing director & auditor of a limited co., brought a libel action against L. W., a solr., because of words in bills of costs which were sent to E. M., the father of G. M., who held preference shares in the co., & to a solr., who represented a daughter of E. M., H., who was also a shareholder in the co. The material words in the bill of costs which was sent to E. M. were:—"Long attendance on Mr. E. M. . . . he insisted that Mr. G. M. was applying the co.'s money for his own ends, & it was believed that at the bottom of the difficulties was Mr. W., who was the auditor of the co., & whom he distrusted." Similar words were used in the bill of costs which was sent to H.'s solr. Pltfs. alleged that the words were published to a typist who typed the bills of costs, to E. M., who was blind & had to have the bill read to him, & also to H.'s solr. Upon the pleas of privilege & of no publication:—**Held:** the mere dictation of a bill of costs to a typist, as a matter of office routine, was not publication, & while there was no absolute privilege in a bill of costs there was privilege when a solr. inserted in it without malice information

which, though defamatory, was relevant in the widest sense & was reasonably necessary to enable his client to understand what he was being asked to pay for.—**MORGAN v. WALLIS** (1917), 33 T. L. R. 495, N. P.

ii. Husband or Wife.

1085. Of defendant.—In an action for libel the fact that deft. has disclosed the libel to his wife is not evidence of publication. In an action for maliciously defacing the written character of a servant by writing upon it a disparaging statement, pltf. may recover substantial damages.—**WENNHAKE v. MORGAN** (1888), 20 Q. B. D. 635; 57 L. J. Q. B. 241; 59 L. T. 28; 52 J. P. 470; 30 W. R. 697; 4 T. L. R. 295, D. C.

1086. Of plaintiff.—Addressing a letter to a wife, containing matter reflecting on her husband, is a publication. Deft., who had lodged in the house of pltf., conceiving that he had whilst there lost certain documents, & imagining that pltf. had abstracted them from a box in which he had kept them, wrote a letter to pltf.'s wife, stating his loss, & his suspicions, in language seriously reflecting upon the character of pltf., & intimating, that, unless pltf. should think proper to return them, he would expose him:—**Held:** the occasion did not justify the writing of the letter, so as to make it a privileged communication, & pltf. was entitled to recover, although the jury negatived malice.—**WENMAN v. ASH** (1853), 13 C. B. 836; 1 C. L. R. 592; 22 L. J. C. P. 190; 17 Jur. 579; 1 W. R. 452; 138 E. R. 1432.

Annotation:—**Mentd.** Phillips v. Barnet (1876), 1 Q. B. D. 436.

1087. — (1) Where pltf. has obtained a verdict in an action for libel, the ct. will not grant a new trial on the ground of excessive damages, unless they think that, having regard to all the circumstances of the case, the damages are so large that no jury could reasonably have given them. In assessing damages the jury are entitled to take into consideration the whole conduct of deft. in the matter from the time the libel was published down to the time their verdict is given.

(2) In an action to recover damages for a libel contained in a letter written by deft. to pltf.'s wife, the jury gave a verdict for pltf. & assessed the damages at £500.—**PRAED v. GRAHAM** (1889), 24 Q. B. D. 53; 59 L. J. Q. B. 230; 38 W. R. 103, C. A.

Annotations:—As to (1) **Consd.** Johnston v. G. W. Ry., [1904] 2 K. B. 250. **Reid.** Parnell v. Walter (1890), 38 W. R. 270; Anderson v. Calvert (1908), 24 T. L. R. 399. **Generally, Mentd.** Chattell v. Dally Mail Publishing Co. (1901), 18 T. L. R. . . .

(d) Repetition.

See Nos. 1167–1170, *post*.

PART V. SECT. 1, SUB-SECT. 1.— A. (c) i.

1082 i. Defendant's clerk—Dictation to clerk—By manager of company.—Deft.'s acting manager discharged pltf. for misbehaviour, & a few days later, hearing pltf. had taken away certain articles of deft.'s, he drafted a letter charging him with theft & threatening prosecution, which he handed a typist to copy & despatch:—**Held:** not such a publication as to destroy the privilege.—**PUTERBAUGH v. GOLD MEDAL CO.** (1903), 5 O. L. R. 680; 23 C. L. T. 193; 3 O. W. R. 535.—**CAN.**

1084 i. — As matter of routine.—**MORAN v. O'REGAN** (1907), 3 E. L. R. 456; 36 N. B. R. 189.—**CAN.**

1084 ii. — The dictation of a letter containing defamatory matter is not publication of the libel to the person to whom the letter is dictated.—**ANGELINI v. ANTICO** (1912), 31 N. Z. L. R. 841.—**N.Z.**

1084 iii. — **EVANS & SONS v. STEIN & Co.** (1904), 7 F. (Ct. of Sess.) 65; 42 Sc. L. R. 103; 12 S. L. T. 462.—**SCOT.**

1084 iv. — **HUGHES v. PRICE** (1909), 26 S. C. 288.—**S. AF.**

f. Statements not relating to business.—Deft., a merchant, in a letter accused pltf. of theft & threatened to expose him. This letter was handed to a confidential clerk & copied, & the copy was signed by deft. & sent by post to pltf.:—**Held:** the writing of such defamatory statements did not fall

within the ordinary business of a merchant, & the giving of it to his clerk to copy was a publication, & the occasion of such publication was not privileged.—**MORAN v. O'REGAN** (1908), 38 N. B. R. 399; 4 E. L. R. 573.—**CAN.**

g. Publication by bank manager—To bank accountant.—**QUILLINAN v. STUART** (1917), 38 O. L. R. 623; 35 D. L. R. 35.—**CAN.**

PART V. SECT. 1, SUB-SECT. 1.— A. (c) ii.

1086 i. Of plaintiff.—Communication to her husband of words defamatory of a woman constitutes publication entitling the woman to maintain an action for damages.—**KUZZULO v. KUZZULO** (1908), T. S. 1030.—**S. AF.**

B. In Criminal Cases.

1088. Publication to party libelled sufficient.]—EDWARDS *v.* WOOTON, No. 1074, *ante*.

1089. ——— Tendency to provoke breach of the peace.]—BARROW *v.* LEWELLIN (1615), Hob. 62; 80 E. R. 211.

*Annotations:—*Reid. *R. v.* Beere (1698), 12 Mod. Rep. 218; Baldwin *v.* Elphinston (1775), 2 Wm. Bl. 1037.

1090. ———.]—HICKS' CASE (1618), Hob. 215; Poph. 139; 80 E. R. 302.

*Annotations:—*Consd. Butt *v.* Conant (1820), 1 Brod. & Bing. 548. Reid. *R. v.* Sumner & Hillard (1665), 1 Sid. 270; *R. v.* Beere (1698), 12 Mod. Rep. 218; Wilkes' Case (1763), 19 State Tr. 982; *R. v.* Adams (1888), 5 T. L. R. 85.

1091. ———.]—CLUTTERBUCK *v.* CHAFFERS (1816), 1 Stark. 471, N. P.

1092. ———.]—On the trial of an indictment for libel the only evidence of publication was the sending it in a letter addressed to the prosecutor himself, & the receipt of it by him:—*Held*: there was sufficient evidence to go to the jury, although the indictment contained no allegation of an intent or a tendency to provoke a breach of the peace.—*R. v.* BROOKE (1856), 7 Cox, C. C. 251.

1093. ———.]—Deft. was tried & convicted on an indictment charging him with having unlawfully & maliciously written & published to a young woman of virtuous & modest character a defamatory letter of & concerning her, & of & concerning her character for virtue & modesty. Deft. having seen an advertisement for a situation inserted by the young woman in a newspaper, wrote, & sent to her at the address given, the letter in question, which contained a proposal in plain terms that she should surrender her chastity to him for a sum of money:—*Held*: the conviction could be sustained, because, under all the circumstances, the defamatory letter might reasonably tend to provoke a breach of the peace.—*R. v.* ADAMS (1888), 22 Q. B. D. 66; 58 L. J. M. C. 1; 59 L. T. 903; 53 J. P. 377; 5 T. L. R. 85; 16 Cox, C. C. 544, C. C. R.

*Annotation:—*Reid. Weld-Blundell *v.* Stephens, [1919] 1 K. B. 520.

1094. Publication by mistake.]—The making a libel is an offence though never published; & if one dictate & another write, both are guilty of making it. . . . It is true, the delivering of it by mistake is no publication; & if there was no other evidence against him but his own confession, the whole must be taken, & not so much of it as would serve to convict him. But when he sent his servant to his study for a paper, when he did not approve of the paper brought by the servant, but fetched another, it is not material whether it was read by H. or not; for if that was the libel, & read by either, it is a publication (*per* CUR.).—*R. v.* PAINE (1696), 5 Mod. Rep. 163; Carth. 405; Comb. 358; Holt, K. B. 294; 87 E. R. 584.

*Annotations:—*Reid. *R. v.* Labouchere (1884), 12 Q. B. D. 320. Mentd. *R. v.* Eriswell (1790), 3 Term Rep. 707.

1095. Publication to private friend in own house.]—*R. v.* PAINE, No. 1094, *ante*.

1096. Copying libel.]—*R. v.* BEARE (OR BEAR OR BEERE), No. 1141, *post*.

1097. Libel written in one county—Delivered in another county—Publication in both counties.]—

(1) Deft. wrote in Leicestershire a letter (being an address to the electors of Westminster), dated Aug. 22, 1819, with reference to a public meeting which had been held at St. Peter's Field, Manchester, on Aug. 16. Criminal information to the effect that deft., intending to excite discontent, disaffection, & sedition, & to excite to hatred & dislike of the Govt., & to cause it to be believed that persons had been inhumanly cut down by

certain troops of the King, composed, wrote, & published of & concerning the Govt., & of & concerning the said troops, the said letter. The judge told the jury that they were to consider whether the paper contained a sober address to the reason of mankind, or whether it was an appeal to their passions, calculated to incite them to acts of violence & outrage. If it was of the former description it was not a seditious libel; if of the latter description it was. He told them also that, assuming intention found by them as charged, the language used amounted in his opinion to seditious libel, but that it was for them to find whether it did so or not:—*Held*: a proper direction under Libel Act, 1792 (c. 60).

(2) If a person composes & writes a seditious libel with the intention of publishing it, *qu.*: whether any crime is thereby committed until publication.

(3) If the libel is posted sealed in one county & addressed to & delivered at a place in another:—*Held*: a publication in each county.

(4) The libel written by deft. in Leicestershire was delivered in Middlesex in an open envelope without seal or postmark by a friend of deft.:—*Held*: under the particular circumstances of the case, & having regard to the consideration that deft. had & the prosecution had not the means of proving how or by whom & in what state the libel was conveyed into Middlesex, the jury were rightly told they might presume the libel to have been delivered open in Leicestershire by the deft. to his friend.

(5) The libel purported to be founded on statements in newspapers to the effect that unarmed & unresisting men & women had been cut down by dragoons at a meeting at Manchester:—*Held*: deft. could not give evidence either at the trial or in mitigation of punishment, to show that such statements, involving criminal charges, were true, but that he might in mitigation of punishment show on affidavit that he had read the statements in newspapers.

(6) On motion in arrest of judgment on the ground that the information averred the libel to have been published of & concerning the Govt., but did not expressly aver the acts which the libel impugned to have been done by or by order of the Govt., & on the ground of want of certainty in the description of the troops referred to:—*Held*: the information was sufficient after verdict.

(7) If he composes & writes the libel in one county with the intention of publishing it, & if he publishes it in another county:—*Held*: he may be tried in either county & the jury may in either county take cognisance of what he did in the other.—*R. v.* BURDETT (1821), 1 State Tr. N. S. 1; 3 B. & Ald. 717; 4 B. & Ald. 95, 314; 106 E. R. 823, 873, 953.

*Annotations:—*As to (1) Reid. *R. v.* Grant, Ranken & Hamilton (1848), 7 State Tr. N. S. 507. As to (2) Reid. A.-G. *v.* Kenifick (1837), 2 M. & W. 715. As to (3) Reid. *R. v.* Lovett (1839), 9 C. & P. 462; Hall *v.* Story (1846), 16 M. & W. 63; Cherry *v.* Thompson (1872), 41 L. J. Q. B. 243; Broad *v.* Perkins (1888), 4 T. L. R. 545. As to (4) Reid. Perkin's Case (1826), 2 Lew. C. C. 150; *R. v.* Duffy (1849), 7 State Tr. N. S. 795. As to (5) Reid. *R. v.* Carden (1879), 5 Q. B. D. 1. As to (7) Reid. *R. v.* Rogers (1877), 3 Q. B. D. 28; *R. v.* Holmes (1883), 12 Q. B. D. 23; Tozier *v.* Hawkins (1885), 15 Q. B. D. 650. Generally, Mentd. Stikeman *v.* Dawson (1847), 1 De G. & Sm. 90; Doe d. Bennett *v.* Hale (1850), 15 Q. B. 171; *R. v.* Meany (1867), 15 W. R. 1082; *R. v.* Cooper (1875), 45 L. J. M. C. 15; *R. v.* Ellis, [1899] 1 Q. B. 230; *R. v.* De Marny, [1907] 1 K. B. 388.

1098. Mere writing—With intention to publish.]—*R. v.* BURDETT, No. 1097, *ante*.

1099. Libel in newspaper—Delivery of newspaper at Stamp Office.]—The delivery of a newspaper to

Sect. 1.—Libel: Sub-sect. 1, B.; sub-sects. 2 & 3, in the nature of an indemnity for the consequences of his own wilful wrong.—**WELD-BLUNDELL v.** [1919] 1 K. B. 520; 88 L. J. K. B. 120 L. T. 494; 35 T. L. R. 245; 63 Sol. Jo. 301, C. A.; *affd.*, [1920] A. C. 950, H. L.

the at the Stamp Office is a to sustain an indictment for *r.*—**R. v. AMPHILL** (1825), 4 B. & C. 125; 3 Dow. & Ry. M. C. 182; 107 E. R. 972.

1100. Manuscript proved in handwriting of defendant—Proof of printing & publishing—No evidence of direction by defendant to print & publish.—(1) If the manuscript of a libel be proved to be in the handwriting of deft., & it be proved to have been printed & published, this is evidence to go to the jury that it was published by deft., although there be no evidence given to show that the printing & publication were by the direction of deft.

(2) If a paper, published by deft., has a direct tendency to cause unlawful meetings & disturbances, & to lead to a violation of the laws, it is a seditious libel; & (3) with respect to the intent every one must be taken to intend the natural consequences of what he has done.—**R. v. LOVETT** (1839), 9 C. & P. 462; 3 State Tr. N. S. 1177.

1101. Libel contained in book—Each copy fresh libel—Continuing publication.—**R. v. CALTHORPE**, No. 2405, *post*.

Ignorance of contents of matters published.—*See* Sub-sect. 3, B., *post*.

Publication by agent.—*See* Sub-sect. 3, C., *post*.

SUB-SECT. 2.—DUTY OF PERSON HAVING LIBEL IN HIS POSSESSION.

1102. Libel concerning private person.—If a libellous letter concern a private person, he that receives it may conceal it in his pocket, or burn it; but if it concerns a public person he ought to reveal it to some public officer or a magistrate. But it is true if he divulge it to any but to a magistrate he is a libeller.—**LINCOLN (BP.) & OSBALDSTON'S CASE** (1639), 3 State Tr. 804.

1103. Libel concerning public person.—**LINCOLN (BP.) & OSBALDSTON'S CASE**, No. 1102, *ante*.

1104. Liability to original utterer—For negligence in allowing publication.—Pltf., who had lent money to a certain co., being asked for a further advance, employed deft., a chartered accountant, to look into the affairs of the co. In a letter of instructions to deft. pltf. inserted libellous statements concerning the former manager & an auditor of the co. Deft. handed the letter to his partner, who negligently left it at the co.'s office. The manager found it, read it, & communicated its contents to the two persons defamed, who sued pltf. for libel & recovered damages against him, the jury in each case finding that the writer of the letter was actuated by malice. Pltf. then sued deft. for breach of an implied duty to keep secret the letter of instructions. The jury having found that it was the duty of deft. to keep the letter secret, that he had neglected this duty, & that the actions of libel & the damages recovered therein were the natural consequence of his negligence:—*Held*: (1) it was the duty of deft. to keep secret the contents of the letter; (2) (**BANKES & WARRINGTON, L.J.J.**) pltf. could recover nominal damages & no more for the breach of this duty, any further damages being

in the nature of an indemnity for the consequences of his own wilful wrong.—**WELD-BLUNDELL v.** [1919] 1 K. B. 520; 88 L. J. K. B. 120 L. T. 494; 35 T. L. R. 245; 63 Sol. Jo. 301, C. A.; *affd.*, [1920] A. C. 950, H. L.

Annotations:—As to (1) *Reid*, **Tournier v. National Provincial & Union Bank of England**, [1924] 1 K. B. 461. As to (2) *Reid*, **Proops v. Chaplin** (1920), 37 T. L. R. 111; *Re Polemis & Furness, Withy*, [1921] 3 K. B. 560; *A. & B. Taxis v. Secretary of State for Air*, [1922] 2 K. B. 328; **Elliott Steam Tug Co. v. Shipping Controller**, [1922] 1 K. B. 127; **The San Onofre**, [1922] P. 243; **Adelaide S.S. Co. v. R.**, [1923] 1 K. B. 59; **Harnett v. Bond**, [1924] 2 K. B. 517. *Generally*, *Mentd.* **Britannia Hygienic Laundry Co. v. Thornycroft** (1925), 94 L. J. K. B. 858; **Hambrook v. Stokes**, [1925] 1 K. B. 141; **The Paludina**, [1925] P. 40.

SUB-SECT. 3.—LIABILITY FOR PUBLICATION.

A. In General.

1105. Material sent to press—Without direction not to publish.—If I send a manuscript to the printer of a periodical publication & do not restrain the printing & publishing of it, & he does print & publish it in that publication, then I am the publisher (**LORD ERSKINE**).—**BURDETT v. ABBOT, BURDETT v. COLMAN** (1817), 5 Dow. 165; 3 E. R. 1289, H. L.

Annotations:—*Mentd.* **Launock v. Brown** (1819), 2 B. & Ald. 592; **R. v. Hobhouse** (1820), 2 Chlt. 207; **Bredreechund v. Elphinstone** (1830), 2 State Tr. N. S. **Wellesley v. Beaufort**, **Long Wellesley's Case** (1831), 2 & M. 639; **Beaumont v. Barrett** (1836), 1 Moo. P. C. C. 59; **Stockdale v. Hansard** (1839), 9 Ad. & El. 1; **Middlesex Sheriff's Case** (1840), 11 Ad. & El. 273; **Re Clarke** (1842), 2 Q. B. 619; **Kielley v. Carson** (1842), 4 Moo. P. C. C. 63; **Howard v. Gosset** (1845), 10 Q. B. 359; **Re Martin, Ex p. Van Sandau** (1845), 4 L. T. O. S. 369; **Reynolds v. Reynolds** (1847), 9 L. T. O. S. 513; **Fenton v. Hampton** (1858), 11 Moo. P. C. C. 347; **Re Fernandes** (1861), 6 H. & N. 717; **Ex p. Fernandez** (1861), 10 C. B. N. S. 3; **Dill v. Murphy** (1864), 1 Moo. P. C. C. N. S. 487; **A. G. of New South Wales v. Macpherson** (1870), L. R. 3 P. C. 268; **Bradlaugh v. Erskine** (1883), 47 L. T. 618; **Bradlaugh v. Gossett** (1884), 12 Q. B. D. 271; **Harvey v. Harvey** (1884), 26 Ch. D. 644; **Barton v. Taylor** (1886), 2 T. L. R. 382; **Fielding v. Thomas**, [1896] A. C. 600; **Heddon v. Evans** (1919), 35 T. L. R. 642; **Pitchers v. Surrey County Council**, [1923] 2 K. B. 57.

1106.—In an action for a libel, deft. cannot either in bar of the action or in mitigation of the damages, give in evidence other libels published of him by pltf., unless such libels are of a prior date & relate distinctly to the subject-matter of the libel declared on. To prove the publication by deft. of a libel on pltf. contained in a newspaper, a manuscript of deft., through several passages of which the editor had before it was composed drawn his pen, was produced. The printed libel, being also produced, was found to correspond exactly with the unobliterated parts of the manuscript. The portions of the manuscript through which the pen was drawn were of a more libellous tendency than the parts published in the newspaper, & did not in any degree qualify them:—*Held*: (1) the manuscript was receivable in evidence, the portions that corresponded with the printed libel to prove the publication by deft., & the residue to show *quo animo* that libel was published; (2) a letter addressed by deft. to pltf. about the same period, containing expressions similar to those found in the printed libel, was also admissible to show *quo animo* the libel was published.—**TARPLEY v. BLABEY** (1830), 2 Bing. N. C. 437; 1 Hodg. 414; 2 Scott, 642; 5 L. J. C. P. 83; 132 E. R. 171.

PART V. SECT. 1, SUB-SECT. 3.—A.

1106 i. Material sent to press.—**DOMINION TELEGRAPH CO. v. SILVER & PAYNE** (1881), 10 S. C. R. 238, CAN.

1106 ii.—In a libel action against a newspaper which assumes full responsibility for what it publishes, the ct. should not, except under special circumstances, compel it to disclose

the names of its contributors or informants.—**DE SCHELKING v. CROMIE** (B. C.), [1918] 3 W. W. R. 1038, CAN.

1107. Communication to newspaper reporter.]—In order to show that deft. had caused & procured a printed libel to be inserted in a newspaper; a reporter to a public newspaper proved that he had given a written statement to the editor of the newspaper, the contents of which had been communicated by deft. for the purpose of such publication, & that the newspaper then produced was exactly the same, with the exception of one or two slight alterations, not affecting the sense:—*Held*: what the reporter published, in consequence of what passed with deft., might be considered as published by deft.; but the newspaper could not be read in evidence, without producing the written account delivered by the witness to the editor.—*ADAMS v. KELLY* (1824), Ry. & M. 157, N. P.

Annotation:—*Apld.* *Parkes v. Prescott* (1869), L. R. 4 Exch. 169.

1108. Libellous picture—Contained in magazine—Referred to in letterpress.]—(1) If the printer & the editor of a magazine be sued for a libellous article contained in it, they are both liable for a libellous lithographic print which is contained in the work, though it was not printed by the printer, provided that the print is referred to in the letterpress part of the libellous article.

(2) In an action for a libel deft. may in mitigation of damages give in evidence other libels published recently before by pltf. of deft., with a view of showing a provocation by pltf.; & a witness may be also asked whether pltf. has not previously published attacks on deft., but the judge will caution the jury not to consider one libel as at all like a set-off against the other.—*WATTS v. FRASER* (1835), 7 C. & P. 369; 1 Mood. & R. 449, N. P.; *subsequent proceedings* (1837), 7 Ad. & El. 223.

1109. Libellous advertisement—Liability of editor.]—*KEYZOR v. NEWCOMB*, No. 1213, *post*.

1110. Sale of newspaper.]—*EMMENS v. POTTLE*, No. 1120, *post*.

1111. —.]—*RIDGWAY v. SMITH & SON* (1890), 6 T. L. R. 275, D. C.

Annotations:—*Refd.* *Vizetelly v. Mudie's Select Library*, [1900] 2 Q. B. 170. *Mentd.* *Elliott v. Garrett* (1902), 18 T. L. R. 498.

B. Ignorance of Contents.

1112. How far a defence.]—*R. v. TWYN*, *R. v. DOVER*, *BREWSTER & BROOKE* (1663), 6 State Tr. 514, 539; Kel. 22, 23; 84 E. R. 1064.

Annotation:—*Refd.* *Martin v. British Museum Trustees & Thompson* (1894), 10 T. L. R. 338.

1113. —.]—*LAMB'S CASE*, No. 1168, *post*.

1114. —.]—*R. v. DODD*, No. 1126, *post*.

1115. —.]—(1) If a printer prints anything that is libellous, it is no excuse to say that he had no knowledge of the contents.

(2) It is a mitigation of the printer's offence, if he will discover the person who brought the paper to him.

(3) Printing initial letters will not protect a libeller.—*Re READ & HUGGONSON* (1742), 2 Atk. 469; 26 E. R. 683; *sub nom.* *ROACH v. GARVAN*, 2 Dick. 794, L. C.

Annotations:—*As to* (1) *Refd.* *Ex p. Jones* (1806), 13 Ves. 237; *Re American Exchange in Europe, American Exchange in Europe v. Gillig* (1889), 58 L. J. Ch. 706. *Generally, Mentd.* *Baker v. Hart* (1742), 2 Atk. 488; *R. v. Clement* (1821), 4 B. & Ald. 218; *Re Ludlow Charities, Lechmere Charlton's Case* (1837), 2 My. & Cr. 316; *Re Martin, Ex p.*

1110 i. Sale of newspaper.]—Apart from the existence of circumstances which should put him as a reasonable person on his guard or on inquiry, a mere newsvendor who sells a newspaper containing defamatory matter may rebut the presumption of having acted *animo injurandi*, raised by the

act of sale, by establishing ignorance of the fact that the paper contained such defamation & that he acted without negligence, & by so doing may render himself free from any liability for damages in connection with the publication of such defamation.—*DUNNING v. THOMSON & Co., LTD*

(1844), 1 Ph. 445; *Birch v. Walsh, O'Mahony's Case* (1846), 8 L. T. O. S. 372; *Ex p. Van Sandau* (1846), 1 Ph. 605; *Coleman v. West Hartlepool Ry.* (1860), 8 W. R. 734; *Tichborne v. Mostyn, Tichborne v. Tichborne* (1867), L. R. 7 Eq. 55, n.; *Re Cheltenham & Swansea Ry. Carriage & Wagon Co.* (1869), L. R. 8 Eq. 580; *Robson v. Dodds* (1) (1869), 20 L. T. 941; *Tichborne v. Tichborne* (1870), 39 L. J. Ch. 398; *Kitcat v. Sharp* (1882), 52 L. J. Ch. 134; *Hunt v. Clarke* (1889), 58 L. J. Q. B. 490; *Re Crown Bank, Re O'Malley* (1890), 44 Ch. D. 649; *McLeod v. St. Aubyn*, [1899] A. C. 549; *R. v. Gray*, [1900] 2 Q. B. 36; *R. v. Tibbits* (1901), 71 L. J. K. B. 4; *Scott v. Scott*, [1913] A. C. 417; *Dunn v. Bevan, Brodie v. Bevan*, [1922] 1 Ch. 276.

1116. —.]—*R. v. CLERK* (1728), 1 Barn. K. B. 304; 94 E. R. 207.

1117. —.]—It [ignorance of contents] goes for nothing & would be an excuse for all sorts of infamy (LORD MANSFIELD, C.J.).—ANON. (1774), Lofft, 544; 98 E. R. 791.

1118. —.]—A porter who in the course of his business delivers parcels containing libellous handbills, is not liable in an action for libel, if he be shown to be ignorant of the contents of the parcels.—*DAY v. BREAM* (1837), 2 Mood. & R. 54, N. P.

Annotation:—*Refd.* *Martin v. British Museum Trustees & Thompson* (1894), 10 T. L. R. 338.

1119. —.]—*MALLON v. SMITH (W. H.) & SON* (1893), 9 T. L. R. 621.

Annotation:—*Refd.* *Vizetelly v. Mudie's Select Library*, [1900] 2 Q. B. 170.

1120. — Negligence.]—The vendor of a newspaper in the ordinary course of his business, though he is *prima facie* liable for a libel contained in it, is not liable, if he can prove that he did not know that it contained a libel; that his ignorance was not due to any negligence on his own part; & that he did not know, & had no ground for supposing, that the newspaper was likely to contain libellous matter. If he can prove those facts he is not a publisher of the libel. *Qu.*: whether such a person can escape liability for the libel if he knows, or ought to know, that the newspaper is likely to contain libellous matter.

The proprietor of a newspaper who publishes the paper by his servants, is the publisher of it, & he is liable for the acts of his servants. The printer of the paper prints it by his servants, & therefore he is liable for a libel contained in it. . . . Taking the view of the jury to be right, that defts. did not know that the paper was likely to contain a libel, & still more, that they ought not to have known this, which must mean, that they ought not to have known it, having used reasonable care—the case is reduced to this, that defts. were innocent disseminators of a thing which they were not bound to know was likely to contain a libel. That being so, I think defts. are not liable for the libel (LORD ESHER, M.R.).—*EMMENS v. POTTLE* (1885), 16 Q. B. D. 354; 55 L. J. Q. B. 51; 53 L. T. 808; 50 J. P. 228; 34 W. R. 116; 2 T. L. R. 115, C. A.

Annotations:—*Apld.* *Mallon v. Smith* (1893), 9 T. L. R. 621; *Martin v. British Museum Trustees & Thompson* (1894), 10 T. L. R. 338. *Expld. & Distd.* *Vizetelly v. Mudie's Select Library*, [1900] 2 Q. B. 170. *Apld.* *Weldon v. Times Book Co.* (1911), 28 T. L. R. 143. *Refd.* *R. v. Judd* (1888), 37 W. R. 143; *R. v. Munslow*, [1895] 1 Q. B. 758. *Mentd.* *Glamorgan Coal Co. v. South Wales Miners' Federation*, [1903] 2 K. B. 545.

1121. —.]—*MARTIN v. BRITISH MUSEUM (TRUSTEES) & THOMPSON* (1894), 10 T. L. R. 338.

Annotation:—*Refd.* *Vizetelly v. Mudie's Select Library*, [1900] 2 Q. B. 170.

(1905), T. H. 313.—S. AF.

h. Publisher of newspaper.]—The publisher of a newspaper is responsible for defamatory matter published in such paper, whether he knows the contents of such paper or not.—*R. v. McLEOD* (1880), 1 L. R. 3 All. 342.—IND.

LIBEL AND SLANDER.

Sect. 1.—Libel: Sub-sect. 3, B. & C. (a) i. & ii., & (b)].

1122. ———.]—The proprietors of a circulating library circulated copies of a book which, unknown to them, contained a libel on pltf. In an action for libel brought against them by pltf. they failed to show that it was not through negligence on their part that they did not know that the book contained the libel when they circulated it:—*Held*: they were liable as publishers of the libel.—*VIZETELLY v. MUDIE'S SELECT LIBRARY, LTD.*, [1900] 2 Q. B. 170; 69 L. J. Q. B. 645; 16 T. L. R. 352, C. A.

1123. ———.]—Defts. who were book distributors, sold two books which were published in the French language in Paris, & which pltf. alleged contained libellous statements regarding her. In an action by pltf. claiming damages from defts. in respect of the publication of these statements, the jury found that defts. did not know of anything libellous contained in the books, that it was not through their negligence that they did not know, & that the books were not of such a character as to put them on inquiry:—*Held*: defts. were not liable.

There are some books as to which there might be a duty on resps. or other distributing agents to examine them carefully, because of their titles or the recognised propensity of their authors to scatter libels abroad. Beyond that the matter cannot go (*COZENS-HARDY, M.R.*).—*WELDON v. TIMES BOOK CO., LTD.* (1911), 28 T. L. R. 143, C. A.

1124. ———.]—A firm of wholesale newspaper agents which has distributed copies of a journal containing defamatory matter is not liable to pay damages in respect thereof if they did not know that the copies distributed by them contained the defamatory matter, & if their ignorance was not due to negligence, & if they neither knew nor were likely to know that the journal was likely to contain defamatory matter. In a libel action against the editor & the printers of a journal, & against a firm of wholesale newspaper agents which had distributed the journal, the judge directed the jury to the above effect & ruled that there was no joint publication by the agents with the other defts., & the jury found that the newspaper agents had not acted innocently, & awarded 1s. damages as against them. The ct. thereupon deprived pltf. of costs as against the newspaper agents on the ground that the amount of damages showed that the jury considered that there was no moral obliquity on their part.—*HAYNES v. DE BECK* (1914), 31 T. L. R. 115.

——— **Publication by agent.**—*See Sub-sect. 3, C. (a) i., ii., & (b), post.*

1125. Question for jury.—*CHUBB v. FLANNAGAN*, No. 1289, *post*.

C. Publication by Agent.

(a) General Agent or Servant.

i. In General.

1126. Servant—Acting in course of employment.—A master shall answer for his servant, & the law presumes him to be acquainted with what his servant does (*per CUR.*).

Finding a libel on a bookseller's shelf is a publication of it by the bookseller (*FORTESCUE, J.*).

Where a master living out of town, & his trade is carried on by his servant, the master shall be chargeable with the servant's publishing a libel in his absence (*RAYMOND, C.J.*).—*R. v. DODD* (1724), Sess. Cas. K. B. 135; 93 E. R. 136.

1127. ———.]—A libel sold in a pamphlet shop by the servant of the owner of the shop, for his use & account, the owner knowing nothing of this libel: yet he is guilty of a publication.—*R. v. NUTT* (1729), Fitz-G. 47; 1 Barn. K. B. 306; 94 E. R. 647.

Annotations:—*Reid. R. v. Almon* (1770), 5 Burr. 2686; *R. v. Topham* (1791), 4 Term Rep. 126; *A.-G. v. Siddon* (1830), 1 Tyr. 41.

1128. ———.]—In point of law the buying the pamphlet in the public open shop of a known professed bookseller & publisher of pamphlets of a person acting in the shop, *prima facie* is evidence of a publication by the master himself; but it is liable to be contradicted, where the fact will bear it, by contrary evidence tending to exculpate the master, & to show that he was not privy, nor assenting to it, nor encouraging it (*LORD MANSFIELD, C.J.*).—*R. v. ALMON* (1770), 5 Burr. 2686; 20 State Tr. 803; 98 E. R. 411.

Annotation:—*Reid. A.-G. v. Siddon* (1830), 1 Cr. & J. 220.

1129. ———.]—It is not sufficient that a man rises later than his usual time, sees a pernicious publication has gone out of his shop by the hand of his servants, acting in the course of sale under his authority, & then endeavours to stop the rest (*ASTON, J.*).—*R. v. WILLIAMS* (1774), Lofft, 759; 98 E. R. 905.

1130. ———.]—A corpn. cannot be held to be incapable of malice so as to be relieved of liability for malicious libel when published by its servant acting in the course of his employment. Although the servant may have had no actual authority, express or implied, to write the libel complained of, containing statements against pltf. which he knew to be untrue, if he did so in the course of an employment which is authorised, the corpn. is liable.—*CITIZENS' LIFE ASSURANCE CO. v. BROWN*, [1904] A. C. 423; 73 L. J. P. C. 102; 90 L. T. 739; 53 W. R. 176; 20 T. L. R. 497, P. C. *Annotations*:—*Reid. Pratt v. British Medical Assocn.*, [1919] 1 K. B. 244. *Mentd. Mousell v. L. & N. W. Ry.*, [1917] 2 K. B. 836.

1131. Acting without master's knowledge.—*R. v. CUTHELL* (1799), Erskine, Speeches on Miscellaneous Subjects, p. 231.

1132. Daughter—With general authority to write father's letters—Father's knowledge of libel must be shown.—In an action for a libel contained in a letter. Proof that it was written by deft.'s daughter, who was authorised to make out his bills & write his general letters of business, is not sufficient unless it can be shown that such libel was written with the knowledge of or by the procurement of deft.; neither can the daughter be called as a witness, to prove by whose direction such letter was written.—*HARDING v. GREENING* (1817), 8 Taunt. 42; 1 Moore, C. P. 477; 129 E. R. 297.

ii. Employee of Newspaper Proprietor.

1133. Liability of principal.—The proprietor of a newspaper is answerable criminally, as well as civilly, for misconduct in the conducting of the paper, as *e.g.* for the publication of a libel, though he has nothing to do with the publication, & the

PART V. SECT. 1, SUB-SECT. 3.—
C. (a) i.

8.—CAN.

36 Calo. 907.—IND.

1126 i. Servant—Acting in course of employment.—*TENCH v. GREAT WESTERN RY. CO.* (1873), 33 U. C. R.

by his servant within the scope of his employment.—*MAH v. BANERJEE* (1909), 1 L. R.

k. ——— **Acting without master's knowledge.**—*CAMERON v. YEATS* (1899), 1 F. (Ct. of Sess.) 456; 36 Sc. L. R. 350; 6 S. L. T. 329.—SCOT.

whole is conducted by his servants.—*R. v. WALTER* (1799), 3 Esp. 21, N. P.

Annotations :—*Consd. R. v. Holbrook* (1878), 4 Q. B. D. 42.
Refd. R. v. Bradlaugh (1883), 15 Cox, C. C. 217.

1184. — Presumption arising from proprietorship—May be rebutted.—In an indictment for libel, the proprietor of a newspaper is *prima facie* answerable for what appears in it; but the presumption arising from proprietorship may be rebutted & an exemption established.—*R. v. GUTCH, FISHER & ALEXANDER* (1829), Mood. & M. 438.

Annotations :—*Refd. A.-G. v. Siddon* (1830), 1 Cr. & J. 220; *Seymour v. Greenwood* (1861), 30 L. J. Ex. 189; *R. v. Holbrook* (1878), 4 Q. B. D. 42.

1185. — Libel Act, 1843 (c. 96), s. 7—What amounts to authorisation—General authority given to editor.—On the trial of a criminal information for libel against the proprietors of a newspaper it appeared that defts. had appointed an editor with general authority to conduct the paper, & left it entirely to his discretion what should be inserted therein, & that such editor had inserted the libel in question without the knowledge or express authority of defts. The jury found defts. guilty.

On a motion for a new trial on the ground that the verdict was against evidence, & of misdirection :—*Held* : (1) the general authority given to the editor was not *per se* evidence that defts. had authorised or consented to the publication of the libel, within above Act, sect. 7; & as the judge at the trial had summed up in terms which might have led the jury to suppose that it was, & the jury had apparently given their verdict on that footing, there must be a new trial.

(2) Libel on an individual is & has always been regarded as both a civil injury & a criminal offence. The person libelled may pursue his remedy for damages or prefer an indictment, or by leave of the ct. a criminal information, or he may both sue for damages & indict. It is ranked amongst criminal offences because of its supposed tendency to arouse angry passions, provoke revenge, & thus endanger the public peace (*LUSH, J.*).—*R. v. HOLBROOK* (1878), 4 Q. B. D. 42; 48 L. J. Q. B. 113; 39 L. T. 536; 43 J. P. 38; 27 W. R. 313; 14 Cox, C. C. 185.

Annotations :—*As to* (1) *Folld. R. v. Ramsay & Foote* (1883), 48 L. T. 733. *Refd. R. v. Tibbits*, [1902] 1 K. B. 77.
As to (2) *Refd. R. v. London (Lord Mayor)* (1886), 16 Q. B. D. 772.

1186. — — — — —.]—*EMMENS v. POTTLE*, No. 1120, ante.

1187. — Right to indemnity by servant.—The declaration stated that deft. had been employed by pltf. to edit the Court Journal for reward, & that he did not perform the duties of editing the same in a proper manner, but, without the knowledge, leave, authority, or consent of pltf., “falsely, maliciously, & negligently inserted & published in the same a false & malicious libel,” etc., that, afterwards, an information was exhibited against pltf. “for the falsely & maliciously printing & publishing” of the said libel, & such proceedings were thereupon had that pltf. was convicted of that offence, & fined £100. After verdict for pltf. the judgment was arrested, on the ground that the injury sustained was not connected with the breach of duty averred, it not appearing that the printing & publishing of which pltf. was con-

victed was the same act as that with which deft. was charged, viz. the inserting & publishing. *Semble* : the proprietor of a newspaper, convicted & fined for the publication of a libel in the paper, inserted without his knowledge & consent by the editor, cannot recover against the editor the damages sustained by such conviction.—*COLBURN v. PATMORE* (1834), 1 Cr. M. & R. 73; 4 Tyr. 677; 3 L. J. Ex. 317; 149 E. R. 999.

Annotations :—*Consd. R. v. Holbrook* (1878), 4 Q. B. D. 42.
Refd. Shackell v. Rosier (1836), 2 Bing. N. C. 634; *Burrows v. Rhodes*, [1899] 1 Q. B. 816; *Leslie v. Reliable Advertising & Addressing Agency*, [1915] 1 K. B. 652; *Weld-Blundell v. Stephens*, [1920] A. C. 956.

(b) Particular Agent.

1188. Communication with request to publish—Publication containing other charges than those communicated—Publication approved by principal.—Indictment for causing to be published in a newspaper a libel on K. The libel told a story of K., & added comments on the story, giving it a ridiculous character. The editor of the paper deposed that deft. asked him to show K. up, & communicated the story, which the editor told to a reporter for the paper; & that this story was, substantially, what was published: that, before the publication appeared, deft. remarked on the delay: & that, after the article came out, deft. expressed approbation of it.—*Held* : on this evidence, a jury might find that the deft. authorised the publication of the particular libel, notwithstanding the comments added, & although it appeared that the editor had heard the story before deft. told it to him.—*R. v. COOPER* (1846), 8 Q. B. 533; 15 L. J. Q. B. 206; 6 L. T. O. S. 369; 10 J. P. 631; 1 Cox, C. C. 266; 115 E. R. 976.

Annotations :—*Consd. Parkes v. Prescott* (1869), L. R. 4 Exch. 169. *Refd. R. v. De Marny*, [1907] 1 K. B. 388.

1189. — Publication in words of agent—Substance of communication adhered to.—Deft. P. was chairman of, & the other deft. E. was present, at a meeting of a board of guardians on an occasion when there was a discussion concerning pltf.'s conduct, in the course of which defamatory statements concerning him were made. Reporters for the local press attended the meeting in the ordinary discharge of their duty. Deft. E., during the proceedings, said, “he hoped the local press would take notice of this very scandalous case,” & requested the chairman to give an outline of it. Deft. P. complied, & in the course of his statement said, “I am glad gentlemen of the press are in the room, & I hope they will take notice of it.” Deft. E. added, “& so do I.” Deft. P. further expressed a hope that publicity would be given to the matter. A correct but condensed summary of the proceedings, containing matter defamatory of pltf., was afterwards inserted in two local newspapers. An action for libel was thereupon brought against defts. The declaration, to which the general issue was pleaded, charged them in two counts with publishing the reports in question, which were set out verbatim. The judge at the trial directed a verdict to be entered for defts., being of opinion that there was no evidence for the jury of the publication by defts. of the libels complained of. On the argument of a bill of exceptions tendered to this ruling :—*Held* : a misdirection.

Where a man makes a request to another to

PART V. SECT. 1, SUB-SECT. 3.— C. (a) ii.

1184 i. Liability of principal—Presumption arising from proprietorship—May be rebutted.—*LEVIEN v. FOX* (1890), 11 N. S. W. L. R. 414; 7 N. S. W. W. N. 72.—AUS.

1184 ii. — — — — —.]—*RAMASAMI v. LOKANADA* (1886), 1 L. R. 9 Mad. 387.—IND.

1184 iii. — — — — —.]—*R. v. GIRJASHANKAR KASHIRAM* (1890), 1 L. R. 15 Bom. 286.—IND.

PART V. SECT. 1, SUB-SECT. 3.— C. (b).

1. Railway police inspector—Imputation of character—During investigation of
STON v. NORTH BRITISH RY.

Sect. 1.—Libel: Sub-sect. 3, C. (b), & D.; sub-sect. 4, A. & B. (a) & (b).]

publish defamatory matter, of which for the purpose he gives him a statement, whether in full or in outline, & the agent publishes that matter adhering to the sense & substance of it, although the language be to some extent his own, the man making the request is liable to an action as the publisher.—*PARKES v. PRESCOTT* (1869), L. R. 4 Exch. 169; 38 L. J. Ex. 105; 20 L. T. 537; 17 W. R. 773, Ex. Ch.

Annotation:—Reid. R. v. De Marney (1906), 71 J. P. 14.

D. Repetition.

See Sect. 3, sub-sect. 2, *post*.

SUB-SECT. 4.—PROOF OF PUBLICATION.

A. In General.

1140. Inference of publication by plaintiff.]—

One surgeon, having sent to another, at the same hotel, a book on a surgical subject unfit for the public eye, & the other having afterwards published a paper charging him with having indecently left it in a public place, & not being called to explain how it was that it came to be so exposed:—*Held*: the jury might infer that he had himself put it there with a view of using it as a pretext for the charge.—*WELLS v. WEBBER* (1862), 2 F. & F. 715.

B. What Amounts to Evidence of Publication.

(a) In General.

1141. Document in handwriting of defendant.]—

(1) Copying a libel is not of itself a publication but is evidence of one.

(2) Having the copy of a libel is evidence of a publication if the libel is generally known to have been published. Otherwise not.

(3) A libel is *prima facie* to be presumed to have been made by the person in whose hand it is written.—*R. v. BEARE (OR BEAR OR BEERE)* (1698), 1 Ld. Raym. 414; Carth. 407; Holt, K. B. 422; 2 Salk. 417; 12 Mod. Rep. 218; 91 E. R. 1175.

Annotations:—As to (3) Folld. R. v. Lovett (1839), 9 C. & P. 462. *Generally, Reid. R. v. Drake* (1706), 11 Mod. Rep. 84; *Entick v. Covington* (1765), 19 State Tr. 1029; *R. v. Shipley* (1784), 4 Doug. K. B. 73; *R. v. Burdett* (1820), 4 B. & Ald. 95. *Mentd. R. v. Carlisle Corpn.* (1722), 8 Mod. Rep. 99.

1142. —.]—In an action for a libel, contained in an article against church rates, written by deft., & published in the "S." newspaper, the manuscript, in the handwriting of deft., addressed to the editor of the "S." & sent to the "S." office, is evidence to show that deft. intended the article to be published in that newspaper. Pltf. may also, for the same purpose, give in evidence handbills on the same subject, published by deft. about the same time; & to show that the libel was published with an intent to injure pltf., evidence may be given that one of the handbills was carried backwards & forwards before his door.—*BOND v. DOUGLAS* (1836), 7 C. & P. 626, N. P.

1143. —.]—*R. v. LOVETT*, No. 1100, *ante*.

1144. Copying libel.]—*R. v. BEARE (OR BEAR OR BEERE)*, No. 1141, *ante*.

1145. Having libel in possession—Known to have been published.]—*R. v. BEARE (OR BEAR OR BEERE)*, No. 1141, *ante*.

1146. Book found in bookseller's shop—Sold by servant of bookseller.]—*R. v. ALMON*, No. 1128, *ante*.

1147. — Name on title page as publisher.]—On an indictment for publishing a blasphemous libel, evidence that the libel was sold in deft.'s shop, & that his name appeared on the title page as one of the publishers, is evidence of publication.

If he circulates to the world for gain a work which is sold in his shop, he is the publisher in the sense which the law attaches to the word "publishing." He is *prima facie* responsible for what is sold (*LORD DENMAN, C.J.*).—*R. v. HETHERINGTON* (1840), 4 State Tr. N. S. 563; *subsequent proceedings*, 4 State Tr. N. S. 594.

1148. Letter to public register—Sent for purpose of publication.]—The publisher of a public register receives an anonymous letter, tendering certain political information on Irish affairs, & requiring to know to whom his letters should be directed; to which an answer is returned in the *Register*; after which he receives two letters in the same handwriting, directed as mentioned, & having the Irish post mark on the envelopes; which two letters were proved to be in the handwriting of deft., the previous letter having been destroyed: this is a sufficient ground for the ct. to have the letters read: & the letters themselves containing expressions of the writer indicative of his having sent them to the publisher of the *Register* in Middlesex for the purpose of publication, the whole is evidence sufficient for the jury to find a publication by the procurement of deft. in Middlesex.—*R. v. JOHNSON* (1805), 7 East, 65; 29 State Tr. 413; 3 Smith, K. B. 94; 103 E. R. 26.

Annotations:—Reid. R. v. Burdett (1820), 1 State Tr. N. S. 1. *Mentd. Kensington v. Inglis* (1807), 8 East, 273; *Jannokee Doss v. Bindabun Doss* (1836), 1 Moo. Ind. App. 67.

1149. Postmark—For purpose of deciding venue.]

(1) In an indictment for a libel, the postmark of a particular place within the county in which the venue is laid, upon a letter containing the libel, is not sufficient evidence of the publication there by deft.

(2) If a libellous letter is sent by the post, addressed to prosecutor at a place out of the county in which the venue is laid in an indictment for the libel, still if it was first received by him within that county, this is a sufficient publication by deft. to support the indictment.—*R. v. WATSON* (1808), 1 Camp. 215, N. P.

Annotations:—As to (1) Reid. R. v. Burdett (1820), 4 B. & Ald. 95; *Woodcock v. Houldsworth* (1846), 16 M. & W. 124.

1150. Letter sent through post—Seals broken.]

(1) A letter containing a libel was proved to be in the handwriting of deft., to have been addressed to a party in Scotland, to have been received at the post office at C. from the post office at H., & to have been then forwarded from C. to London to be forwarded to Scotland, & it was produced at the trial

[1917] S. C. 442; 54 Sc. L. R. 357; 1 S. L. T. 224.—*SCOT*.

m. *Publication by association's secretary of defamatory resolutions of chairman.]—PHILPOTT v. WHITTAL*, [1907] E. D. C. 193.—S. AF.

PART V. SECT. 1, SUB-SECT. 4.—A. n. *Failure of proof—Without substantial amendment of statement.]—*FRANKS v. BURNETT (1911), 19

o. — *To whom published.]—*LUBBE v. ROBINSON, [1923] C. P. D. 110.—S. AF.

p. *Onus of proof—On plaintiff.]—*JACKSON v. STALEY (1885), 9 O. R. 334.—CAN.

q. *Question for jury.]—*WRIGHT v. MORNING HERALD CO. (1881), 14 Q. B. 2 C. L. T.

r. — *Where evidence sufficient for submission to jury.]—*CROSSKILL v.

MORNING HERALD PRINTING & PUBLISHING CO. (1883), 16 N. S. R. (4 R. & G.) 200.—CAN.

PART V. SECT. 1, SUB-SECT. 4.—B. (a).

t. *Tricks of style.]—*SCOTT v. CRERAR (1887), 14 A. R. 152.—CAN.

a. *Pamphlet in course of preparation.]—*A deft. permitted proofs of a pamphlet in the course of preparation, which contained libellous words, to fall into the hands of co-defts.:—*Held*:

with the proper postmarks, & with the seal broken:—*Held*: sufficient *prima facie* evidence that it reached the person to whom it was addressed, & of a publication to him.

(2) Pltf. & deft. were jointly interested in property in Scotland, of which C. was manager. Deft. wrote to C. a letter, principally about the property, & the conduct of pltf. with reference thereto, but containing a charge against pltf. with reference to his conduct to his mother & aunt:—*Held*: though the part of the letter about deft.'s conduct as to the property might be confidential & privileged, such privilege could not extend to the part of the letter about pltf.'s conduct to his mother & aunt.—*WARREN v. WARREN* (1834), 1 Cr. M. & R. 250; 4 Tyr. 850; 3 L. J. Ex. 294; 149 E. R. 1073.

Annotations:—*As to* (2) *Refd.* *Wilson v. Robinson* (1845), 14 L. J. Q. B. 196; *Nevill v. Fine Arts & General Insce.*, [1895] 2 Q. B. 156; *McQuire v. Western Morning News Co.*, [1903] 2 K. B. 100; *Adam v. Ward*, [1917] A. C. 309.

1151. —.]—*SHIPLEY v. TODHUNTER*, No. 896, *ante*.

1152. Original document destroyed—Production & proof of sale of similar papers.]—In an action against A. for publishing a libel, evidence sufficient to go to a jury is furnished by proof that a libel was actually published; that it was a printed paper, since destroyed; that it corresponded with a printed paper produced; & that A. printed a paper corresponding with that produced, & sent three hundred to a shop from whence a person actually publishing the libel procured it; & that the libel was, on that occasion, taken from a parcel apparently containing three hundred.—*JOHNSON v. HUDSON & MORGAN* (1836), 7 Ad. & El. 233, n.; 1 Har. & W. 680; 5 L. J. K. B. 95; 112 E. R. 459.

Annotation:—*Refd.* *Watts v. Fraser* (1837), Will. Woll. & Dav. 451.

1153. Pamphlet lent by person to whom published—Identification of returned pamphlet.]—In an action for a libel contained in a pamphlet a witness stated that she had received a copy from deft. & that she had read certain portions of it; that she had lent it to A. & that he had afterwards given her a copy back, which she believed to be the same she had lent to him, but that she would not swear that it was the same, yet that she had no reason to doubt it:—*Held*: there was sufficient evidence of publication for the jury.—*FRYER v. GATHERCOLE* (1849), 4 Exch. 262; 18 L. J. Ex. 389; 13 L. T. O. S. 285; 13 Jur. 542; 154 E. R. 1209.

1154. Pointing to placard—Authorship not proved.]—*HIRD v. WOOD* (No. 1) (1894), 38 Sol. Jo. 234, C. A.

Publication of newspapers.]—*See* Nos. 1155–1160, *post*.

(b) Publication of Newspapers.

1155. Mere printing—*Prima facie* evidence of publication.]—(1) Publication of a libel must be stated in a declaration, but may be collected from the whole of it, & needs not any technical form of words.

(2) Printing a libel may be an innocent act, but, unless qualified by circumstances, shall *prima facie* be understood to be a publishing. It must be delivered to a compositor & the other

subordinate workman. Printing it in a newspaper admits of no doubt upon the face of it (*per CUR.*).—*BALDWIN v. ELPHINSTON* (1775), 2 Wm. Bl. 1037; 96 E. R. 610, Ex. Ch.

Annotations:—*As to* (2) *N.F. Watts v. Fraser* (1837), 7 Ad. & El. 223. *Refd.* *R. v. Burdett* (1820), 4 B. & Ald. 95.

Compare No. 1160, *post*.

1156. Production of copy.]—An affidavit made & signed by the printer & publisher & proprietor of a newspaper, as required by 38 Geo. 3, c. 78; which affidavit contained the names of the parties, the place where the paper was printed, & the title of it; together with the production of a newspaper tallying in every respect with the description of it in the affidavit is not only evidence by that Act of the publication of such paper by the parties named, but is also evidence of its publication in the county where the printing of it is described to be; & this, upon the trial of an information for a libel contained in such newspaper.—*R. v. HART & WHITE* (1808), 10 East, 94; 30 State Tr. 1316; 103 E. R. 711.

in a newspaper:—*Held*: the publication was proved by the production of a newspaper corresponding in title, etc., with that described in the affidavit lodged at the Stamp Office.—*MAYNE v. FLETCHER* (1829), 9 B. & C. 382; 4 Man. & Ry. K. B. 311; 2 Man. & Ry. M. C. 356; 7 L. J. O. S. K. B. 269; 109 E. R. 142.

Annotations:—*Fold.* *R. v. O'Connell* (1844), 5 State Tr. N. S. 1. *Refd.* *Cook v. Ward* (1830), 4 Moo. & P. 99.

1158. —.]—To render the certified copy of the affidavit made by the proprietor of a newspaper evidence under 38 Geo. 3, c. 78, it must either appear upon the jurat that the person before whom it was made, had authority to take it, or this must be proved *aliunde*. But it is sufficient evidence of publication at common law to put in the original affidavit of the proprietor stating where the paper was so published, & to prove that a paper with the corresponding title containing the libel was purchased there.—*R. v. WHITE* (1811), 3 Camp. 98, N. P.

1159. —.]—(1) It is a libel to publish a ludicrous story of an individual in a newspaper, if it tend to render him the subject of public ridicule, although he had previously told the story of himself.

(2) An examined copy of an affidavit filed by the proprietor of a newspaper at the Stamp Office did not correspond in terms with the title of the paper, when produced in evidence, but the sub-distributor of stamps produced the paper in which the alleged libel was published, & said that he believed that deft. was the proprietor, & that he had accounted & paid duties on advertisements inserted therein:—*Held*: it was sufficient evidence to go to a jury of a publication by deft.

(3) Proof that pltf. had been made the subject of laughter at a public meeting, is admissible, as identifying him with the subject of a libel, & as a proof of the consequences which had necessarily resulted to him from its publication.

(4) A declaration for a libel, after an inducement that one C. had been tried & convicted of murder, & was about to be hanged for such crime, alleged

evidence of publication of a libel.—*LUCAS v. MINISTERIAL UNION, ETC. OF BRITISH COLUMBIA* (1917), 23 B. C. R. 257.—CAN.

PART V. SECT. 1, SUB-SECT. 4.—
B. (b).

as to

lisher—Must comply with Newspaper Act.]—*SKRYHA v. TELEGRAM PRINTING CO.* (1914), 29 W. L. R. 505; 7 W. W. R. 167; 20 D. L. R. 692; 24 Man. L. R. 721.—CAN.

c. Notice as to proprietor & publisher—Where same person.]—*SCOWN PUBLISHING CO., LTD.*

[1918] 2 W. W. R. 118; 40 D. L. R. 373; 56 S. C. R. 305.—CAN.

d. —.]—*DINGLE v. WORLD NEWSPAPER CO. OF TORONTO* (1918), 57 S. C. R. 573; 45 D. L. R. 226.—CAN.

e. Publication attributed to correspondent.—One of many correspondents.]

LIBEL AND SLANDER.

Sect. 1.—Libel: Sub-sect. 4, B. (b). & C.; sub-sect. 5. Sect. 2: Sub-sect. 1, A., B. & C.; sub-sect. 2. Sect. 3: Sub-sects. 1 & 2, A. & B. (a).]

that deft. published the libel of & concerning pltf., without averring that it was published of pltf., & of & concerning the matters stated in the indictment:—*Held*: nevertheless, to be sufficient.—*COOK v. WARD* (1830), 6 Bing. 409; 4 Moo. & P. 99; 8 L. J. O. S. C. P. 126; 130 E. R. 1338.

1160. —.]—Deft. proposed to prove in mitigation of damages, that he had been provoked to write the libel complained of by other libels previously published by pltf. in certain newspapers & in a magazine. To effect this he offered in evidence a certificate of an affidavit from the Stamp Office, that pltf. was a proprietor of one of the newspapers, & proved that he was also editor of the others, & that he had read over in manuscript an article tending to provoke deft., which afterwards appeared in one of them. He also produced copies of the newspapers obtained from the Stamp Office one of which corresponded with the affidavit: & proved that the others had been signed & deposited under directions of pltf. by his printer, & one of them was proved by pltf.'s printer to have been printed by him. The magazine produced was also stated by pltf.'s publisher to have been published by him, according to his belief before the appearance of deft.'s libel. Deft. gave no evidence to show that he had seen any of the libels by which he alleged that he had been provoked:—*Held*: (1) the deposit of the newspapers at the Stamp Office did not, by 38 Geo. 3, c. 78, under those circumstances afford evidence of a publication; (2) the publication of a newspaper could not be inferred from the circumstance of one having been printed; (3) even if the publication had been proved, the evidence was inadmissible to show provocation, unless some further evidence was given from which the jury might infer that deft. had seen the libels by pltf. previous to writing the libel complained of.—*WATTS v. FRASER* (1837), 7 Ad. & El. 223; 2 Nev. & P. K. B. 157; Will. Woll. & Dav. 451; 6 L. J. K. B. 226; 1 Jur. 671; 112 E. R. 455.

Annotation:—As to (2) *Folld. R. v. O'Connell* (1844), 5 State Tr. N. S. 1.

See, also, No. 1099, *ante*.

Proof of publication in general.—*See EVIDENCE*, Vol. XXII., p. 383, Nos. 3296 *et seq.*

C. Admissibility of Evidence.

1161. **Contents of newspaper placard—Calling attention to libel in defendant's newspaper.**—In an action on the case for a libel in a newspaper, pltf. cannot give evidence of the contents of a placard posted in the window of a third person, although the placard states what will appear in deft.'s newspaper respecting pltf., & that which it

—*NUNN v. BRANDON* (1892), 24 O. R. 385.—CAN.

1. *Printing from notes of defendant.*—*MACKENZIE v. CUNNINGHAM* (1901), 8 B. C. R. 36.—CAN.

PART V. SECT. 1, SUB-SECT. 4.—C.

g. *Previous publication.*—In an action for libel evidence may be given by deft. of a previous publication by pltf. connected with the libel complained of, but not of a publication subsequent to the libel—at any rate, where it makes no difference to deft.—

30 O. R.

foretold does appear accordingly.—*RAIKES v. RICHARDS* (1827), 2 C. & P. 562, N. P.

1162. **Manuscript in handwriting of defendant—Partly erased.**—*TARPLEY v. BLABEY*, No. 1106, *ante*.

1163. **Handbills dealing with same subject as libel complained of—Published about same time.**—*BOND v. DOUGLAS*, No. 1142, *ante*.

1164. **Repetition & republication—Knowledge of defendant of probability of such repetition.**—A paragraph in a statement of claim in an action for a libel published in a newspaper stated that deft. knew that the words published would be, & the same in fact were, repeated & published in other editions of the same newspaper:—*Held*: evidence of the facts stated in this paragraph would be admissible at the trial, & therefore the paragraph was properly pleaded & ought not to be struck out.

The law is thus stated, & I think correctly stated, in *Odgers on Libel*. . . . Where there is evidence that deft., though he spoke only to A., intended & desired that A. should repeat his words, or expressly requested him to do so, here deft. is liable for all the consequences of A.'s repetition of the slander (*HUDDLESTON, B.*).—*WHITNEY v. MOIGNARD* (1890), 24 Q. B. D. 630; 59 L. J. Q. B. 324; 6 T. L. R. 274.

Secondary evidence.—*See EVIDENCE*, Vol. XXII., pp. 218, 222, Nos. 1906, 1964.

Proof of handwriting.—*See EVIDENCE*, Vol. XXII., pp. 197, 199, Nos. 1689, 1722, 1724.

SUB-SECT. 5.—PRACTICE.

See Sect. 4, sub-sect. 1, post.

SECT. 2.—SLANDER.

SUB-SECT. 1.—LIABILITY FOR PUBLICATION.

A. In General.

1165. **Liability for each publication—Of same slander.**—*ANON.* (1625), 3 Bulst. 313; 81 E. R. 260.

B. By Servant.

1166. **Servant acting within scope of employment.**—In an action of damages for slander against a municipal corpn., pursuer averred that one G., who was in the service of defenders as a tax collector, & whose duties included the collection of the police assessments payable by pursuer's husband & the granting of receipts therefor & for instalments thereof, while in the exercise of his duty as police tax collector in the employment of defenders called at pursuer's house & demanded payment of the police taxes. Pursuer tendered the balance due, which G. declined to accept as

v. CALDER (1883), 23 N. B. R. 73.—CAN.

PART V. SECT. 2, SUB-SECT. 1.—B.

1166 i. **Servant acting within scope of employment.**—*ROGERS v. DICK* (1863), 1 Macph. (Cl. of Sess.) 411; 35 Sc. Jur. 250.—SCOT.

1166 ii. —.]—*BEATON v. GLASGOW CORPN.*, [1908] S. C. 1010; 45 Sc. L. R. 780; 16 S. L. T. 207.—SCOT.

1166 iii. —.]—An employer is liable for a verbal slander uttered by his servant in the course of the servant's employment & for the benefit of the employer.—*FINBURGH v. MOSS' EMPIRES, LTD.*, [1908] S. C. 928; 45 Sc. L. R. 792; 16 S. L. T. 116.—SCOT.

1166 iv. —.]—*ELLIS v.*

PART V. SECT. 2, SUB-SECT. 1.—A.

k. **Slander not believed—By persons to whom published.**—Where defamatory words were spoken by deft. before persons who did not believe them:—*Held*: deft. was not protected by Defamation Act, s. 2.—*PARKER v.*

l. **Words uttered at instigation of plaintiff's inquiry agent.**—*RUDD v. CAMERON* (1912), 21 O. W. R. 860; 3 O. W. N. 1003; 26 O. L. R. 154; 4 D. L. R. 567.—CAN.

m. **Must be in hearing of third party.**—An action for slander will not lie for words spoken to pltf., unless in the hearing of a third

correct & asked to see the receipts for previous payments, & then left the house. That when he did call again on the same day he accused pursuer of having altered a receipt for 7s. 6d. from the sum of 4s. 6d. for which it had been truly made out, for the purpose of defrauding defenders of the sum of 3s.; that the receipt bore no marks of having been altered; that when she denied the charge G. became violent & threatened to lodge information with the police authorities which would result in her being put in gaol for three months for forgery; & that he repeated the slander in the house of a neighbour:—*Held*: the averments disclosed no ground of action against defenders, for there was nothing on the face of them to show expressly or by implication that the expression of any opinion by G. as to the genuineness of any receipt which might be produced to him for payment of taxes was within the scope of his employment.—*GLASGOW CORPN. v. LORIMER*, [1911] A. C. 209; 80 L. J. P. O. 175; *sub nom.* *GLASGOW CORPN. v. RIDDELL*, 104 L. T. 354, H. L.

Annotations:—*Mentd.* *Lloyd v. Grace, Smith* (1912), 107 L. T. 531; *Pratt v. British Medical Assocn.*, [1919] 1 K. B. 244.

—*J*—*See, also*, Nos. 1126–1130, *ante*; *AGENCY*, Vol. I., pp. 594 *et seq.*

C. Repetition.

See Sect. 3, post.

SUB-SECT. 2.—PRACTICE

See Sect. 4, Sub-sect. 2, post.

SECT. 3.—REPETITION.

SUB-SECT. 1.—IN GENERAL.

1167. Reading aloud libellous statement—Whether publication.—(1) A libel is made either against a private person, or a magistrate, or public person; & in either case is punishable, although the party libelled is dead at the time of making the libel; (2) it is not material, whether the libel be true or false; (3) a libel is either *in scriptis* or *sine scriptis*. A libel *in scriptis* is, when an epigram, rhyme, or other writing is composed or published, to the scandal or contumely of another; (4) such libel may be published (a) *verbis aut cantilenis*: as where it is maliciously repeated or sung in the presence of others; (b) *traditione*, when the libel or any copy of it is delivered over to scandalise the party.—*CASE DE LIBELLIS FAMOSIS* (1605), 5 Co. Rep. 125 a; 77 E. R. 250.

Annotations:—*As to* (1) *Consd.* *R. v. Topham* (1791), 4 Term Rep. 126; *R. v. Ensor* (1887), 3 T. L. R. 366. *Reid.* *R. v. Labouchere* (1884), 12 Q. B. D. 320. *As to* (4) *Reid.* *Harman v. Delany* (1731), 2 Stra. 898; *Forrester v. Tyrrell* (1893), 57 J. P. 532. *Generally, Mentd.* *Townsend v. Hughes* (1678), 2 Mod. Rep. 150.

1168. ———. *J*—To be convicted of libel in the Star Chamber, the party ought to be either a contriver of the libel, or a procurer of the contriving of it, or a malicious publisher of it, knowing it to be a libel.

If one reads a libel, that is no publication of it, or if he hears it read, it is no publication of it, for

before he reads or hears it, he cannot know it to be a libel; or if he hears or reads it, & laughs at it, it is no publication of it; but if after he has read or heard it, he repeats it, or any part of it in the hearing of others, or after that he knows it to be a libel, he reads it to others, that is an unlawful publication of it (*per CUR.*).—*LAMB'S CASE* (1610), 9 Co. Rep. 59 b; *Moore*, K. B. 813; 77 E. R. 822.

Annotations:—*Expld.* *R. v. Beare* (1698), 1 Ld. Raym. 414. *Reid.* *Forrester v. Tyrrell* (1893), 57 J. P. 532. *Mentd.* *Townsend v. Hughes* (1678), 2 Mod. Rep. 150; *Emmens v. Pottle* (1885), 34 W. R. 116.

1169. ———. *J*—If a man reads a libel on another to himself & then reads it aloud before other persons, that makes him a libeller. Deft. received an anonymous letter whilst at a meeting of a lodge, of which both he & pltf. were members. Deft. read the letter to himself & then by leave of the chairman read it to the members present. The jury found that the letter contained defamatory matter reflecting on pltf.:—*Held*: a publication of a libel.—*FORRESTER v. TYRRELL* (1893), 57 J. P. 532; 9 T. L. R. 257, C. A.

1170. Disclosure of name of original utterer—Whether libel actionable as oral slander.—*M'GREGOR v. THWAITES*, No. 1668, *post*.

SUB-SECT. 2.—LIABILITY FOR.

A. Libel.

1171. Disclosure of original utterer—Whether mitigation of offence of repeater.—*Re READ & HUGGONSON*, No. 1115, *ante*.

1172. ———. *Whether a defence.*—In an action for a libel, it is no plea, that deft. had the libellous statement from another, & upon publication disclosed the author's name.—*DE CRESPIGNY v. WELLESLEY* (1829), 5 Bing. 392; 2 Moo. & P. 695; 7 L. J. O. S. C. P. 100; 130 E. R. 1112.

Annotations:—*Reid.* *Delegal v. Highley* (1837), 3 Bing. N. C. 950; *Tidman v. Ainslie* (1854), 10 Exch. 63. *Mentd.* *M'Pherson v. Daniels* (1829), 10 B. & C. 263; *Jones v. Hulton*, [1909] 2 K. B. 444.

1173. ———. *J*—In an action for libel it is no justification that the libellous matter was previously published by a third person, & that deft., at the time of his publication, disclosed the name of that person, & believed all the statements contained in the libel to be true.—*TIDMAN v. AINSLIE* (1854), 10 Exch. 63; 156 E. R. 357.

Annotation:—*Consd.* *Dickeson v. Hilliard & Hare, Robinson v. Hilliard & Hare* (1874), 30 L. T. 196.

See, also, No. 1668, *post*.

Repetition of slander.—*See* Nos. 1189–1197, *post*.

B.

(a) Liability of Original Utterer.

1174. General rule—Primâ facie no liability.—In an action for slander by husband & wife against husband & wife, the words declared upon, imputing adultery to the female pltf. having been addressed to her by the female deft., in the presence of other persons, but in the absence of the other pltf., & repeated without the authority of the female deft. by the female pltf. to her husband, who in consequence of such words so repeated, refused to continue to cohabit with her—the loss by the

FREE LABOUR ASSOCN. (1905), 7 F. (Ct. of Sess.) 629; 42 Sc. L. R. 495; 13 S. L. T. 70.—*SCOT.*

1166 v. ———. *J*—*M'ADAM v. CITY & SUBURBAN DAIRIES, LTD.*, [1911] S. C. 430; 48 Sc. L. R. 318; 1 S. L. T. 99.—*SCOT.*

1166 vi. ———. *J*—*AIKEN v. CALEDONIAN RY. CO.*, [1913] S. C. 68; 50 Sc. L. R. 45; [1912] 2 S. L. T. 314.—*SCOT.*

PART V. SECT. 3, SUB-SECT. 1.

n. Seconding defamatory resolution at public meeting.—*Seconding at a*

public meeting a defamatory resolution, proposed by another, is an adoption & repetition of the defamation, which constitutes a sufficient publication to render the seconder liable in damages to the person injured.—*MEURANT v. RAUBENHEIMER* (1868), 1 Buch. A. C. 87.—*S. AF.*

*Sect. 3.—Repetition: Sub-sect. 2, B. (a) & (b).
Sect. 4: Sub-sect. 1.]*

female pltf. of the *consortium* of her husband was alleged as special damage:—*Held*: on the authority of *Ward v. Weeks*, No. 2136, *post*, defts. were not liable for the unauthorised repetition by the female pltf. to her husband.

Qu.: whether the loss of *consortium* is a ground of special damage. *Qu.*: whether the words were such as to justify the husband in depriving his wife of her *consortium*. *Semble*: that there was no duty or obligation on the wife to repeat the words to her husband.

Where one man makes a statement to another, & that other thinks fit to repeat it to a third, I do not think it reasonable to hold the first speaker responsible for the ultimate consequences of his speech (*BRAMWELL, B.*).—*PARKINS v. SCOTT* (1862), 1 H. & C. 153; 31 L. J. Ex. 331; 6 L. T. 394; 8 Jur. N. S. 593; 10 W. R. 562; 158 E. R. 839; *previous proceedings*, 2 F. & F. 799, N. P.

Annotations:—*Consd.* *Clarke v. Morgan* (1877), 38 L. T. 354; *Speight v. Gosnay* (1891), 60 L. J. Q. B. 231. *Refd.* *Hirst v. Goodwin* (1862), 3 F. & F. 257; *Riding v. Smith* (1876), 1 Ex. D. 91; *Weld-Blundell v. Stephens*, [1920] A. C. 956.

1175. ———.]—*HIRST v. GOODWIN*, No. 450, *ante*.

1176. ———.]—*DERRY v. HANDLEY*, No. 1180, *post*.

1177. ———.]—On an application for leave to issue a writ of summons for service out of the jurisdiction, it appeared that the cause of action was an alleged slander uttered abroad & followed by special damage in England:—*Held*: the writ ought not to issue, for as it was not shown that the slander was intended to be transmitted to England, the special damage, if it was the cause of action, was not the act of the person who uttered the slander, or an act for which he was responsible, so that there was no act done by him within the jurisdiction within R. S. C., 1875, Ord. 11, r. 1.

There is ample authority to show that a man is not liable for damage occasioned by a repetition of the slander (*BRAMWELL, L.J.*).—*BREE v. MARESCAUX* (1881), 7 Q. B. D. 434; 50 L. J. Q. B. 676; 44 L. T. 765; 29 W. R. 858, C. A.

Annotation:—*Consd.* *Weld-Blundell v. Stephens*, [1920] A. C. 956.

1178. ———.]—*SPEIGHT v. GOSNAY*, No. 1188, *post*.

See, also, No. 2136, *post*.

1179. **Exceptions to rule—Words uttered to person under duty to repeat.**—*PARKINS v. SCOTT*, No. 1174, *ante*.

1180. ———.]—The general rule that the remedy of a slandered person, in cases where the words are uttered by the original slanderer to another, who communicates them to a third person, whereby special damage arises, is against the intermediate person & not the original slanderer, does not apply where the words are spoken to a person who is under a moral obligation to communicate them to a third. In such case the communication is a privileged one, & the original utterer of the slander is responsible.—*DERRY v. HANDLEY* (1867), 16 L. T. 263.

Annotation:—*Refd.* *Speight v. Gosnay* (1891), 60 L. J. Q. B. 231.

PART V. SECT. 3, SUB-SECT. 2.— B. (a).

1188 i. **Exceptions to rule**
[Defendant is original utterer of
act.]—Deft. was held liable for damages
for the effect of the repetition of
defamatory words uttered
such repetition being the

consequences of the utterance.—*BORDEAUX v. JOBS* (1913), 25 W. L. R. 600; 6 Alta. L. R. 440.—*CAN.*

V. SECT. 3, SUB-SECT. 2.— B. (b).

1189 i. **General rule.**—Each publica-

1181. ———.]—*SPEIGHT v. GOSNAY*, No. 1188, *post*.

See, also, No. 1922, *post*.

1182. ——— **Original utterer authorising repetition.**—*PARKINS v. SCOTT*, No. 1174, *ante*.

1183. ———.]—*SPEIGHT v. GOSNAY*, No. 1188, *post*.

1184. ——— **Original utterer intending repetition.**—*WHITNEY v. MOIGNARD*, No. 1164, *ante*.

1185. ———.]—*SPEIGHT v. GOSNAY*, No. 1188, *post*.

See, also, No. 1177, *ante*.

1186. ——— **Original utterer requesting repetition.**—*WHITNEY v. MOIGNARD*, No. 1164, *ante*.

1187. ———.]—*PARKES v. PRESCOTT*, No. 1130, *ante*.

1188. ——— **Repetition natural consequence of original utterer's act.**—Deft. uttered a slander consisting of a false imputation upon the chastity of pltf., an unmarried woman, in the presence of pltf.'s mother. The mother repeated it to pltf., who repeated it to the man to whom she was engaged to be married & he broke off the engagement. There being no evidence that deft. authorised or intended the repetition of the slander, or that he knew of pltf.'s engagement:—*Held*: an action of slander could not be maintained against him.

Where special damage arises from the repetition of a slander, an action may be maintained against the person uttering the slander if he authorised or intended the repetition; or if the repetition was the natural consequence of his act; or, *semble*: if there was a moral obligation on the person in whose presence the slander was uttered to repeat it.

Primâ facie this case appears to be governed by *Parkins v. Scott*, No. 1174, *ante*, which is an authority for the proposition that in the case of an unauthorised repetition of a slander it is not the person who utters the slander, but the person who repeats it, who is liable (*LINDLEY, L.J.*).—*SPEIGHT v. GOSNAY* (1891), 60 L. J. Q. B. 231; 55 J. P. 501; 7 T. L. R. 239, C. A.

Annotation:—*Refd.* *Weld-Blundell v. Stephens*, [1920] A. C. 956.

Special damage resulting from repetition.—*See* Part VIII., Sect. 1, sub-sect. 4, B. (a) vii., *post*.

(b) *Liability of Person Repeating Slander.*

1189. **General rule.**—Slanderous words spoken as hearsay are actionable.—*READ'S CASE* (1598), Cro. Eliz. 645; 78 E. R. 884.

1190. ———.]—*MEGGS v. GRIFFYTH* (1601), Gouldsb. 138; Cro. Eliz. 400; 75 E. R. 1049.

1191. ———.]—*LEWIS v. WALTER*, No. 816, *ante*.

1192. ———.]—An action lies for slanderous words, although deft. reported them as spoken by another, pltf. averring that they were not so spoken.—*RAYNOLDS v. BLANCHETT* (1674), 1 Freem. K. B. 275; 89 E. R. 197.

1193. ———.]—(1) In an action for slander, for words spoken of pltf. in his trade, importing a direct assertion made by deft., that pltf. was insolvent, deft. pleaded, that one W. spoke & published to deft. the same words, & that deft., at the time of speaking & publishing them, declared

tion is a distinct tort, & every person repeating the slander becomes an independent slanderer.—*STEWART v.* (1918), 42 O. L. R. 477

WICK (1835), 13 Sh. (Ct. of Sess.) 1127; 31 Fac. Coll. 47.—*SCOT.*

that he had heard & been told the same from & by the said W.:—*Held*: it is not an answer to an action for oral slander for deft. to show that he heard it from another, & named the person at the time, without showing that deft. believed it to be true, & that he spoke the words on a justifiable occasion.

(2) To constitute a good defence to an action where the publication of the slander is not intended to be denied, defts. must negative the charge of malice . . . or show that pltf. is not entitled to recover damages. . . . A party is not the less entitled to recover damages . . . for injurious matter published concerning him because another person previously published it (*LITTLEDALE, J.*).—*M'PHERSON v. DANIELS* (1829), 10 B. & C. 263; 5 Man. & Ry. K. B. 251; 8 L. J. O. S. K. B. 14; 109 E. R. 448.

Annotations:—*As to* (1) *Folld. C.*—*v. Lindsell* (1847), 9 L. T. O. S. 24. *Refd.* *Ward v. Weeks* (1830), 7 Bing. 211; *Delegal v. Highley* (1837), 3 Bing. N. C. 950; *Tidman v. Ainslie* (1854), 10 Exch. 63. *As to* (2) *Apld.* *Watkins v. Hall* (1868), L. R. 3 Q. B. 396. *Generally, Mentd.* *Speck v. Phillips* (1839), 8 L. J. Ex. 277; *R. v. Nood* (1852), 6 Cox, C. C. 137; *Johnson v. Emerson* (1871), L. R. 6 Exch. 329; *Allen v. Flood*, [1898] A. C. 1.

1194. —.—.]—It is no defence to allege, in response to the libel, that the defamatory words were uttered, without anger or malice, in a discussion with intimate friends respecting the truth of the report containing the defamation, the party mentioning the channel of the report, & offering to assist in discovering the author.—*COLLIS v. BATE* (1846), 4 Notes of Cases, 540; 10 Jur. 647.

1195. —.—.]—*WATKIN v. HALL*, No. 1272, *post*.

1196. Publication of name of original utterer—*Whether good defence.*—*NORTHAMPTON'S (EARL), CASE* (1613), 2 State Tr. 861; 12 Co. Rep. 132; 77 E. R. 1407.

Annotations:—*Folld.* *Davis v. Lewis* (1796), 7 Term Rep. 17. *Expld.* *Lewis v. Walter* (1821), 4 B. & Ald. 605. *Distd.* *M'Gregor v. Thwaites* (1824), 3 B. & C. 24. *Consd.* *De Crespigny v. Wellesley* (1829), 5 Bing. 392. *Dbtd.* *M'Pherson v. Daniels* (1829), 10 B. & C. 263. *Consd.* *Ward v. Weeks* (1830), 7 Bing. 211. *Distd.* *Tidman v. Ainslie* (1854), 10 Exch. 63. *Refd.* *Townsend v. Hughes* (1876), 2 Mod. Rep. 150; *Maitland v. Goldney* (1802), 2 East, 426; *Woolnoth v. Meadows* (1804), 5 East, 463; *Delegal v. Highley* (1837), 3 Bing. N. C. 950; *Phillips* (1839), 8 L. J. Ex. 277; *Sinclair v. Storey* (1843), 1 L. T. O. S. 148.

1197. —.—.]—In a justification of slander, that deft. named the original author of it at the time, it is not sufficient to allege that the original slanderer used such & such words or to that effect; although in the libel declared on deft. stated that another had spoken the same slanderous words of pltf. or words to that effect: but deft. must give the very words used, though it be only necessary to prove some material part of them. *Qu.*: whether a defendant can by naming the original author justify the publishing in writing slanderous words spoken by such other; especially after knowing that they were unfounded.—*MAITLAND v. GOLDNEY* (1802), 2 East, 426; 102 E. R. 431.

Annotations:—*Refd.* *Woolnoth v. Meadows* (1804), 5 East, 463; *M'Gregor v. Thwaites* (1824), 3 B. & C. 24.

Compare No. 1172, *ante*.

PART V. SECT. 4, SUB-SECT. 1.

a. *Where justification pleaded—& publication admitted—Right to begin.*—In an action for libel where publication is admitted & justification pleaded by deft., pltf. is entitled to begin even though the affirmative issue is on deft.

M'Pherson v. CLAYTON, [1925] N. Z. L. R. 569.—N.Z.

p. *Particulars—Defendant's right to.*—In an action of libel deft. is not

names of the person or persons to whom, the date or dates on which, & the place or places where, the alleged libel was published, in the absence of special grounds requiring them, & especially in a case where the particulars of publication, if any, must be known to deft.—*KEOGH v. INCORPORATED DENTAL HOSPITAL OF IRELAND*, [1910] 2 I. R. 166.—IR.

q. —.—.]—*BRITISH LEGAL & ASSURANCE*

SECT. 4.—PRACTICE.

SUB-SECT. 1.—LIBEL.

1198. *How pleaded—Necessity for allegation of publication.*—*BALDWIN v. ELPHINSTON*, No. 1155, *ante*.

1199. —.—.]—*Libel purporting to be assertion of some other person.*—An action for a libel, charging in one count that deft. published it as purporting to be a letter from A. to B.; & in another charging generally that deft. published the libellous matter, is not sustained by proof of a publication, wherein deft. stated that in a debate in the Irish House of Commons, several years before, the A.-G. of Ireland had read such a letter; & then stating the libellous matter as said by him, in commenting upon the letter: for the characters of the several libels are essentially different, though the slander imputed may be the same. It seems also that a libellous assertion that pltf. "has been for some time past confined on a charge of high treason," taken as a fact asserted generally by the publisher on his own knowledge, would refer to the period of the publication, & therefore would not be proved by showing that it was asserted to have been said by another some years before, & consequently referring to the period when it was so said. But proof of a warrant, to arrest on suspicion of high treason, will not sustain a justification that pltf. was arrested & confined on a charge of high treason.—*BELL v. BYRNE* (1811), 13 East, 554; 104 E. R. 486.

Annotations:—*Apld.* *M'Pherson v. Daniels* (1829), 10 B. & C. 263. *Refd.* *Cartwright v. Wright* (1822), 5 B. & Ald. 615.

—.]—*Libel itself must be set out.*—See Nos. 967, 968, *ante*.

1200. *Particulars—Persons to whom published.*—In an action for libel brought by pltf. as the director of a co. against defts., a committee of the shareholders in the co., for statements contained in a report drawn up & alleged to be maliciously published by them, defts. had obtained, after pleadings had been closed, an order for particulars of the occasion of any publication, by them to persons other than shareholders:—*Held*: defts. were not entitled to such particulars, since the publication complained of clearly included publication to others than shareholders, though not expressly so stated, & sufficiently complied with the requirements of pleading under R. S. C., Ord. 19, r. 4.—*GOURAUD v. FITZGERALD* (1888), 37 W. R. 265; 5 T. L. R. 80, C. A.

1201. —.—.]—*Unknown to plaintiff.*—A statement of claim in a libel action alleged that the libel had been published to certain persons named & to others whose names were unknown to pltf., but known to defts., & that pltf. would rely upon the publication thereof to every person to whom they might discover it was published. Defts. moved that the statement of claim should be struck out so far as it referred to the publication of the libel to persons unknown to pltf. on the ground that it was embarrassing because they knew not how to plead to it; & further, that it gave pltf. an opportunity of

LTD. v. SHEFFIELD, [1911] 1 I. R. 69.—IR.

r. *Action against newspaper correspondent—Right to notice.*—*UNDERWOOD v. ROACH* (1908), 6 E. L. R. 561.—CAN.

t. *Disclosure of newspaper correspondent's name.*—*MORRISON v. SMITH & Co.* (1897), 24 R. (Ct. of Sess.) 471; 34 So. L. R. 370; 4 S. L. T. 261.—SCOT.

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administering "fishing interrogatories" with the object of ascertaining whether in fact he had been so libelled. The Ct. of Appeal, reversing a decision of COLERIDGE, J., ordered that the statement of claim should stand:—*Held*: there was jurisdiction, & that it was a matter of discretion whether interrogatories could be administered when a statement of claim was so drawn.—*RUSSELL v. STUBBS, LTD.* (1908), [1913] 2 K. B. 200, n.; 82 L. J. K. B. 756, n.; 108 L. T. 706; 52 Sol. Jo. 580, H. L.

Annotations:—*Expld. & Distd.* *Barham v. Huntingfield*, [1913] 2 K. B. 193. *Apld.* *Leng v. Langlands* (1916), 114 L. T. 665. *Consd.* *Re Whitworth*, *O'Rourke v. Darbishire*, [1919] 1 Ch. 320.

See R. S. C., Ord. 19, rr. 4, 6, 7.

Interrogatories — Right to administer.] — See DISCOVERY, Vol. XVIII., pp. 203 et seq.

SUB-SECT. 2.—SLANDER.

1202. Words spoken to several persons—Superfluous allegations—When struck out.]—The court will not order counts in slander to be struck out as unnecessary or superfluous, where they were introduced in a *colloquium* with several persons, as in some counts it was necessary to set out the names of the persons to whom the words were spoken, & to omit them in others; & a pltf. is not to be confined to one particular statement of the words spoken.—*NELSON v. GRIFFITHS* (1824), 2 Bing. 412; 9 Moore, C. P. 785; 3 L. J. O. S. C. P. 55; 130 E. R. 365.

1203. — Plaintiff not confined to one statement.]—*NELSON v. GRIFFITHS*, No. 1202, *ante*.

1204. Right of defendant to particulars—Of persons to whom slander uttered.]—In slander, with special damage, particulars refused of the persons to whom the words were spoken, but interrogatories of the persons whose patronage

pltf. was supposed to have lost, allowed.—*WOOD v. JONES* (1858), 1 F. & F. 301.

1205. — — —.]—Particulars of the names & addresses of persons mentioned in the statement of claim & of how pltf.'s business was falling off refused in an action of slander.—*WINGARD v. COX*, [1876] W. N. 106; Bitt. Prac. Cas. 144; 2 Char. Cham. Cas. 33.

Annotation:—*Consd.* *Bradbury v. Cooper* (1883), 12 Q. B. D. 94.

1206. — — —.]—A statement of claim alleged that T., "at the request & by the direction of deft., falsely & maliciously spoke & published of & concerning pltf." certain slanderous words, which were set out:—*Held*: deft. was entitled to particulars of the persons to whom the words were uttered.—*BRADBURY v. COOPER* (1883), 12 Q. B. D. 94; 53 L. J. Q. B. 558; 48 J. P. 198; 32 W. R. 32, D. C.

Annotations:—*Refd.* *Roselle v. Buchanan* (1886), 55 L. J. Q. B. 376; *Gouraud v. Fitzgerald* (1888), 5 T. L. R. 19.

1207. — — —.]—In an action for slander the ct. ordered pltf., upon a summons taken out by deft. before delivery of the defence, to give particulars of the names of the persons to whom the alleged slander was uttered.—*ROSELLE v. BUCHANAN* (1886), 16 Q. B. D. 656; 55 L. J. Q. B. 376; 34 W. R. 488; 2 T. L. R. 367, D. C.

Annotation:—*Distd.* *Gouraud v. Fitzgerald* (1888), 37 W. R. 55.

1208. — — — "Best particulars he can give."]—When particulars are required to be given of the names of persons who may have heard deft. utter certain slanders in a public room, an order that pltf. is to deliver "the best particulars he can give of the persons present" when the slanders were uttered is correct, & will not be varied by the ct.—*WILLIAMS v. RAMSDALE* (1887), 36 W. R. 125.

1209. — — —.]—*DAVIES v. ROLLESTON*, [1920] W. N. 29, C. A.

See R. S. C., Ord. 19, rr. 4, 6, 7.

Right to administer interrogatories.]—See DISCOVERY, Vol. XVIII., pp. 203 et seq.

Part VI.—Defences.

SECT. 1.—JUSTIFICATION.

SUB-SECT. 1.—MUST BE SPECIALLY PLEADED.

1210. Must be pleaded if relied on.]—In an action for words that import felony or treason, deft. cannot give in evidence the truth of them on the general issue.—*SMITH v. RICHARDSON* (1737), Willes, 20; Barnes, 195; 2 Com. 552; 125 E. R. 1024.

Annotation:—*Refd.* *Bromage v. Prosser* (1825), 4 B. & C. 247.

1211. — — —.]—*UNDERWOOD v. PARKS*, No. 2022, *post*.

1212. — — —.]—*RUMSEY v. WEBB*, No. 1541, *post*.

1213. — — —.]—(1) In an action by an optician against a newspaper proprietor for inserting an advertisement alluding to pltf. as a licenced

hawker & quack in spectacle secrets:—*Held*: evidence that this was true would be admissible under the general issue, as showing that the advertisement was not a libel.

(2) An editor is bound to make some inquiries before he publishes anything imputing fraud or crime to another (*POLLOCK, C.B.*).—*KEYZOR v. NEWCOMB* (1859), 1 F. & F. 559.

1214. Joinder with other plea.]—*SMITH v. LODGE* (1747), Barnes, 356; 94 E. R. 952.

1215. — — —.]—In an action of slander deft. may plead together pleas equivalent to "not guilty" & a plea in justification.—*RESTELL v. STEWARD* (1875), 1 Char. Cham. Cas. 87; Bitt. Prac. Cas. 46.

1216. — — — Payment into court.]—In an action for libel defts. pleaded denial & justification of

a. Evidence — Opinions of readers — As to whom libel applies.]—On the trial of an action for libel witnesses who had read the paper containing the "allowed to state to whom

PART V. SECT. 4, SUB-SECT. 2.

b. Disclosure of author of slander—When a bar to action.]—The disclosure of the name of the original author of a slanderous report previously to the commencement of an action, is a bar to the same.—*MURPHY v. KROUGH* (1818), 1 Nfld. L. R. 77.—*NFLD.*

c. Right of defendant to particulars — Of places where slanders uttered.]—An application by deft., that pltf.'s attorney might be required to furnish to him a statement of the occasions on which words were uttered for which an action of slander had been brought was granted.—*SLATOR v. SLATOR* (1863), 8 L. T. 856.—*IR.*

the libel without the innuendo, & pleaded alternatively an apology & payment into ct. of 40s. as amends:—*Held*: these defences could be pleaded together, & they were not embarrassing.—*HAWKESLEY v. BRADSHAW* (1880), 5 Q. B. D. 802; 49 L. J. Q. B. 333; 42 L. T. 285; 44 J. P. 473; 28 W. R. 557, C. A.

Annotations:—*Reid*. *Emden v. Carte* (1881), 19 Ch. D. 311; *Gontard v. Carr* (1883), 53 L. J. Q. B. 467, n.; *Fleming v. Dollar* (1889), 23 Q. B. D. 388.

1217. ———.]—*FLEMING v. DOLLAR*, No. 1262, *post*.

1218. In what cases available—Under Lord Campbell's Act.]—The special plea of justification given by the above Act cannot be pleaded to an indictment for a seditious libel. Such plea can only be pleaded in justification of a private or personal libel.—*R. v. DUFFY* (1846), 6 State Tr. N. S. 303; 7 L. T. O. S. 546; 2 Cox, C. C. 45.

Justification & fair comment compared, *see* Sect. 4, sub-sect. 2, *post*.

SUB-SECT. 2.—SUFFICIENCY OF PLEA.

A. In General.

1219. Must be in precise terms of imputation.]—*FYSH v. THOROWGOOD*, No. 470, *ante*.

1220. ———.]—Saying A. is a thief, & has stolen twenty pounds, cannot be justified by pleading that she stole a hen; for the whole slander must be answered.—*HILSDEN v. MERCER* (1823), Cro. Jac. 677; 79 E. R. 586.

Annotation:—*Reid*. *Compagnon v. Martin* (1771), 2 Wm. Bl. 790.

1221. ———.]—Deft. published an account of the proceedings under a commission of lunacy, which pltf. had attended as a witness, & stated that pltf.'s testimony, "being unsupported by that of any other person, failed to have any effect on the jury." "The object was to set aside a will." "Mr. J. commented with cutting severity on the testimony of Mr. O.," pltf.:—*Held*: the whole taken together was a libel; & a plea justifying only the words "Mr. J. commented with cutting severity on the testimony of Mr. O." was ill.—*ROBERTS v. BROWN* (1834), 10 Bing. 519; 4 Moo. & S. 407; 3 L. J. C. P. 168; 131 E. R. 996.

1222. ———.]—Where a clergyman had been accused by letter to the bishop of being party to a disgraceful scene, by which means he had brought scandal on religion in the parish. On an action for libel:—*Held*: (1) a plea of justification should justify the assertion that the act was a disgraceful one; (2) it was not necessary to lay special damage; such an accusation would be quite sufficient to maintain an action of libel whether pltf. was a clergyman or not.—*JAMES v. BOSTON* (1845), 5 L. T. O. S. 152.

1223. ———.]—A libellous paragraph published of pltf. in a newspaper, stated, in substance, that he was a confederate of blacklegs; that he had sought admission into a Yacht Club; that he gave an entertainment in the expectation of being elected, but was blackballed, & the next morning bolted, & some of the tradesmen of the town had to lament the fashionable character of his entertainment. A plea of justification, after alleging facts to show that pltf. was the confederate of

persons who had been guilty of cheating at cards, & the facts of his giving an entertainment, & of his being blackballed, as mentioned in the libel, etc., stated that on the following morning "he quitted the town & neighbourhood, leaving divers of the tradesmen, to whom he owed money, unpaid," naming them:—*Held*: bad, inasmuch as such quitting might be innocent, & without any intention to defraud.—*O'BRIEN v. BRYANT* (1846), 16 M. & W. 168; 4 Dow. & L. 341; 16 L. J. Ex. 77; 8 L. T. O. S. 216; 153 E. R. 1145.

1224. ———.]—(1) A declaration for a libel imputing to an officer in the army, that he had been guilty of murder, in killing his opponent in a duel; & further alleging that the duel was supposed to have been fought under circumstances revolting to the ordinary notions of honour, is not answered by a plea alleging merely that pltf. killed his antagonist, & was tried for murder, & acquitted; deft. was bound to justify also the matter of aggravation. *Semble*: (2) a replication setting up the acquittal of pltf., by way of estoppel, would be bad.

(3) No doubt a man may be guilty of a libel in imputing dishonourable conduct to another though not involving a breach of any positive law (*JERVIS, C.J.*).—*HELSHAM v. BLACKWOOD* (1851), 11 C. B. 111; 20 L. J. C. P. 187; 17 L. T. O. S. 166; 15 Jur. 861; 138 E. R. 412.

Annotation:—*Generally*, *Mentd.* In the *Estate of Crippen*, [1911] P. 108.

1225. ———.]—*ROGERS v. BEADELL* (1854), 23 L. T. O. S. 114.

1226. ———.]—To a declaration setting out part of a newspaper article, accusing pltf. of base & ungrateful conduct, deft. pleaded pleas alleging that words in the article charging pltf. with bribery were omitted from the declaration. The pleas went on, setting out the whole of the newspaper article which charged pltf. with bribery & other improper conduct, & justified the whole article so set out:—*Held*: these pleas were rightly struck out by a judge at chambers as being calculated to prejudice, embarrass, & delay the fair trial of the action; C. L. P. Act, 1852 (c. 76), s. 61, had not altered the law of pleading so as to allow deft. in an action of libel or slander to plead pleas putting a different meaning upon the alleged libel or slander from that assigned to it by the declaration, & justifying the libel or slander in the sense so put upon it by these pleas.—*BREMIDGE v. LATIMER* (1864), 4 New Rep. 285; 10 L. T. 816; 12 W. R. 878.

Annotations:—*Consd.* *Watkin v. Hall* (1868), L. R. 3 Q. B. 396; *Rassam v. Budge*, [1893] 1 Q. B. 571.

1227. ———.]—In pleading justification in an action of slander the very words alleged to have been uttered should be used.—*RESTELL v. STEWARD* (1875), Bitt. Prac. Cas. 65; 1 Char. Cham. Cas. 89.

1228. ———.]—*BOTTERILL v. WHYTEHEAD*, No. 163, *ante*.

1229. ———.]—(1) To a statement of claim setting out defamatory words, alleged to have been spoken by deft. of pltf., deft. pleaded that he "did say the following words," & proceeded to set out his own version of what he had said, which differed materially from the words set out in the statement of claim; & then alleged that the words spoken by deft. were true in substance & in

PART VI. SECT. 1, SUB-SECT. 2.—A.

1219 i. Must be in precise terms of imputation.]—*LONGWORTH v. HYNDMAN* (1844), 1 U. C. R. 17.—CAN.

1219 ii. ———.]—*FORBES v. MCCLELL* (1868), 4 P. R. 272.—CAN.

1219 iii. ———.]—*PULFORD v. WALLACE* (1901), 21 C. L. T. 238; 1 O. L. R. 278.—CAN.

1219 iv. ———.]—*M'DONALD v. BEGG* (1862), 24 Dunl. (Ct. of Sess.) 685.—SCOT.

d. Effect restricted to mitigation of damages.]—*WILSON v. WOODS* (1835), 9 O. R. 687.—CAN.

e. Whether plea barred by former apology.]—*Held*: defender in an action of damages for slander was not barred from pleading *veritas* by having, on a

Sect. 1.—Justification: Sub-sect. 2, A., B. & C.]

fact, & were spoken on a privileged occasion. On a motion to strike out this defence:—*Held*: the defence, as pleaded, was embarrassing, & tended to prejudice the fair trial of the action, & must therefore be struck out.

(2) Deft. cannot justify part of a libel or slander unless he can show clearly that the statements are severable (SMITH, L.J.).—*RASSAM v. BUDGE*, [1893] 1 Q. B. 571; 62 L. J. Q. B. 312; 68 L. T. 717; 57 J. P. 361; 41 W. R. 377; 9 T. L. R. 347; 37 Sol. Jo. 358; 5 R. 336, C. A.

1230. Must extend to whole libel.]—(1) Plea of justification of a libel must extend to the whole libel.

(2) Whether the vituperative terms contained in a libel are truly applied, is a question of fact for the jury; & therefore, where the libel was, that pltf. was a "great defaulter," & he was proved to be a defaulter, the jury were to say whether it was true that he was a great defaulter.—*WARMAN v. HINE* (1837), 1 J. P. 346; 1 Jur. 820.

1231. Must aver truth at time imputation made.]—A justification to an action for calling a man "a bkpt. slave," must aver that he was a bkpt. at the time the words were spoken.—*UPSHEER v. BETTS* (1620), Cro. Jac. 578; 79 E. R. 495.

Plea of fair comment & justification.]—*See Sect. 4, sub-sect. 6, post.*

B. General Plea.

1232. Delivery of particulars.]—*ODGER v. MORTIMER* (1873), cited in L. R. 8 C. P. at p. 368; *subsequent proceedings*, 28 L. T. 472.

Annotation:—*Refd.* *Gourley v. Plimsoll* (1873), L. R. 8 C. P. 362.

1233. —.]—A plea of justification in libel may be allowed, in a general form, where the charge is not matter indictable, deft. rendering particulars of the charges intended to be justified.—*BEHRENS v. ALLEN* (1862), 8 Jur. N. S. 118; *subsequent proceedings*, 3 F. & F. 135, N. P.

Annotation:—*Refd.* *Gourley v. Plimsoll* (1873), 28 L. T.

1234. —.]—The general practice of the ct. now is, in actions of libel, to allow pleas of justification in a general form with a liberal allowance of particulars.—*GOURLY v. PLIMSOLL* (1873), 29 L. T.

As to particulars generally, *see* Sub-sect. 4, *post.*

1235. Statement of facts—Necessity for—Issuable facts.]—*HOLMES v. CATESBY*, No 1242, *post.*

1236. —.]—(1) In an action for a libel on pltf., tending to injure his credit & reputation in his profession & business of an attorney, & defamatory of him in his said profession & business, it was held to be sufficient evidence of pltf. being an attorney, that it was proved by the book of admissions produced by the proper officer, & that he practised as an attorney. It was also decided to be no objection to maintaining such an action, that it appeared in evidence that during the time of the grievances stated in the declaration, pltf. had omitted to take out his certificate as required by the 37 Geo. 3, c. 90, for more than a year:

but that he might still sue as an attorney for damages in consequence of a libel imputing improper conduct to him in his character of attorney.

(2) Statements made in a libel have the effect of dispensing with proof, on the part of a pltf., of facts so stated, if they become necessary to support pltf.'s case. General evidence of pltf.'s bad character & ill repute in his business as a practising attorney cannot be admitted either to contradict the allegation in the declaration, that pltf. during, etc., exercised & carried on the business of an attorney, with great credit & reputation, with a view to mitigating damages on the general issue, or in support of averments in deft.'s pleas pleaded by way of justification that pltf. was a disreputable professor & practitioner in the law.

(3) Pleas by way of justification, generally aspersing the character of pltf. by averments, without stating particular acts of bad conduct apposite to the justification of defts., are not only demurrable, but ought to be demurred to, as due to the ct. & to the judge before whom the action may be tried. It is an erroneous notion that by demurring to a plea of justification pltf. necessarily admits the truth of the slanders in a libel. That which is well pleaded only is admitted.—*JONES v. STEVENS* (1822), 11 Price, 235; 147 E. R. 458.

Annotations:—*As to* (2) *Consd.* *Saunders v. Mills* (1829), 6 Bing. 213. *Apld.* *Thompson v. Nye* (1850), 16 Q. B. 175. *Consd.* *Scott v. Sampson* (1882), 8 Q. B. D. 491. *Refd.* *Burgess v. Beaumont* (1844), 9 Jur. 14; *Wood v. Cox* (1888), 4 T. L. R. 652. *As to* (3) *Refd.* *Zierenberg v. Labouchere*, [1893] 2 Q. B. 183. *Generally, Mntd.* *Young v. Murphy* (1836), 3 Bing. N. C. 54; *Re Wilton, Ex p. Chambers* (1838), 2 Keen, 497.

1237. —.]—(1) An action of libel may be maintained for items in a bill of costs headed "relative to your defalcations." A bill of costs delivered under a judge's order is not a privileged communication.

(2) A general plea of justification of a libel contained in such a bill, that it is true, without stating the facts, ought not to be allowed.

(3) If you believe pltf. himself used the words complained of in his interviews with deft., you should find for deft. But if you are of opinion that this was not so, but that the words were inserted for the purpose of deterring pltf. from the exercise of his legal right of taxing deft.'s bill, you should give pltf. such good sound substantial damages as will mark your sense of the injury pltf. has sustained in having a charge of embezzlement against him canvassed in an attorney's office, & by others, before whom the bill would necessarily come (*BRAMWELL, B.*).—*BRUTON v. DOWNES* (1859), 1 F. & F. 668.

1238. —.]—In an action for libel deft. may not deny generally in his statement of defence that "deft. wrote or published the same falsely or maliciously, as alleged," but must set out the facts upon which he relies, either to show justification or privilege.—*BELT v. LAWES* (1882), 51 L. J. Q. B. 359, D. C.

1239. —.]—Charge against magistrate—"Pocketing fines"—Names of persons from whom fines received.]—A plea, justifying slandering pltf. as a justice of the peace, of pocketing fines of prisoners, whom pltf. had convicted, should state

former occasion, written a letter of apology, admitting that similar statements then made by her were false, & undertaking not to repeat them.—*R. v. S.*, [1914] S. C. 193.—*SCOT.*

PART VI. SECT. 1, SUB-SECT. 2.—B.

1236 i. Statement of facts—Necessity

for.]—*GIBB v. SHAW* (1859), 18 U. C. R. 165.—*CAN.*

1236 ii. —.]—To an indictment for libel, the language of which was couched in vague general terms, deft. pleaded that the words & statements complained of in the indictment were true in substance & in fact, & that it

was for the public benefit that the matters charged in the alleged libel should be published by him:—*Held*: the plea was insufficient, because it did not set out the particular facts upon which deft. intended to rely.—*R. v. CREIGHTON* (1890), 19 O. R. 339.—*CAN.*

the names of the parties convicted & of whom pltf. had received the fines.—**NEWMAN v. BAILEY** (1776), 2 Chit. 665.

Annotations:—**Apld.** *J'Anson v. Stuart* (1787), 1 Term Rep. 748; *Hickinbotham v. Leach* (1842), 10 M. & W. 361. **Refd.** *Zierenberg v. Labouchere*, [1893] 2 Q. B. 183.

1240. ——— **Charge of fraud—Particular instances of fraud.**—**J'ANSON v. STUART**, No. 88, *ante*.

1241. ——— **Names of persons defrauded.**—(1) In case for libel, the declaration alleged the libel to be, that pltf. sought admission to a club held in the town of P., & gave an entertainment a few days before he was to be elected as he thought; that three days after he stood the ballot & was blackballed; that next morning he bolted, & some of the poor tradesmen had to lament the fashionable character of his entertainment. Plea, that pltf. did suddenly leave & quit the town of P. without paying every one & all of the debts contracted by him with divers persons in the said town, & without notice to them, & with intent to defraud & delay some of the last mentioned persons, whereby the said persons remained unpaid & defrauded:—**Held**: bad on special demurrer, for not stating the names of the persons alleged to have been defrauded.

(2) The declaration also averred, that the libel used the words "blacklegs" & "black sheep" to denote persons guilty of fraud, & that divers persons had formed a club called "The Royal Western Yacht Club"; that deft., intending to cause it to be believed that pltf. was a confederate of persons guilty of fraudulent play at cards, & of being blacklegs & black sheep in the sense aforesaid, in a certain newspaper, etc., published of & concerning pltf. the following libel: "Royal Western Yacht Club: Expulsion of two blacklegs," meaning an expulsion from the club of two persons being blacklegs in the sense in which that word was used as aforesaid. The declaration then alleged, that suspicion had attached to two members, meaning the aforesaid two persons, of the club, owing to two gentlemen having been plucked at cards, at the residence of one of the two suspected persons, in a manner seeming to indicate foul play; that inquiry took place, which resulted in expelling the two suspected persons, that a person known to be a confederate of the expelled parties, sought admission into the club. His name was O'B., meaning thereby pltf.:—**Held**: as matter shown to be libellous by prefatory averment was so coupled with innuendoes in the declaration as to show it to have been published by deft. of & concerning pltf., the declaration need not aver it to be also published of & concerning the Royal Western Yacht Club, or any other part of the prefatory averment.—**O'BRIEN v. CLEMENT** (1846), 16 M. & W. 159; 4 Dow. & L. 343, 563; 16 L. J. Ex. 76, 77; 153 E. R. 1141.

1242. ——— **General charge of misconduct—Repetition of same general charge.**—The justification of a libel must state issuable facts, not general charges of misconduct.

A libel charged an attorney with general misconduct, viz. gross negligence, falsehood, prevarication, & excessive bills of costs, in the business he had conducted for deft. A plea in justification, repeating the same general charges, without specifying the particular acts of misconduct, upon demurrer:—**Held**: insufficient.—

HOLMES v. CATESBY (1809), 1 Taunt. 543; 127 E. R. 944.

Annotations:—**Apld.** *Hickinbotham v. Leach* (1842), 10 M. & W. 361. **Refd.** *Zierenberg v. Labouchere*, [1893] 2 Q. B. 183. **Mentd.** *Young v. Murphy* (1836), 3 Bing. N. C. 54.

1243. ——— **Sufficient to enable plaintiff to meet charge.**—*Semble*: a plea justifying a charge of felony, must give the particular facts, from which defts. mean to insist that a felony was committed by pltf. as charged; & those facts must be stated with the same particularity as would be required in an indictment for the felony. At least the plea must give particulars sufficient to enable pltf. to meet the charge, & to prepare for his defence against it.—**CARPENTER v. JONES** (1827), 6 L. J. O. S. K. B. 4.

1244. ——— **Imputation of criminal offence—Facts to be stated with same particularity as on indictment.**—**CARPENTER v. JONES**, No. 1243, *ante*.

1245. ——— **Charge against pawnbroker—Of replenishing & pawning damaged pledges—Names of pawnbrokers with whom goods pledged.**—A libel charged pltf., a pawnbroker, with the dishonourable practice of duffing, i.e. of replenishing or doing up damaged goods, & pledging them with other pawnbrokers. Plea, that pltf. did replenish or do up divers goods, & did pledge them with other pawnbrokers:—**Held**: the plea was bad, for omitting to state the names of the pawnbrokers with whom the goods were pledged. *Qu.*: whether the nature of the goods ought to have been stated.

It is a perfectly well established rule in cases of libel or slander, that where the charge is general in its nature, deft. in a plea of justification, must state some specific instances of the misconduct imputed to pltf. (**PARKE, B.**).

The plea ought to state the charge with the same precision as in an indictment (**ALDERSON, B.**).—**HICKINBOTHAM v. LEACH** (1842), 10 M. & W. 361; 2 Dowl. N. S. 270; 11 L. J. Ex. 341; 152 E. R. 510.

Annotations:—**Apld.** *O'Brien v. Clement* (1847), 16 M. & W. 159. **Apprvd.** *Zierenberg v. Labouchere*, [1893] 2 Q. B. 183. **Apld.** *Wootton v. Slevier*, [1913] 3 K. B. 499.

1246. **Must be specific.**—**CAUSSIDIÈRE v. LONG** (1850), 15 L. T. O. S. 258.

1247. **Action for several distinct libels.**—To a declaration containing three counts for three distinct libels, the ct. refused to allow deft. to plead one general plea of justification.—**HONESS v. STUBBS** (1860), 7 C. B. N. S. 555; 29 L. J. C. P. 220; 6 Jur. N. S. 682; 8 W. R. 188; 141 E. R. 933.

Annotation:—**Refd.** *Behrens v. Allen* (1862), 8 Jur. N. S. 118.

C. Plea as to Part of Libel.

1248. **General rule.**—A special plea must traverse & answer the whole of the declaration.—**JOHNS v. GITTINGS** (1591), Cro. Eliz. 239; 78 E. R. 495.

Annotation:—**Refd.** *Clarkson v. Lawson* (1829), 6 Bing. 266.

1249. ———.]—**HILSDEN v. MERCER**, No. 1220, *ante*.

1250. ———.]—Defts. justified & proved the truth of a libel, charging pltf. with having acted in a grand swindling concern at Manchester; but omitted any justification of the following passage in the libel: "As we have already stated, C. had been at Leeds for one or two days before his arrival

PART VI. SECT. 1, SUB-SECT. 2.—C.

1248 i. General rule.—**TAYLOR v. CARR** (1847), 3 U. C. R. 306.—**CAN.**

1248 ii. ———.]—**FITCH v. LEMMON** (1868), 27 U. C. R. 273.—**CAN.**

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mentioned:—*Held*: this plea was good, being a justification of the libel & the innuendo.—*BIGGS v. GREAT EASTERN Ry. Co.* (1868), 18 L. T. 482; 16 W. R. 908.

Plea of justification without the innuendo.—*See Nos. 950, 951, ante.*

E. Other Cases.

1270. Plea of repetition—Name of informant mentioned.—It is no justification to an action of slander, to plead that such an one told the slander to deft. But if the person repeating the slander at the same time mention the name of the person from whom he heard it, that may be pleaded in justification to an action brought against the former.—*DAVIS v. LEWIS* (1796), 7 Term Rep. 17; 101 E. R. 832.

Annotations:—Refd. Maitland v. Goldney (1802), 2 East, 426; *Woolnoth v. Meadows* (1804), 5 East, 463; *McGregor v. Thwaites* (1824), 4 Dow. & Ry. K. B. 695; *McPherson v. Daniels* (1829), 5 Man. & Ry. K. B. 251.

1271. ———.—Justification of a libel, that there was reason for thinking the imputation was true from what had been said:—*Held*: bad, unless it is stated what had been said, & by whom.—*LANE v. HOWMAN* (1814), 1 Price, 76; 145 E. R. 1336.

1272. ——— Belief in truth of rumour.—Declaration, that deft. had spoken of pltf., who was the chairman of the South Eastern Ry. co., concerning the fall in the shares of the co., the words following: "You have heard what has caused the fall, I mean, the rumour about the South Eastern chairman having failed?" meaning thereby that pltf., being chairman of the South Eastern Ry. co., had become embarrassed in his pecuniary affairs & had become & was insolvent: Plea, that deft. meant, & was understood by the bystanders to mean, that there had been & there was a rumour current on the Stock Exchange about the chairman of the South Eastern Ry. co. having failed, & not that pltf. had become embarrassed, & had become insolvent, as in the innuendo alleged; & that it was true that there had been & then was a rumour current on the Stock Exchange that the chairman of the South Eastern Ry. co. had failed:—*Held*: (1) the plea was no answer to the declaration, for that the existence of the rumour did not justify the repetition of the slander contained in it, without showing that deft. believed it to be true, & he spoke the words on a justifiable occasion; & (2) if the latter part of the plea were rejected, the plea could not be supported as amounting to the general issue, for that by Common Law Procedure Act, 1852 (c. 76), s. 61, pltf. would succeed, if the words uttered by deft. turned out actionable, although not used in the sense put upon them by the innuendo.

(3) A declaration containing one count for libel or slander, with an innuendo that the words were used in a particular meaning, shall be taken as if there were two counts, one with the innuendo & one without the innuendo; & if pltf. prove either it is sufficient (*BLACKBURN, J.*).—*WATKIN v. HALL* (1868), L. R. 3 Q. B. 396; 9 B. & S. 279; 37 L. J. Q. B. 125; 18 L. T. 561; 32 J. P. 485; 16 W. R. 857.

Annotation:—As to (2) Refd. Mulligan v. Cole (1875), L. R. 10 Q. B. 549.

Repetition as a defence.—*See Part V., Sect. 3, ante.*

1273. Libel stating existence of suspicion—Plea averring existence of suspicion.—*R. v. GRIFFIN* (1849), 13 J. P. Jo. 36.

SUB-SECT. 3.—PROOF OF JUSTIFICATION.

A. Onus of Proof.

1274. On defendant.—If, in an action for a libel, deft. plead justifications, without pleading the general issue, & the affirmative of the issue be on deft., he is entitled to begin, & pltf. has not in such case, a right to begin, with a view of proving the amount of his damages. If deft., in an action for libel, imputing want of skill to a surgeon, plead that pltf. did want skill, & that he performed an operation in an unsurgeonlike manner, occupying unnecessary time, & causing unnecessary pain, these are all affirmatives on the part of deft.

That party on whom the affirmative lies has to begin. Pltf. must, in the first instance, be taken to exercise his profession with skill, as no one is presumed to have misconducted himself, & if deft. asserts that pltf. wanted skill, & occupied unnecessary time, in the performance of an operation, it lies upon him to prove it; & so, if deft. says, that an operation was unskilfully performed, & caused more pain than was necessary, it lies upon him to prove that also. It is incumbent upon deft. to make out the truth of all these assertions; & till that is done, pltf. is not called upon to go into any evidence (*LORD TENTERDEN, C.J.*).—*COOPER v. WAKLEY* (1828), 3 C. & P. 474; *Mood. & M.* 248, N. P.

Annotations:—Expld. Soward v. Leggatt (1836), 7 C. & P. 613. *Consd. Mercer v. Wall* (1845), 5 L. T. O. S. 304. *Expld. Edwards v. Matthews* (1847), 16 L. J. Ex. 291; *Cannam v. Farmer* (1849), 3 Exch. 698. *Refd. Stanford v. Paton* (1843), 1 L. T. O. S. 414. *Mentd. Wakley v. Cooke* (1849), 4 Exch. 511.

1275. Shifting of onus to plaintiff.—*R. v. LABOUCHERE*, No. 1280, *post*.

B. Degree of Proof Required.

(a) In General.

1276. Libel containing several statements—Averment of truth of all—One statement not proved.—Where a libel charged pltf. with various acts of cruelty to a horse, & amongst others, with knocking out an eye, & deft. pleaded that the charge was true in substance & effect; the jury having found that it was true in all particulars, except that the eye was not knocked out:—*Held*: the justification was not proved, & pltf. was entitled to a verdict on that plea.—*WEAVER v. LLOYD* (1824), 2 B. & C. 678; 4 Dow. & Ry. K. B. 230; 2 L. J. O. S. K. B. 122; 107 E. R. 535.

1277. Libel proved true in substance.—To an action for libelling pltf., in their business of sellers of medicines, by publishing that defts. had crushed the hygiest system of wholesale poisoning pursued by the scamps & rascals, defts. pleaded & proved the conviction of two of the vendors of pltf.' pills for manslaughter:—*Held*: the plea was sufficient, & sufficiently proved, though it did not justify the words scamps & rascals, & though one of the victims died notwithstanding he had taken fewer pills than the vendor recommended; it appearing that a larger number would

PART VI. SECT. 1, SUB-SECT. 3.—A.

1274 i. On defendant.—*MAJJU v. LACHMAN PRASAD* (1924), I. L. R. 46 All. 671.—*IND.*

PART VI. SECT. 1, SUB-SECT. 3.—B. (a).

1277 i. Libel proved true in substance.—*STEWART v. ROWLANDS* (1864), 14

C. P. 485.—*CAN.*

1277 ii. ———.—Where the charge is general in its terms, although deft. in a plea of justification must state

only have accelerated his death; & it was not necessary for defts. to show they had completely crushed the system.—*MORRISON v. HARMER* (1837), 3 Bing. N. C. 759; 3 Hodg. 108; 132 E. R. 603; *sub nom. MORISON v. HARMER*, 4 Scott, 524.

Annotations:—*Consd. Bremridge v. Latimer* (1864), 4 New Rep. 285. *Apld. Sutherland v. Stopes*, [1925] A. C. 47. *Refd. Biggs v. G. E. Ry.* (1868), 18 L. T. 482.

1278. —.]—(1) A plea of justification to a libel, in which deft. justifies on the ground pltf. was guilty of bigamy, requires the same strictness of proof as is required on the trial of an indictment for bigamy.

(2) If, in justifying a libel that pltf. was guilty of "polygamy" in marrying three wives, who were all living at the same time, deft. pleads that pltf. was guilty of "polygamy" in marrying three persons named, who were all living at the same time; it is sufficient proof of the marriages to show the actual marriages as to two, & reputation & cohabitation as to the third; because if by the term "polygamy," the offence of bigamy is meant, the substance of the issue is made out by proof of the two marriages; & if by the term "polygamy," the mere fact of these marriages is meant, as distinct from the crime of bigamy, evidence of reputation & cohabitation is receivable.—*WILLMETT v. HARMER* (1839), 8 C. & P. 695, N. P.

1279. —.]—Pltf. was convicted before the Lord Mayor of travelling on defts.' railway from London Bridge to Cannon Street without a ticket, & sentenced to a fine of 1s. with costs, or in default three days' imprisonment. Defts. published placards stating that deft. had been so convicted & fined, & describing the alternative as being "imprisonment with hard labour." Pltf. sued defts. for libel. Defts. pleaded the truth of the statements contained in the placards:—*Held*: (1) the question for the jury in such a case is, whether defts.' account of the conviction is substantially correct; (2) pltf. is at liberty, with a view to the assessment of damages, to enter into all the circumstances which led to the conviction, although such evidence tends to show that the conviction was erroneous.—*GWYNN v. SOUTH EASTERN RY. CO.* (1868), 18 L. T. 738.

1280. —.]—(1) On the trial of an indictment for libel, the libel being that the prosecutor was one of a gang of card sharpers, innuendo, that he cheated at cards, & the plea stating specific instances of card sharpening or cheating at cards, & also that he confederated with others for the purpose of playing & cheating at cards, & did so play & cheat at various places:—*Held*: it was sufficient to prove the plea in substance, & it was so proved, the jury finding that in two instances pltf. did cheat at cards, & that he did confederate with the other persons for the purpose of so playing as alleged, & it was not necessary to prove other instances alleged.

(2) A report of the French police to the Criminal Investigation Department in London, stigmatising the prosecutor & his associates as swindlers & card sharpers, & a copy of which was read by deft. to a friend of the prosecutor's before the libel was published, as the materials on which it was founded:—*Held*: admissible, not as proof of the facts stated, & therefore, *semble*: not in proof of the justification, but under the general issue as leading up to the publication of the libel, & as

evidence of *bona fides* & honest belief in its truth & so in aid of a defence under the general issue, & there was such defence.

(3) If, however, *prima facie* evidence is given in proof of the justification, the onus is then on the prosecutor to disprove it, & his not calling witnesses, whom he must be in a position to call & who will be friendly to him, is strong evidence against him.—*R. v. LABOUCHERE* (1880), 14 Cox, C. C. 419, N. P.

1281. Libel partly justified—Judgment for plaintiff.]—For an action for libel, the declaration set out the whole of a long letter, in which deft. imputed to pltf. improper conduct in various transactions which had taken place in reference to a ditch of pltf.'s, alleged by deft. to be a nuisance. Deft. pleaded "as to so much of the libel as related to & charged pltf. with the keeping of the nuisance," a plea which attempted to justify every sentence contained in the letter. The jury found that pltf. kept the ditch as a nuisance, but negatived the improper conduct imputed to pltf. in the letter:—*Held*: upon this finding, pltf. was entitled to the verdict.

If a material part of a plea of justification fails, the plea fails altogether (*ERLE, J.*).—*BIDDULPH v. CHAMBERLAYNE* (1851), 17 L. T. O. S. 124.

(b) Imputation of Commission of Crime.

1282. General rule—Same strictness of proof required as on indictment.]—In an action for libel, to support a plea of justification stating that pltf. had forged & uttered, knowing it to be forged, a certain bill of exchange, to justify a verdict for deft., the same evidence must be given as would be necessary to convict pltf. if he were on trial for those offences; but if the evidence falls short of satisfying the jury that the strict legal offence was committed, they may take the facts proved into their consideration in estimating the damages.

If the declaration in case for a libel state, *inter alia*, that at a certain place certain meetings for the promotion of sedition & blasphemy had been held, & that deft. published of & concerning pltf., & of & concerning the other matters, & of & concerning the said meetings, a libel charging him among other things with having taken the chair at the said place, but not saying anything of the character of the meetings there, it will not be ground of nonsuit should pltf. at the trial fail to prove that the meetings were such as he described in his inducement.—*CHALMERS v. SHACKELL* (1834), 6 C. & P. 475, N. P.

1283. —.]—*WILLMETT v. HARMER*, No. 1278, *ante*.

1284. —.]—In an action by a discharged servant against his late master for slander, imputing robbery; deft. pleading that pltf. had robbed him in giving away pieces of bread:—*Held*: if they were such as the servant might fairly suppose the master would not object to his disposing of, the jury should find for pltf.—*ROBERTS v. RICHARDS* (1862), 3 F. & F. 507.

1285. Application of rule—Circumstances of suspicion—Whether sufficient.]—In an action for saying "A. stole my plate," deft. cannot justify that he spoke the words on a suspicion that A. was the thief.—*POWELL v. PLUNKET* (1626), Cro. Car. 52; 79 E. R. 649, Ex. Ch.

1286. —.]—*BELL v. BYRNE*, No. 1199, *ante*.

some specific instances of the mis-
sufficient if the substance of the
charge is justified.—*KENNEDY v. DALA-*
[1919] E. D. L. 1.—S. AF.

PART VI. SECT. 1, SUB-SECT. 3.— B. (b).

1285 i. Application of rule—Circum-
stances of suspicion—Whether sufficient.]

—*MASSE v. DOMINION BRIDGE CO., LTD.* (1909), 6 E. L. R. 209.—CAN.

i. — Imputation of perjury.]—*LANG v. GILBERT* (1860), 9 N. B. R. (4 All.) 445.—CAN.

Sect. 1.—Justification: Sub-sect. 3, B. (b), (c), (d), (e) & (f), C. & D.; sub-sect. 4, A.]

1287. ———.]—(1) *Semble*: if a libel consist of distinct propositions, any one of them may be separated from the rest, & justified.

(2) Where a libel charges pltf. with having committed a felony, deft. cannot justify by showing circumstances which amount to suspicion only, & without averring in the same terms as the libel, that which charges the actual commission of the felony.—*MOUNTNEY v. WATTON* (1831), 2 B. & Ad. 673; 9 L. J. O. S. K. B. 298; 109 E. R. 1293.

Annotations:—As to (1) *Folld. M'Gregor v. Gregory* (1843), 11 M. & W. 287. *Apld. Fleming v. Dollar* (1889), 23 Q. B. D. 388. As to (2) *Refd. Walker v. Brogden* (1865), 19 C. B. N. S. 65.

1288. ——— *Statement charging theft of certain articles—Proof of theft of other articles.*—*ABBOTT v. BACON* (1851), 17 L. T. O. S. 203.

(c) *Imputation of Fraud.*

1289. Proof of fraudulent intent.—(1) A libel contained in an advertisement by two tradesmen in partnership, stating that they deemed it necessary to caution their friends against a fraudulent representation that any part of their business had been removed, it being obvious that their concern was still carried on solely at 9, Mansion House Street, & that they had no connection with a shop recently opened in another place under circumstances grossly misrepresented, & highly discreditable, with a view of defrauding them of a part of their business, is not justified by proof that the person alluded to, who had been for several years in partnership with them, had issued a bill, in which, after thanking his friends for their favours during his residence at 9, opposite the Mansion House, he stated that he had removed his establishment to another place, where the business would be carried on under the firm of R. R. C. & Co.; & in addition to this, had put over his shop door, "R. R. C. & Co., removed from opposite the Mansion House."

(2) If the publication of a libel consists in merely selling a few copies of a periodical, in which, *inter alia*, it is contained, one question for the jury is, did the parties know what it was they were selling.—*CHUBB v. FLANNAGAN* (1834), 6 C. & P. 431, N. P.

1290. ———.]—Deft. published of pltf's., coal merchants, what purported to be a report of an inquiry before a board of guardians respecting the fraudulent conduct of pltf's. agent, who, in performance of a contract for "best coals," had delivered at the workhouse coals of an inferior description, & by falsifying the weighing machine by means of a wedge, deficient in weight. The libel commenced: "The way in which Messrs. P., pltf's., do things at Guildford. Inserting the wedge": & ended with a recommendation of one of the guardians to "have nothing more to do with Messrs. P.," innuendo, "deft. meaning thereby that pltf's. were cognisant of & had sanctioned improper & fraudulent conduct by their agent at Guildford, & were accustomed to carry

on their said trade there improperly & fraudulently." Deft. pleaded a justification, following the innuendo, & saying that the coals delivered, as mentioned in the libel, were inferior in quality, as pltf's. well knew, & deficient in weight. The judge ruled, that deft. having by his plea alleged that the fraud of their agent was sanctioned by pltf's., he must prove it; & he told the jury that they must find for pltf's., unless they were satisfied that deft. had shown some complicity on their part in the misconduct & fraud imputed to their agent. The jury having found for pltf's.:—*Held*: there was no misdirection, & the libel imputed personal misconduct & fraud to pltf's.—*PRIOR v. WILSON* (1856), 1 C. B. N. S. 95; 140 E. R. 39.

1291. ———.]—*MORRISON v. BELCHER*, No. 1732, *post*.

(d) *Rumour.*

1292. Proof of existence of rumour—Whether sufficient.—*WATKIN v. HALL*, No. 1272, *ante*.

(e) *Libel containing Several Imputations.*

1293. Whether all charges must be established.—

(1) Where a justification is pleaded, under Libel Act, 1843 (c. 96), s. 6, to an indictment for a defamatory libel, & the libel contains several distinct imputations, & the plea alleges the truth of all & is traversed generally, if the evidence fail as to any one of them the verdict will be entered generally against deft. Therefore, where, upon the trial of an issue upon a plea justifying the whole of such a libel, evidence was offered in support of some only of the imputations, & the jury found that one only of the imputations upon which evidence was offered was proved, the verdict was entered up for the Crown on that issue generally; & the ct. refused to grant a new trial on the ground that the finding as to the other issues upon which evidence was offered was against the weight of evidence.

(2) Where deft., having pleaded such a plea, is convicted, the ct., in apportioning punishment, looks into the evidence given at the trial, for the purpose of considering whether the guilt of deft. is aggravated or mitigated by the plea & the evidence. In such a case deft. may, in mitigation of punishment, show by affidavit that, after the publication, but before plea pleaded, information was given to him which, if true, would have supported an allegation in the plea, evidence having been given, at the trial, to account for the non-production of proof, but no evidence in support of the allegation itself.—*R. v. NEWMAN* (1853), 1 E. & B. 558; *Dears. C. C.* 85; 22 L. J. Q. B. 156; 22 L. T. O. S. 76; 17 J. P. 84; 17 Jur. 617; 118 E. R. 544.

Annotations:—As to (1) *Distd. R. v. Labouchere* (1880), 14 Cox, C. C. 419. *Refd. Fleming v. Dollar* (1889), 23 Q. B. D. 388. *Generally, Refd. R. v. Labouchere, Vallombrosa's Case* (1884), 50 L. T. 177.

1294. ———.]—Where, in libel, deft. had charged pltf. with having, on a certain occasion, acted from motives of spite & lucre, & pleaded a justification, which failed as to the latter feature of the charge:—*Held*: the libel being entire, deft. was not

PART VI. SECT. 1, SUB-SECT. 3.—
B. (e).

1289 i. Proof of fraudulent intent.—*TOBIN v. GANNON* (1901), 34 N. S. R. 9.—CAN.

PART VI. SECT. 1, SUB-SECT. 3.—
B. (d).

Proof of existence of rumour—

1292 ii. ———.]—*EYES v. HENDERSON* (circa 1873), 1 N. Z. Jur. 34.—N.Z.

PART VI. SECT. 1, SUB-SECT. 3.—
B. (e).

1293 i. Whether all charges must be established.—A plea did not justify all the material charges in a declaration for libel:—*Held*: plea bad.—*CANADA LIFE ASSURANCE CO. v. O'LOANE* (1872), 32 U. C. R. 379.—CAN.

1293 ii. ———.]—*LEONARD v. WHARTON* (1921), 65 D. L. R. 323; *reveg.*, 17 O. W. N. 127.—CAN.

1293 iii. ———.]—*WILLIAMS v. SHAW* (1884), 4 E. D. C. 105.—S. AF.

1293 iv. ———.]—When the truth is pleaded in answer to an action for defamation, deft. to succeed must justify every statement made in the alleged defamation.—*FYNE v. LEE* (1900), 17 S. C. 251.—S. AF.

entitled to a verdict on the plea as it stood, or to any part of it.—*CORY v. BOND* (1860), 2 F. & F. 241.

1295. —.]—*MOUNTNEY v. WATTON*, No. 1287, *ante*.

1296. —.]—*ZIERENBERG v. LABOUCHERE*, No. 1310, *post*.

(f) *Other Cases.*

1297. "Murderer"—Proof of indictment for murder.]—An indictment for murder against A. is no justification for calling him a murderer. Nor that a robbery was committed, & common fame charged A. with it, a justification for calling him thief.—*ANON.* (1565), 2 Dyer, 236 a; 73 E. R. 522.

1298. Thief—Proof of theft—Attributed to plaintiff by rumour.]—*ANON.* (1565), No. 1297, *ante*.

1299. — By plaintiff—Offence since purged.]—*CUDDINGTON v. WILKINS* (1615), Hob. 81; Owen, 150; Moore, K. B. 872; 74 E. R. 966; *sub nom.* *CUDDINGTON v. WILKIN*, 1 Brownl. 10.

Annotations:—*Appld.* *Searle v. Williams* (1620), Hob. 288; *R. v. Reilly* (1787), 1 Leach, 454; *Re Barber* (1850), 15 L. T. O. S. 500. *Foll.* *Leyman v. Latimer* (1878), 3 Ex. D. 352. *Appld.* *Hay v. Tower Division of London JJ.* (1890), 24 Q. B. D. 561. *Reid.* *Alexander v. N. E. Ry.* (1865), 34 L. J. Q. B. 152; *Monson v. Tussauds*, *Monson v. Tussaud*, [1894] 1 Q. B. 671.

1300. — Proof of loss of chattel—Found in plaintiff's possession—No averment that chattel stolen.]—*ANON.* (1624), Win. 115; 124 E. R. 96.

1301. "Libellous journalist"—Proof of former publication of libel.]—In an action for a libel which contained violent imputations against pltf.'s character, & in which there was the following passage; "There can be no ct. of justice unpolluted which this libellous journalist, meaning pltf., this violent agitator, etc. is allowed to disgrace with his presidentship." Deft. pleaded, in justification of the words "libellous journalist," the publication by pltf. in a paper of which pltf. was the publisher of a false scandalous, malicious & defamatory libel against one B. C. with intention to injure him in his profession:—*Held*: the plea imputed to pltf. moral misconduct & malice in the publication of the libel, & the production of the record in the case stated in the plea, & in which action £100 damages had been recovered against the now pltf., did not, without other evidence, support the plea.—*WAKLEY v. COOKE* (1849), 4 Exch. 511; 19 L. J. Ex. 91; 14 L. T. O. S. 158; 154 E. R. 1316.

Annotation:—*Mentd.* *R. v. Ingham* (1864), 5 B. & S. 257.

1302. Imputation as to treatment of clients—By solicitor—Proof of one client being so treated.]—*BISHOP v. LATIMER*, No. 151, *ante*.

1303. "Felon"—Proof of conviction—Punishment not completed.]—*LEYMAN v. LATIMER*, No. 634, *ante*.

C. *Question for Jury.*

1304. General rule.]—*R. v. SHIPLEY*, No. 1006, *ante*.

1305. —.]—*WARMAN v. HINE*, No. 1230, *ante. post*.

PART VI. SECT. 1, SUB-SECT. 3.—D. g. *Admissibility—Evidence as to truth of charge—Truth not pleaded.*]—*MANTOBA FREE PRESS CO. v. MARTIN* (1892), 21 S. C. R. 518.—*CAN.*

PART VI. SECT. 1, SUB-SECT. 4.—A. h. *Allegation of publication to persons unknown.*]—As a general rule, in an action for defamation, a pltf. who pleads publication to persons unknown must, if required, give further particulars.—*MCCARTER, BURR*

& Co. v. *HARRIS* (Alta.), [1922] 1 W. W. R. 677.—*CAN.*

k. *Where justification pleaded.*]—In an action of libel pltf. alleged that deft. had accused him in a newspaper article of having made false returns to the government in his business of distiller. To this deft. pleaded justification:—*Held*: pltf. was entitled to particulars of the defence intended to be set up under this plea.—*CORCORAN v. ROBB* (1879), 8 P. R. 49.—*CAN.*

l. —.]—A plea of justification

D. *Evidence.*

1306. *Admissibility—Evidence of plaintiff's character.*]—In an action of slander for imputing felony, with a count for maliciously charging pltf. with theft before a justice, to which deft. pleaded the general issue, & also pleas in justification of the slander, averring that the charge of felony was true:—*Held*: evidence of general good character was not admissible for pltf.—*CORNWALL v. RICHARDSON* (1825), Ry. & M. 305, N. P.

1307. — Questions to witnesses.]—Libel, imputing that pltf. had received rosewood, knowing it to have been stolen. Pleas of justification, stating that B. had stolen the rosewood from A., & that pltf. had received it, knowing it to be stolen:—*Held*: deft.'s counsel might ask what B. said, with a view of proving that B. committed the larceny; & pltf.'s counsel might ask deft.'s witnesses what was pltf.'s general character for honesty.—*POWELL v. HARPER* (1833), 5 C. & P. 590, N. P.

SUB-SECT. 4.—PARTICULARS.

A. *Necessity for.*

1308. *General charge.*]—In an action for libel, deft. pleaded that the defamatory matter in the declaration complained of was & is true in substance & in fact. The ct. ordered him to give particulars of the facts & matters he relied on to justify the libel, or, in default, that the plea should be struck out.—*JONES v. BEWICKE* (1869), L. R. 5 C. P. 32.

Annotation:—*Distd.* *Gourley v. Plimsoll* (1873), L. R. 8 C. P. 362.

1309. —.]—*STAINBANK v. BECKETT*, [1879] W. N. 203, C. A.

1310. —.]—In an action for libel where the charge made against pltf. in the alleged libel is general in its nature, deft. who pleads justification must state in his particulars the facts on which he relies in support of his justification.

Strictly speaking, deft., having pleaded generally a justification of the whole libel, would be bound to prove the whole to be true, & if he failed in doing so, it might be said that his plea of justification failed altogether. That would have been the old practice; but that seems to be too strict a view of the rights of the parties to take at the present time, & I think we ought to treat the case as if the statements in the claim were statements of separate libels, & the general plea of justification as if it applied to each part of the claim (*LORD ESHER, M.R.*).—*ZIERENBERG v. LABOUCHERE*, [1893] 2 Q. B. 183; 63 L. J. Q. B. 89; 69 L. T. 172; 57 J. P. 711; 41 W. R. 675; 9 T. L. R. 487; 4 R. 464, C. A.

Annotations:—*Consd.* *Wootton v. Sievier*, [1913] 3 K. B. 499. *Distd.* *Gaston v. United Newspapers* (1915), 32 T. L. R. 143. *Reid.* *Yorkshire Provident Life Assce. v. Gilbert & Rivington*, [1895] 2 Q. B. 148; *Waynes Merthyr Co. v. Radford*, [1896] 1 Ch. 29; *Arnold & Butler v. Bottomley*, [1908] 2 K. B. 151.

1311. —.]—*WOOTTON v. SIEVIER*, No. 1317,

to a libellous statement in general terms should set out the particular facts relied on as a justification.—*EYES v. HENDERSON* (circa 1873), 1 N. Z. Jur. 34.—*N.Z.*

m. —.]—*PASCOE v. BERTRAM* (1914), 33 N. Z. L. R. 646.—*N.Z.*

n. — & *discovery sought.*]—A deft. in a libel action who has pleaded a general justification, must furnish pltf. with the particulars of the facts relied on as a justification before he can obtain discovery from

Sect. 1.—Justification: Sub-sect. 4, A., B. (a) & (b), & C.; sub-sects. 5 & 6.]

1312. Specific charge.]—Where a slander imputing a specific charge is justified in the defence, particulars of the plea of justification are unnecessary & will not be ordered.—*CUMMING v. GREEN* (1891), 7 T. L. R. 408.

B. Sufficiency of.

(a) In General.

See R. S. C., Ord. 19, rr. 7, 15, &, generally, PRACTICE.

1313. Must be relevant.]—Charge that pltf. were “thieves & swindlers in connection with the part they have played in financial operations in South Africa.” Particulars, alleging that pltf. had made politics subservient to their personal ends for the purpose of enriching themselves were struck out as irrelevant & embarrassing.—*MARKHAM v. WERNHER, BEIT & Co.* (1902), 18 T. L. R. 763, H. L.; *affg. S. C. sub nom. WERNHER, BEIT & Co. v. MARKHAM* (1901), 18 T. L. R. 143, C. A.

Annotation:—Refd. Kent Coal Concessions v. Duguid, [1910] 1 K. B. 904.

1314. Must not be embarrassing.]—*MARKHAM v. WERNHER, BEIT & Co.*, No. 1313, *ante*.

(b) In Particular Cases.

1315. Libel capable of more than one meaning—Particulars as to which meaning intended to be justified.]—An alleged libel was capable of meaning either that a charge had been made against pltf., or that the charge had been made & was true. Deft. pleaded the truth of the libel. Pltf. applied for particulars of the plea of justification:—*Held*: pltf. was entitled to information whether deft. intended to justify one or both meanings.—*HENNESSY v. WRIGHT* (1888), 57 L. J. Q. B. 594; 59 L. T. 795; 36 W. R. 878; 4 T. L. R. 651, C. A.

Annotation:—Distd. Digby v. Financial News, [1907] 1 K. B. 502.

1316. Charge of lying—Particulars of specific falsehoods.]—Pltf. applied for an order for particulars of a defence of justification pleaded to an action for libel contained in a review of a book written by him. The review stated that pltf. was, by his own confession, a most barefaced liar:—*Held*: pltf. was entitled to particulars of the passages in his book on which defts. relied in support of the defence of justification, & such particulars must specify the pages in the book at which the several passages relied on occurred, & the first & last words of such passages.—*DEVEREUX v.*

pltf.—*BULLEN v. TEMPLEMAN* (1896), 5 B. C. R. 43.—CAN.

o. ———.]—*HENNEFORTH v. MALOOF* (1918), 42 O. L. R. 36; 13 O. W. N. 396.—CAN.

PART VI. SECT. 1, SUB-SECT. 4.—B. (a).

1313 i. Must be relevant.]—*HERALD PRINTING & PUBLISHING Co. v. RYALL*, [1923] 4 D. L. R. 488; 3 W. W. R. 953; *reversg. in part* 32 B. C. R. 265.—CAN.

p. Must be specific.]—Declaration for a libel charging deft., an inspecting field officer of militia, with swearing & drunkenness on a specific occasion & generally. Plea, that the statements complained of were true in the sense in which they were alleged to have been used:—*Held*: plea bad, as being too general.—*BARETTO v. LIRIE* (1867), 26 U. C. R. 408.—CAN.

q. ———.]—*MULIER v. GERTH* (1896),

17 P. R. 129.—CAN.

r. Where insufficient — Whether struck out.]—Particulars in an action for libel cannot be struck out as insufficient; if those delivered are too general, the judge at the trial will exercise his discretion as to the admission of evidence thereunder.—*CITIZENS' INSURANCE Co. v. CAMPBELL* (1883), 10 P. R. 129.—CAN.

t. Sufficient to enable defendant to plead.]—*Held*: pltf. having given all the information in his possession, & deft. not having sworn that she could not plead without further particulars, or that she was ignorant of what occasion was complained of, it was useless & unnecessary to order the particulars.—*WINNETT v. APPELBE* (1894), 16 P. R. 57.—CAN.

a. Limited particulars—Postponement till after examination of plaintiff for discovery.]—In a libel action defts. directed to give particulars of state-

CLARKE & Co., [1891] 2 Q. B. 582; 60 L. J. Q. B. 773; 7 T. L. R. 714, D. C.

1317. Charge against racehorse trainer—Of making bets on horses irregularly run—Names of persons with whom bets made.]—Pltf., an owner & trainer of racehorses, sued defts. for libel, alleging in his statement of claim that the meaning of the libel was that pltf. had been guilty of gross dishonesty in the training & running of horses, & particularly that he had on several occasions conspired with other trainers & with jockeys to defraud bookmakers & owners of racehorses & the public generally for his own pecuniary gain. Defts. pleaded justification, & under an order made by the judge delivered particulars ranging over a period of three years, specifying a number of races, jockeys, & horses with the weights carried by them, & giving the names of certain trainers. The particulars further gave numerous instances of races in which horses were asserted to have been “pulled” by their jockeys, acting under the pltf.’s orders, with the result that other horses backed by pltf. had won. A summons for further & better particulars, naming the bookmakers with whom pltf. was alleged to have backed the horses in question & the amounts of the bets respectively, having been dismissed by the judge, pltf. appealed:—*Held*: the following rules were established, namely, where deft. raises an imputation of misconduct against pltf., pltf. ought to be enabled to go to trial with knowledge of the acts which it is alleged he has committed & upon which deft. intends to rely as justifying the imputation; & if the particulars are such as deft. ought to give, he cannot refuse to do so merely on the ground that his answer will disclose the names of his witnesses; & applying these rules, pltf. in this case was entitled to have particulars of the names of the persons with whom or through whom defts. proposed to prove that he had made the bets to which they intended to refer, & the places or times at which such backings took place; he was not, however, entitled to particulars as to the amounts of such bets.—*WOOTTON v. SIEVIER*, [1913] 3 K. B. 499; 82 L. J. K. B. 1242; 109 L. T. 28; 29 T. L. R. 596; 57 Sol. Jo. 609, C. A.

C. What Particulars may be Given.

1318. Particulars of similar acts to act charged.]—Pltf. complained of a libel charging him with conspiring with specified persons to defraud the underwriters of a certain ship & her cargo by pretending that the ship had been attacked & the cargo seized by pirates. Defts. pleaded that the words complained of were true in substance

ment of defence. Without waiting for pltf.’s examination for discovery particulars to be limited to ground of defts.’ belief that words complained of are true.—*TIMMINS v. NATIONAL LIFE INSURANCE Co.* (1908), 10 W. L. R. 81.—CAN.

PART VI. SECT. 1, SUB-SECT. 4.—B. (b).

b. Charge of theft.]—*THORNTON v. CAPSTOCK* (1883), 9 P. R. 535.—CAN.

c. Charge of forgery.]—*FELLOWES v. HUNTER* (1861), 20 U. C. R. 382.—CAN.

PART VI. SECT. 1, SUB-SECT. 4.—C.

1318 i. Particulars of similar acts to act charged.]—*DEVI DYAL v. R.* (1922), 1 L. R. 4 Lah. 55.—IND.

d. As to conduct of public official—After ceasing to hold office.]—*Held*: the conduct of the holder of a public office was not a matter of public

& fact. In their particulars of justification they stated facts concerning cargoes, greatly over insured by or with the knowledge of pltf., on two other vessels, & alleged that part of the cargo on one of them had been transferred to a motor boat & seized by foreign revenue authorities, the vessel's log having been altered so as to make it appear that the cargo was covered by the insurance when in fact it was not; & that the other vessel was scuttled, & half her cargo lost, her policy having been indorsed with a false warranty of her class. Pltf. applied to have these allegations struck out of the particulars on the ground that they were irrelevant. Defts.' case being that the subject-matter of the libel was a part only of a wide scheme for defrauding underwriters. The ct. refused to strike out the allegations at that stage in the proceedings, but left for future consideration by the appropriate tribunal the question of defts.' right to discovery in respect of the facts alleged, & of the admissibility of these facts in evidence at the trial.

Of course, if he [deft.] were to include anything that was obviously irrelevant, pltf. would be right in taking the earliest opportunity of striking that out. But sometimes deft. seeks to rely on facts & matters which may or may not be admissible as evidence in chief in support of his plea of justification, & the future relevancy of which is a matter of doubt at the time when they are stated as particulars. This, as it seems to me, is one of these cases (*BANKES, L.J.*).—*GODMAN v. TIMES PUBLISHING CO., LTD.*, [1926] 2 K. B. 273; 95 L. J. K. B. 747; 135 L. T. 291; 70 Sol. Jo. 606, C. A.

Irrelevant particulars.—See No. 1313, *ante*.

Embarrassing particulars.—See No. 1313, *ante*.

Particulars justifying innuendo.—See Nos. 950, 951, *ante*.

SUB-SECT. 5.—EVIDENCE.

1319. Admissibility—Extracts from plaintiff's book.—*WILLIAMS v. FAULDER* (circa 1798), cited in 11 Price, at p. 258; 147 E. R. 466.

Annotation :—*Refd.* *Jones v. Stevens* (1822), 11 Price, 235.

1320. — Evidence of guilt of principal—Though previously acquitted—When plaintiff charged with being accessory.—*COOK v. FIELD* (1788), 3 Esp. 133, N. P.

Annotation :—*Refd.* *Helsham v. Blackwood* (1851), 11 C. B. 111.

1321. — Opinion of medical witness—Question of professional honour.—Deft. had pleaded truth in justification of a libel, part of which alleged that a physician in refusing to act with pltf., also a physician, had "honourably & faithfully discharged his duty to his medical brethren":—*Held*: it was not competent to deft. to offer in evidence the opinion of a medical witness on this head.—*RAMADGE v. RYAN* (1832), 9 Bing. 333; 2 Moo. & S. 421; 2 L. J. C. P. 7; 131 E. R. 640.

1322. — Evidence of existence of rumour—To justify slander.—Evidence of the existence of a rumour cannot be admitted to justify a slander. Such evidence, however, is admissible by way of mitigation, but only when at the time of the slander being uttered it was affirmed that the slander

was a rumour.—*LOCKHART v. JELLY* (1869), 19 L. T. 659, N. P.

1323. — Acts by plaintiff subsequent to libel—If within reasonable time after publication.—Pltf. brought an action against defts. for libel which he alleged meant that he had absconded with the property of a co., that his solvency was doubtful, & that his character & reputation were such that he was likely to misappropriate funds of co.'s with which he was connected. Defts. pleaded that the words taken in that sense were true in substance & in fact, & in their particulars of defence they stated various acts by pltf. to show that he had a tendency to be dishonest. Several of these acts had occurred after the date of the publication of the libel, & pltf. applied for an order to strike these out as inadmissible:—*Held*: in a case of libel on character & reputation, where justification was pleaded, evidence of facts which occurred within a reasonable time after the publication of the libel & went to show the existence of an alleged tendency was admissible.—*MAISEL v. FINANCIAL TIMES, LTD.*, [1915] 3 K. B. 336; 84 L. J. K. B. 2148; 113 L. T. 772; 31 T. L. R. 510; 59 Sol. Jo. 596; C. A.

See, generally, *EVIDENCE*, Vol. XXII., pp. 53 *et seq.*

Examination of witnesses abroad—Order subject to terms.—See *EVIDENCE*, Vol. XXII., p. 585, Nos. 6429, 6430.

Whether party entitled to split evidence into two parts—As part of his case—& partly as evidence in reply.—See *EVIDENCE*, Vol. XXII., p. 480, Nos. 5059, 5060.

SUB-SECT. 6.—COSTS.

See, generally, *PRACTICE*.

1324. Plaintiff succeeding on justification issue—Failing on other issues.—Where to an action of libel there are pleas of not guilty & a justification, & deft. gives no evidence of justification, but obtains a verdict on the general issue, pltf. is entitled to a verdict & his costs on the plea of justification.—*EMPSON v. FAIRFAX* (1838), 8 Ad. & El. 296; 3 Nev. & P. K. B. 385; 1 Will. Woll. & H. 353; 7 L. J. Q. B. 194; 2 Jur. 441; 112 E. R. 849.

1325. — — — — ——*HARRISON v. BUSH*, No. 1550, *post*.

1326. — — — — ——Where in an action for libel pleas of justification & privilege are set up, & deft. fails to establish the plea of justification, & judgment is given for him on the plea of privilege, pltf. is not entitled to the costs of witnesses whose evidence does not relate exclusively to the plea of justification.—*BROWN v. HOUSTON*, [1901] 2 K. B. 855; 70 L. J. K. B. 902; 85 L. T. 160; 17 T. L. R. 683, C. A.

Annotation :—*Distd.* *Re Wright, Crossley* (1902), 86 L. T. 280.

1327. Plea containing separate allegations—Indivisible for purpose of verdict—Some allegations only proved.—If a plea, containing many separate allegations, is nevertheless indivisible for the purpose of the verdict, & deft. fails to establish it in its entirety, but proves several of the allegations contained in it:—*Held*: pltf. is still entitled to

interest in a political contest in another part of the country a number of years after such person had ceased to hold such office, & when he was not a candidate or official in the contest in question, & particulars of such matters of alleged public interest were struck out of the statement of defence in an action

for libel.—*WADE v. NEWS ADVERTISER*, [1917] 2 W. W. R. 1134.—CAN.

e. Particulars of malice.—As the particulars ordered were particulars of malice which could not be given, appeal allowed.—*TIMMONS v. NATIONAL LIFE ASSURANCE CO.* (1909), 12 W. L. R.

492.—CAN.

PART VI. SECT. 1, SUB-SECT. 5.

1. Admissibility — Evidence as to intention—In writing material letter.—*WHITE v. TYRRELL* (1856), 27 L. T. O. S. 334.—IR.

LIBEL AND SLANDER.

Sect. 1.—Justification: Sub-sect. 6. Sect. 2: Sub-sects. 1 & 2, A.

recover the costs of witnesses called to disprove those allegations, although the jury, at the request of the judge, have expressly found the facts so alleged.—*BIDDULPH v. CHAMBERLAYNE* (1851), 17 Q. B. 351; 17 L. T. O. S. 164; 117 E. R. 1314.

—*Consd. Reynolds v. Harris* (1858), 3 C. B. Refd. *Paterson v. Harris* (1862), 2 B. & S.

SECT. 2.—ABSOLUTE PRIVILEGE.

SUB-SECT. 1.—IN GENERAL.

1328. Privileged communication & privileged occasion distinguished.]—*PULLMAN v. HILL & Co.*, No. 1069, *ante*.

1329. Meaning of—Exemption from all inquiry as to malice.]—(1) The absolute privilege attaching to the statement of judicial officers, advocates, & witnesses is not a privilege to be malicious, but a privilege that their statements in judicial proceedings should be exempt from any inquiry whether they were prompted by malice or not, it being for the public interest that such statements should be made without any apprehension of subsequent legal proceedings.

The real doctrine of what is called "absolute privilege" is that in the public interest it is not desirable to inquire whether the words or acts of certain persons are malicious or not. It is not that there is any privilege to be malicious, but that, so far as it is a privilege of the individual, I should call it rather a right of the public, the privilege is to be exempt from all inquiry as to malice (*CHANNELL, J.*).

(2) The report of an official receiver made to the ct. under Companies (Winding-up) Act, 1890 (c. 63), s. 8 (2), is absolutely privileged.—*BOTTOMLEY v. BROUGHAM*, [1908] 1 K. B. 584; 77 L. J. K. B. 311; 99 L. T. 111; 24 T. L. R. 262; 52 Sol. Jo. 225.

Annotations:—As to (1) Apprvd. Burr v. Smith, [1909] 2 K. B. 306. *Consd. Copartnership Farms v. Harvey-Smith*, [1918] 2 K. B. 405. *Apprvd. Everett v. Griffiths*, [1920] 3 K. B. 163. *As to (2) Follid. Burr v. Smith*, [1909] 2 K. B. 306. *Refd. Copartnership Farms v. Harvey-Smith*, [1918] 2 K. B. 405. *Generally, Mentd. Re Tweddle*, [1910] 2 K. B. 697.

1330. Nature of doctrine—Public interest.]—*BOTTOMLEY v. BROUGHAM*, No. 1329, *ante*.

1331. ———.]—*SCOTT v. STANSFIELD*, No. 1352, *post*.

1332. Inherent power of court—To strike out statement of claim—R. S. C., Ord. 25, r. 4.]—*HODSON v. PARE*, No. 1395, *post*.

1333. ———.]—*LAW v. LLEWELLYN*, No. 1356, *post*.

1334. ———.]—(1) An action for libel will not lie against an official receiver in respect of observations on the affairs of a co. in liquidation published by him to the creditors & contributories of the co. in the performance of his duty as prescribed by Companies (Winding-up) Act, 1890 (c. 63), sched. 1, s. 3, such observations being absolutely privileged.

Where an officer appointed by the Board of Trade under Companies (Winding-up) Act, 1890 (c. 63), s. 27, had, in the performance of his duty,

prepared for & delivered to that Board a report on matters within Sect. 29, sub-sect. 2, of the Act for the purpose of its being laid by them before Parliament as part of their general annual report as directed by that sub-sect.:—*Held*: an action for libel would not lie against him in respect of statements contained in that report.

(2) The ct. has an inherent power of dismissing an action on the ground that it is frivolous & vexatious, & it is not necessary for the exercise of that power that the statement of claim should be, on the face of it, demurrable. It may be exercised if, upon facts which are brought before the ct., or of which they may take judicial cognisance, the action is clearly shown to be frivolous & vexatious (*FLETCHER MOULTON, L.J.*).

I do not see any difference, in point of principle, between the position of the official receivers & the Inspector-General in Cos.' Liquidation in making these reports & that of a chief clerk of a judge in the Ch. Div. in reporting on a case to the judge. No one has ever dreamed of suggesting that in such a case the chief clerk would be liable to an action for libel (*FARWELL, L.J.*).—*BURR v. SMITH*, [1909] 2 K. B. 306; 78 L. J. K. B. 889; 101 L. T. 194; 25 T. L. R. 542; 53 Sol. Jo. 502; 16 Mans. 210, C. A.

Annotation:—Generally, Mentd. Re Tweddle, [1910] 2 K. B. 697.

See, further, PRACTICE & PROCEDURE.

SUB-SECT. 2.—SUBJECT-MATTER.

A. Administration of Justice.

(a) In General.

1335. General rule.]—Words spoken in a course of justice are not actionable.—*WESTON v. DOBNIET* (1617), Cro. Jac. 432; 79 E. R. 360.

Annotations:—Refd. Kennedy v. Hilliard (1859), 1 L. T. 78. *Mentd. Traverse v. Daws* (1673), Freem. K. B. 324.

1336. Extent of privilege—Whether to statements made without reasonable & probable cause.]—*THOMAS v. CHURTON*, No. 1357, *post*.

1337. ———.]—*SCOTT v. STANSFIELD*, No. 1352, *post*.

(b) To What Tribunals Applicable.

1338. Military court—Court-martial.]—If a court-martial after stating in their sentence the acquittal of an officer against whom a charge has been preferred subjoin thereto a declaration of their opinion that the charge is malicious & groundless, & that the conduct of the prosecutor in falsely calumniating the accused is highly injurious to the service, the president of the court-martial is not liable to an action for a libel for having delivered such sentence & declaration to the Judge-Advocate.—*JEKYLL v. MOORE* (1806), 2 Bos. & P. N. R. 341; 127 E. R. 658.

1339. ——— Court of inquiry.]—It having been reported that pltf., an officer in the Army, had made charges against his brother officers, the Commander-in-Chief directed that a ct. of inquiry should be assembled, who should inquire into the matter & report thereon to the Commander-in-Chief. A ct. was held at which deft., an officer in the Army, was required as a witness. Being

PART VI. SECT. 2, SUB-SECT. 2.—A. (b).

1339 i. Military court—Court of inquiry.]—Statements made before a military ct. of inquiry are absolutely privileged; & so is the report of the president to the commanding officer,

so long as it deals only with matters within the scope of the inquiry, even though it be malicious.—*BAMFORD v. CLARKE* (1876), 14 N. S. W. S. C. R. (L.) 303.—*AUS.*

g. Arbitration tribunal—Committee on production—Under Munitions of

*War Act, 1915.]—**SLACK v. BARR* (1918), 82 J. P. 91.—*SCOT.*

*h. ———.]—**NEILL v. HENDERSON* (1901), 3 F. (Ct. of Sess.) 387; 38 Sc. L. R. 286; 8 S. L. T. 377.—*SCOT.*

*k. Maori Land Board.]—*In the hearing of applications for the con-

examined as a witness, he gave *vivâ voce* evidence, & then handed in a paper containing, in substance, a repetition of his evidence, with some additions upon the subject, & this paper was received by the ct. A report was made by the ct. to the Commander-in-Chief. Pltf. applied for a court-martial upon deft. for such his conduct towards pltf. The application was not acceded to, & pltf. brought an action against deft., in respect of the written paper as a libel, & in respect of the *vivâ voce* evidence as slander. The judge at the trial ruled that the action would not lie if the verbal & written statements complained of were made by deft., being a military officer, in the course of a military inquiry in relation to the conduct of pltf., he being also a military officer, & with reference to the subject of the inquiry, although deft. had acted *malâ fide*, & with actual malice, & without any reasonable & probable cause, & with a knowledge that the statement made & handed in by him as aforesaid was false. A bill of exceptions having been tendered:—*Held*: (1) this ruling as to the law was correct; (2) the evidence of deft. was but a parcel of the minutes of the proceedings of the ct., which when reported & delivered to the Commander-in-Chief was received & held by him on behalf of the Sovereign, & as such was inadmissible in evidence.

(3) The authorities are clear, uniform & conclusive, that no action of libel or slander lies, whether against judges, counsel, witnesses or parties, for words written or spoken in the ordinary course of any proceeding before any ct. or tribunal recognised by law (KELLY, C.B.).—*DAWKINS v. ROKEBY* (LORD) (1873), L. R. 8 Q. B. 255; 42 L. J. Q. B. 63; 28 L. T. 134; 21 W. R. 544, Ex. Ch.; *affd.* (1875), L. R. 7 H. L. 744, H. L.

Annotations:—As to (1) *Apld.* *Dawkins v. Saxe Weimar* (Prince Edward) (1876), 1 Q. B. D. 499. *Consd.* *Seaman v. Netherclift* (1876), 2 C. P. D. 53; *Royal Aquarium & Summer & Winter Garden Soc. v. Parkinson*, [1892] 1 Q. B. 431. *Refd.* *Dickeson v. Hilliard* (1874), L. R. 9 Exch. 79; *Heddon v. Evans* (1919), 35 T. L. R. 642. As to (2) *Consd.* *Hennessy v. Wright* (1888), 21 Q. B. D. 509. *Refd.* *Goffin v. Donnelly* (1881), 6 Q. B. D. 307; *Barratt v. Kearns*, [1905] 1 K. B. 504; *Copartnership Farms v. Harvey-Smith*, [1918] 2 K. B. 405. As to (3) *Folld.* *Seaman v. Netherclift* (1876), 2 C. P. D. 53. *Apld.* *Munster v. Lamb* (1883), 11 Q. B. D. 588. *Expld.* *Royal Aquarium & Summer & Winter Garden Soc. v. Parkinson*, [1892] 1 Q. B. 431. *Apld.* *Chatterton v. Secretary of State for India in Council*, [1895] 2 Q. B. 189; *Barratt v. Kearns*, [1905] 1 K. B. 504; *Attwood v. Chapman*, [1914] 3 K. B. 275. *Consd.* *Everett v. Griffiths*, [1920] 3 K. B. 163. *Refd.* *Copartnership Farms v. Harvey-Smith*, [1918] 2 K. B. 405. *Generally, Refd.* *R. v. Army Council, Ex p. Ravenscroft* (1917), 33 T. L. R. 387; *Fraser v. Hamilton* (1918), 87 L. J. K. B. 1116. *Mentd.* *Re Tufnell's Petition of Right* (1876), 45 L. J. Ch. 731; *Grant v. Secretary of State for India* (1877), 46 L. J. Q. B. 681.

1340. Justices—Acting as judicial authority under Lunacy Act, 1890 (c. 5).—*HODSON v. PARE*, No. 1395, *post*.

1341. — Licensing justices—Dealing with objections to renewal of licenses.—Licensing justices when dealing with an objection to the renewal of an old on-license are not a ct. within the rule by which defamatory statements made in the course of proceedings before a ct. are absolutely privileged.

Pltf., who was the holder of an old on-license, was an appct. at the general annual licensing meeting for the renewal of his license. Deft., a private individual, gave notice of his intention to oppose pltf.'s application on the ground that, as he alleged, pltf. was not a fit & proper person to hold such a

license. Deft. served a copy of his notice of objection on pltf., on the clerk to the licensing justices, on the superintendent of police, & on the owners of the premises. In an action by pltf. claiming damages in respect of the alleged defamatory statements contained in deft.'s notice of objection, deft. pleaded that, as he was taking a necessary & proper step in a judicial proceeding, the publication of the notice of objection was absolutely privileged:—*Held*: the licensing justices were not a ct. in law; & (2) even if they were held to be a ct. in law, deft., in objecting to the renewal of the license, did not come within the category of persons on whose behalf privilege could be claimed; & (3) even if deft. came within the category of persons who could claim privilege, such privilege did not extend to the notices of objection served on the superintendent of police & on the owners of the premises.—*ATTWOOD v. CHAPMAN*, [1914] 3 K. B. 275; 83 L. J. K. B. 1666; 111 L. T. 726; 79 J. P. 65; 30 T. L. R. 596.

Annotations:—As to (1) *Refd.* *Copartnership Farms v. Harvey-Smith*, [1918] 2 K. B. 405; *Everett v. Griffiths*, [1920] 3 K. B. 163. As to (2) *Refd.* *Copartnership Farms v. Harvey-Smith*, [1918] 2 K. B. 405.

1342. Select committee of House of Parliament.]

—To an action of slander deft. pleaded that the statements complained of were part of the evidence given by him in the character of a witness before a select committee of the House of Commons:—*Held*: the statements so made were privileged, & the action would not lie.—*GOFFIN v. DONNELLY* (1881), 6 Q. B. D. 307; 50 L. J. Q. B. 303; 44 L. T. 141; 45 J. P. 439; 29 W. R. 440.

1343. Privy Council—Not acting in judicial capacity.]—A communication to the Privy Council not in its judicial capacity, containing false & libellous matter is not entitled to absolute privilege; but the qualified privilege may be displaced by proof of express malice.

Deft. wrote a letter to the Privy Council reflecting on the character of pltf. in his capacity of veterinary inspector under Contagious Diseases (Animals) Act, 1878 (c. 74). Pltf., as such veterinary inspector, was appointed to his office by the local authority, but was liable to be removed, after inquiry, if the Privy Council thought fit. Pltf. brought this action, & at the trial the jury found that deft. had been guilty of express malice in sending the communication, & gave a verdict for pltf. with damages. Deft. moved for a new trial. Deft., both at the trial & the hearing of the motion, contended that as the communication had been made to the Privy Council, a high official body, one of whose duties was to remove inspectors under Contagious Diseases (Animals) Act, 1878, for good cause shown, it was absolutely privileged:—*Held*: the communication having been made to the Privy Council not in its judicial capacity was privileged only *submodo*, which privilege could be displaced by proof of express malice.—*PROCTOR v. WEBSTER* (1885), 16 Q. B. D. 112; 55 L. J. Q. B. 150; 53 L. T. 765; 2 T. L. R. 103, D. C.

1344. County council—Meeting for granting licences—Music & dancing licences.]—*ROYAL AQUARIUM & SUMMER & WINTER GARDEN SOCIETY v. PARKINSON*, No. 1592, *post*.

1345. Stewards of Jockey Club.]—The question arises out of the publication in the Racing Calendar of decisions, first of the local stewards; secondly,

firmation of alienations of native land a Maori Land Board is exercising judicial functions, & the president of such board while exercising such functions possesses absolute immunity from actions of libel & slander.—*FITZHER-*

BERT v. ACHESON, [1921] N. Z. L. R. 265.—N.Z.

1. *Bankruptcy proceedings.*—The Official Assignee in Bkpcy., when presiding at a meeting of creditors called under the authority of Bkpcy.

Act, 1892, Part VII., at which a bkpt. is being examined on oath, is not a judge of a ct. of tribunal, & is not exercising judicial authority & consequently statements volunteered by a creditor at such a meeting during

Sect. 2.—Absolute privilege: Sub-sect. 2, A. (b) & (c) i. & ii.]

of the fact that the Jockey Club had investigated the matter & had remitted it to the local stewards; & thirdly, of the local stewards on the second occasion. . . . Two grounds of privilege have been set up. It was said first, though it was not strenuously pressed, that the decisions of the Jockey Club are of a quasi-judicial character, & that the publication of these decisions is of such public interest as to make the occasion of the publication privileged. It seems to me that even assuming that the decisions are quasi-judicial the decisions are not of such general public interest as to make the occasion privileged (COLLINS, M.R.). —*HOPE v. FANSON & WEATHERBY* (1901), 18 T. L. R. 201, C. A.

1346. Ecclesiastical Commission—Under Pluralities Acts, 1838–1885.]—A commission, issued by the bishop of a diocese under the above Acts, to inquire into the inadequate performance of the ecclesiastical duties of any benefice, creates a judicial tribunal, & the occasion on which a witness gives evidence before the Comrs. is absolutely privileged, & no action is maintainable in respect of evidence so given.—*BARRATT v. KEARNS*, [1905] 1 K. B. 504; 74 L. J. K. B. 518; 92 L. T. 255; 53 W. R. 356; 21 T. L. R. 212, C. A.

Annotation:—*Consd.* *Copartnership Farms v. Harvey-Smith*, [1918] 2 K. B. 405.

1347. Local military tribunal—Under Military Service Acts, 1916.]—The local military tribunal constituted under the above Acts, & Military Service Regulations (Amendment) Order, 1916, & the Regulations annexed thereto is a judicial body, & defamatory statements made by a member in the course of proceedings before it are absolutely privileged.—*COPARTNERSHIP FARMS v. HARVEY-SMITH*, [1918] 2 K. B. 405; 88 L. J. K. B. 472; 118 L. T. 541; 34 T. L. R. 414; 16 L. G. R. 687.

Annotation:—*Apprvd.* *Gerhold v. Baker* (1918), 35 T. L. R. 102.

(c) To What Persons Applicable.

i. Judges, etc.

1348. Judge.]—*R. v. SKINNER* (1772), 1 Lofft, 54; 98 E. R. 529.

Annotations:—*Consd.* *Kennedy v. Hilliard* (1859), 1 L. T. 78; *Seaman v. Netherclift* (1876), 1 C. P. D. 540. *Apld.* *Munster v. Lamb* (1883), 11 Q. B. D. 588. *Refd.* *Dawkins v. Rokeby* (1873), L. R. 8 Q. B. 255; *Copartnership Farms v. Harvey-Smith*, [1918] 2 K. B. 405.

1349. —.]—*ALLARDICE & BOSWELL v. ROBERTSON* (1830), 1 Dow & Cl. 495; 6 E. R. 610, H. L.

Annotations:—*Consd.* *Seaman v. Netherclift* (1876), 2 C. P. D. 53; *Law v. Llewellyn*, [1906] 1 K. B. 487.

1350. —.]—No action lies for acts done or words spoken by a judge in the exercise of his judicial office although his motive is malicious & the acts or words are not done or spoken in the honest exercise of his office (LORD ESHER, M.R.).

ANDERSON v. GORRIE, [1895] 1 Q. B. 668; 71 L. T. 382; 10 T. L. R. 660; 14 R. 79, C. A.

Annotation:—*Refd.* *Everett v. Griffiths*, [1921] 1 A. C. 631.

1351. —.]—*CHAMBERS v. GOLDTHORPE, RESTELL v. NYE*, [1901] 1 K. B. 624; 70 L. J.

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PART VI. SECT. 2, SUB-SECT. 2. A. (c) i.

1348 i. Judge.]—A judge has, respect to words uttered by

the course of judicial proceedings, with reference to the case before him, an absolute privilege.—*PRIMROSE v. WATERSTON* (1902), 4 F. (Ct. of Sess.) 783; 39 Sc. L. R. 475; 10 S. L. T. 37.—*SCOT.*

1348 ii. —.]—An action does not lie against a judge of a ct. of record for anything done by him as a judge in a judicial proceeding. A county ct. judge or a recorder is within the privilege. The privilege is not

K. B. 482; 84 L. T. 444; 49 W. R. 401; 17 T. L. R. 304; 45 Sol. Jo. 325, C. A.

Annotations:—*Mentd.* *Kennedy v. Barrow-in-Furness Corpn.* (1909), *Hudson's B. C.* 4th ed. Vol. 2, p. 411; *Brightman v. Tate*, [1919] 1 K. B. 463; *Boynton v. Richardson* (1924), 69 Sol. Jo. 107.

1352. — County court.]—Plea to a declaration for slander, that deft. was a county ct. judge & the words complained of were spoken by him in his capacity as such judge while sitting in his ct. & trying a cause in which present pltf. was deft. Replication, that the said words were spoken falsely & maliciously, & without any reasonable, probable or justifiable cause, & without any foundation whatever & not *bond fide* in the discharge of deft.'s duty as judge & were wholly irrelevant in reference to the matter before him:—*Held*: the replication was bad, & the action not maintainable.

This provision of the law is not for the protection of, or benefit of, a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence & without fear of consequences (KELLY, C.B.).—*SCOTT v. STANSFIELD* (1868), L. R. 3 Exch. 220; 37 L. J. Ex. 155; 18 L. T. 572; 32 J. P. 423; 16 W. R. 911.

Annotations:—*Expld.* *Seaman v. Netherclift* (1876), 1 C. P. D. 540. *Consd.* *Munster v. Lamb* (1883), 11 Q. B. D. 588. *Apld.* *Anderson v. Gorrie*, [1895] 1 Q. B. 668. *Refd.* *Dawkins v. Paulet* (1869), L. R. 5 Q. B. 94; *Law v. Llewellyn*, [1906] 1 K. B. 487; *Burr v. Smith*, [1909] 2 K. B. 306; *Everett v. Griffiths*, [1921] 1 A. C. 631.

1353. — In any court.]—*DAWKINS v. ROKEBY* (LORD), No. 1339, *ante*.

1354. Magistrate.]—*R. v. SKINNER* (1772), Lofft, 54; 98 E. R. 529.

Annotations:—*Consd.* *Kennedy v. Hilliard* (1859), 1 L. T. 78; *Seaman v. Netherclift* (1876), 1 C. P. D. 540. *Apld.* *Munster v. Lamb* (1883), 11 Q. B. D. 588. *Refd.* *Dawkins v. Rokeby* (1873), L. R. 8 Q. B. 255; *Copartnership Farms v. Harvey-Smith*, [1918] 2 K. B. 405.

1355. —.]—*KENDILLON v. MALTBY*, No. 2133, *post*.

1356. —.]—A magistrate, when sitting in the course of his judicial duties, is a "judge" within the rule laid down by *Munster v. Lamb*, No. 1368, *post*; & *Hodson v. Pare*, No. 1395, *post*; that defamatory observations by a judge in the course of his judicial duties are not actionable.

(1) A defamatory statement made by a magistrate, while sitting in the course of his judicial duties, respecting a prosecutor upon or with reference to the withdrawal of a criminal charge before the ct.:—*Held*: not to be actionable, even though it was alleged that the statement was made falsely & maliciously & without reasonable cause.

(2) The statement of claim in an action for slander brought by the prosecutor against the magistrate on the ground of that defamatory statement was ordered to be struck out under R. S. C., Ord. 25, r. 4, as disclosing no reasonable cause of action.—*LAW v. LLEWELLYN*, [1906] 1 K. B. 487; 75 L. J. K. B. 320; 94 L. T. 359; 70 J. P. 220; 54 W. R. 368; 50 Sol. Jo. 289, C. A.

1357. Coroner.]—A coroner holding an inquest on a dead body, is not liable to an action for words falsely & maliciously spoken by him in his address

the individual, but for the sake of the public, & the advancement of justice. If impleaded he should rely on his privilege. An added allegation of malice does not make the action maintainable. The privilege extends to words spoken as well as to things done.—*TUGHAN v. CRAIG*, [1918] 1 L. R. 245.—*IR.*

1348 iii. —.]—*LITTLE v. CLEMENTS* (LORD) (1851), 17 L. T. O. S. 8.—*IR.*

to the jury. *Qu.* : if they had been spoken by him maliciously, & without reasonable & probable cause.—*THOMAS v. CHURTON* (1862), 2 B. & S. 475 ; 31 L. J. Q. B. 139 ; 6 L. T. 320 ; 8 Jur. N. S. 795 ; 26 J. P. Jo. 308 ; 121 E. R. 1150.

Annotations :—*Consd.* *Seaman v. Netherclift* (1876), 1 C. P. D. 540 ; *Anderson v. Gorrie*, [1895] 1 Q. B. 668.

ii. Advocates.

1358. General rule.—If a councillor speak scandalous words against one in defending his client's cause, an action does not lie against him for so doing, for it is his duty to speak for his client, & it shall be intended to be spoken according to his client's instructions (*CLYN, C.J.*).—*WOOD v. GUNSTON* (1855), *Sty.* 462 ; 82 E. R. 863.

1359. —.]—*MACKAY v. FORD*, No. 1370, *post*.

1360. —.]—*DAWKINS v. ROKEBY* (LORD), No. 1339, *ante*.

1361. —.]—*LEWIS v. HIGGINS* (1876), 21 Sol. Jo. 113.

1362. — *Though irrelevant to issue— & malicious or false.*—*MUNSTER v. LAMB*, No. 1368, *post*.

1363. —.]—No action for damages will lie for defamatory words spoken by an advocate in the course of an inquiry before a judicial tribunal (*LINDLEY, L.J.*).—*WELDON v. MAPLES* (1888), 4 T. L. R. 529, C. A.

1364. Extent of privilege—Matters relevant to issue.—A counsellor in law retained has a privilege to enforce anything which is informed him by his client, & to give it in evidence, it being pertinent to the matter in question, & not to examine whether it be true or false. But matter not pertinent to the issue, or the matter in question, he need not to deliver ; for he is to discern in his discretion what he is to deliver, & what not ; & although it be false, he is excusable, being pertinent to the matter : but if he give in evidence anything not material to the issue which is scandalous, he ought to aver it to be true, otherwise he is punishable ; for it shall be intended as spoken maliciously & without cause ; which is a good ground for an action (*per CUR.*).—*BROOK v. MONTAGUE* (1605), *Cro. Jac.* 90 ; 79 E. R. 77.

Annotations :—*Folld.* *Hodgson v. Scarlett* (1818), 1 B. & Ald. 232. *Refd.* *Weston v. Dobniet* (1617), *Cro. Jac.* 432. *Mentd.* *Hearne v. Stowell* (1841), 11 L. J. Q. B. 25.

1365. —.]—*HUGHES' CASE* (1620), *Hob.* 328 ; 80 E. R. 470.

1366. —.]—An action for defamation will not lie against a barrister for words spoken by him as counsel in a cause pertinent to the matter in issue.—*HODGSON v. SCARLETT* (1818), 1 B. & Ald. 232 ; 106 E. R. 86.

Annotations :—*Consd.* *R. v. Kiernan* (1855), 7 Cox, C. C. 6. *Refd.* *Revis v. Smith* (1856), 18 C. B. 126 ; *Kennedy v. Hilliard* (1859), 1 L. T. 78 ; *Thomas v. Churton* (1862), 2 B. & S. 475 ; *Dawkins v. Paulet* (1869), 9 B. & S. 768 ; *Dawkins v. Rokeby* (1873), L. R. 8 Q. B. 255 ; *Seaman v. Netherclift* (1876), 1 C. P. D. 540 ; *Munster v. Lamb* (1883), 11 Q. B. D. 588. *Mentd.* *Gibbs v. Pike* (1842), 9 M. & W. 351.

1367. —.]—A party in a matter before the ct. had kept a sum of money which, by his contract, he ought not to have kept : counsel in reference to this matter, used the language, "This gentleman has defrauded us," & was interrupted by the ct. before he had finished his sentence :—*Held* : (1) the words were not actionable ; & (2) they were not irrelevant to the matter before the ct.—*NEEDHAM v. DOWLING* (1845), 15 L. J. C. P. 9.

Annotation :—*Generally, Refd.* *Dawkins v. Paulet* (1869), 9 B. & S. 768.

1368. —.]—(1) No action will lie against an advocate for defamatory words spoken with reference to, & in the course of, an inquiry before a judicial tribunal, although they are uttered by the advocate maliciously & not with the object of supporting the case of his client, & are uttered without any justification or even excuse, & from personal ill-will or anger towards the person defamed arising out of a previously existing cause & are irrelevant to every issue of fact which is contested before the tribunal.

H. was charged before a ct. of petty sessions with administering drugs to the inmates of M.'s house in order to facilitate the commission of a burglary at it. M. was the prosecutor, & L., who was a solr., appeared for the defence of H. There was some evidence, although of a very slight character, that a narcotic drug had been administered to the inmates of M.'s house upon the evening before the burglary, & H. had been at M.'s house on that evening. During the proceedings before the ct. of petty sessions, L., acting as advocate for H., suggested that M. might be keeping drugs at his house for immoral or criminal purposes. There was no evidence that M. kept any drugs for those purposes :—*Held* : no action by M. for defamation would lie against L.

A counsel's position is one of the utmost difficulty. He is not to speak of that which he knows ; he is not called upon to consider whether the facts with which he is dealing are true or false. What he has to do, is to argue as best he can, without degrading himself, in order to maintain the proposition which will carry with it either the protection or the remedy which he desires for his client. If amidst the difficulties of his position he were to be called upon during the heat of his argument to consider whether what he says is true or false, whether what he says is relevant or irrelevant, he would have his mind so embarrassed that he could not do the duty which he is called upon to perform. For, more than a judge, infinitely more than a witness, he wants protection on the ground of benefit to the public. The rule of law is that what is said in the course of the administration of the law is privileged ; & the reason of that rule covers a counsel even more than a judge or a witness. To my mind it is illogical to argue that the protection of privilege

PART VI. SECT. 2, SUB-SECT. 2.— A. (c) ii.

1358 i. General rule.—*NIKUNJA BHARI SEN v. HARENDRA CHANDRA SINHA* (1913), 1 L. R. 41 Calc. 514.—*IND.*

1358 ii. —.]—When a complaint is made against an advocate in respect of a statement made in the course of a judicial proceeding, it is the ct.'s duty to presume that the statement was made on instruction & in good faith & for the protection of his client's interest, & that unless circumstances clearly show that the statement complained of as defamatory was made wantonly or from malicious or private motive the complaint should not be

entertained.—*MCDONNELL v. R.* (1925), 1 L. R. 3 Ran. 524.—*IND.*

1358 iii. —.]—On the hearing of an information properly laid against pltf., deft., the prosecuting counsel, with reference to a document, a Crown grant, produced by pltf., made use of words which it was assumed meant, or might mean, that it had been fraudulently altered by pltf. :—*Held* : even if the statements were made maliciously, they were absolutely privileged.—*RICHARDSON v. HARLEY* (1911), 31 N. Z. L. R. 464.—*N.Z.*

1358 iv. —.]—*BAYNE v. MACGREGOR* (1863), 1 Macph. (Ct. of Sess.) 615 ; 35 Sc. Jur. 368.—*SCOT.*

1364 i. Extent of privilege—Matters

relevant to issue.—*R. v. JACKSON* (1846), 7 L. T. O. S. 237, 323.—*IR.*

n. Extent of privilege—To what persons—Proctor in ecclesiastical court.—A proctor acting for an impugnant in an ecclesiastical ct., is not privileged in making observations reflecting on the integrity of an officer of the ct., if such observations be not relevant to the cause.—*HIGGINSON v. O'FLAHERTY* (1855), 4 I. C. L. R. 125.—*IR.*

o. Statements unusually harsh & irritating.—Although the ct. may be of opinion that the observations of counsel, which provoked the sending of the letter, were privileged as being pertinent to the issue & not malicious, yet when such observations have been

Sect. 2.—Absolute privilege: Sub-sect. 2, A. (c) ii., iii. & iv.]

ought not to exist for a counsel, who deliberately & maliciously slanders another person. The reason of the rule is, that a counsel, who is not malicious & who is acting *bona fide*, may not be in danger of having actions brought against him. If the rule of law were otherwise, the most innocent of counsel might be unrighteously harassed with suits, & therefore it is better to make the rule of law so large that an innocent counsel shall never be troubled, although by making it so large counsel are included who have been guilty of malice & misconduct (BRETT, M.R.).

(2) With regard to witnesses, the general conclusion is that all witnesses speaking with reference to the matter which is before the ct., whether what they say is relevant or irrelevant, whether what they say is malicious or not, are exempt from liability to any action in respect of what they state, whether the statement has been made in words, that is, on *viva voce* examination, or whether it has been made upon affidavit (BRETT, M.R.).—MUNSTER v. LAMB (1883), 11 Q. B. D. 588; 52 L. J. Q. B. 726; 49 L. T. 252; 47 J. P. 805; 32 W. R. 243, C. A.

Annotations:—As to (1) Folld. Weldon v. Maples (1888), 4 T. L. R. 529. Consd. Pedley & May v. Morris (1891), 61 L. J. Q. B. 21. Refd. Law v. Llewellyn, [1906] 1 K. B. 487; Bottomley v. Brougham, [1908] 1 K. B. 584; Burr v. Smith, [1909] 2 K. B. 306; Copartnership Farms v. Harvey-Smith, [1918] 2 K. B. 405.

1369. — Statements by counsel after trial.]

—In an action for a libel which purported to be a report of a trial, deft. pleaded that the supposed libel was in substance a true account & report of the trial:—*Held*: (1) this plea was bad.

I think the plea ought to show the libel to be a true account & report of the trial. I do not mean to say that it is necessary that the supposed libel should contain every word uttered at the trial or that unnecessary matter may not be omitted (LITTLEDALE, J.).

Semble: (2) although it be lawful for a counsel in the discharge of his duty to utter matter injurious to individuals, yet the subsequent publication of such slanderous matter is not justifiable, unless it be shown that it was published for the purpose of giving the public information which it was fit & proper for them to receive, & that it was warranted by the evidence.—FLINT v. PIKE (1825), 4 B. & C. 473; 6 Dow. & Ry. K. B. 528; 3 L. J. O. S. K. B. 272; 107 E. R. 1136.

Annotations:—As to (1) Folld. Roberts v. Brown (1834), 10 Bing. 519. Refd. Delegal v. Highley (1837), 3 Hodg. 158. As to (2) Refd. Stockdale v. Hansard (1839), 9 Ad. & El. 1; Kennedy v. Hilliard (1859), 1 L. T. 78; Munster v. Lamb Q. B. D. 588.

1370. — To what persons—Solicitor.]—An attorney acting as an advocate has the same privilege as counsel.

K. being charged by pltf. with an assault committed in turning him out of certain premises in which he had agreed to sell wine on commission under an agreement with J., deft., an attorney, appeared for K., & stated that J. had sufficient reasons for determining the agreement; that he had been plundered by pltf. to a frightful extent:—

unusually harsh & irritating, it will, in making absolute the conditional order, put a stay upon the issuing of the information until further application.—R. v. KIERMAN (1855), 7 Cox, C. C. 6.—IR.

PART VI. SECT. 2, SUB-SECT. 2.—A. (c) iii.

p. General rule.]—The immunity of witnesses in judicial proceedings

from liability for statements made therein is not a statutory one, but is founded upon a rule of law declared by the cts. & based upon grounds of public policy & convenience. Such immunity extends to a witness before a commission appointed under the authority of a statute to inquire into some matter properly cognizable, if such evidence be pertinent to the inquiry, even though the Act under which

Held: no action lay against deft. for the words so uttered by him in defence of his client. MACKAY v. FORD (1860), 5 H. & N. 792; 29 L. J. Ex. 404; 2 L. T. 514; 24 J. P. 823; 6 Jur. N. S. 587; 8 W. R. 586; 157 E. R. 1397.

iii. Witnesses.

1371. General rule—Words spoken.]—ANFIELD v. FEVERHILL (1614), 2 Bulst. 269; 1 Roll. Rep. 61; 80 E. R. 1113.

Annotation:—Mentd. London Corpn. v. Cox (1867), L. R. 2 H. L. 239.

1372. — — —.]—REVIS v. SMITH, No. 1378, post.

1373. — — —.]—DAWKINS v. ROKEBY (LORD), No. 1339, ante.

1374. — — —.]—A witness in a ct. of justice is absolutely privileged as to anything he may say as a witness having reference to the inquiry on which he is called as a witness. A statement, as to another matter, made to justify the witness in consequence of a question going to the witness' credit, has reference to the inquiry within the above rule.

Deft., an expert in handwriting, gave evidence in the trial of *D. v. M.* that, in his opinion, the signature to the will in question was a forgery. The jury found in favour of the will, & the presiding judge made some very disparaging remarks on deft.'s evidence. Soon afterwards deft. was called as a witness in favour of the genuineness of a document, on a charge of forgery before a magistrate. In cross-examination he was asked whether he had given evidence in the suit of *D. v. M.*, & whether he had read the judge's remarks on his evidence. He answered "Yes." Counsel asked no more questions, & deft. insisted on adding, though told by the magistrate not to make any further statement as to *D. v. M.*: "I believe that will to be a rank forgery, & shall believe so to the day of my death." An action of slander for these words having been brought by one of the attesting witnesses to the will:—*Held*: the words were spoken by deft. as a witness, & had reference to the inquiry before the magistrate, as they tended to justify deft., whose credit as a witness had been impugned; & deft. was, therefore, absolutely privileged.—SEAMAN v. NETHERCLIFT (1876), 2 C. P. D. 53; 46 L. J. Q. B. 128; 35 L. T. 784; 41 J. P. 389; 25 W. R. 159, C. A.

Annotations:—Expld. Goffin v. Donnelly (1881), 6 Q. B. D. 307. Refd. Stevens v. Sampson (1879), 49 L. J. Q. B. 120; Munster v. Lamb (1883), 11 Q. B. D. 588; Watson v. M'Ewan, Watson v. Jones (1905), 93 L. T. 489. Mentd. Law v. Llewellyn, [1906] 1 K. B. 487.

1375. — — —.]—MUNSTER v. LAMB, No. 1368, ante.

1376. — Affidavit.]—AYRES v. SEDGWICK (1620), Palm. 142; 81 E. R. 1018; sub nom. AIRE v. SEDGWICKE, 2 Roll. Rep. 195.

Annotation:—Refd. Kennedy v. Hilliard (1859), 1 L. T. 78.

1377. — — —.]—An action will not lie for defamation in an affidavit taken in the Ct. of Ch. in a cause there depending.—DAWLING v. VENMAN (1686), 3 Mod. Rep. 108; 2 Show. 446; 87 E. R. 69.

the commission is appointed & the method of its appointment are open to sound legal objections.—GEORGESON v. MOODIE, [1917] 3 W. W. R. 997; 12 Alta. L. R. 358; 38 D. L. R. 105.—CAN.

q. — — —.]—A witness in a ct. of justice is absolutely privileged as to anything he may say as a witness having reference to the inquiry on which he is called as a witness.—

1378. ———.]—No action lies against a man for a statement made by him, whether by affidavit or *viva voce*, in the course of a judicial proceeding, even though it be alleged to have been made "falsely & maliciously, & without any reasonable or probable cause."—*REVIS v. SMITH* (1856), 18 C. B. 126; 25 L. J. C. P. 195; 27 L. T. O. S. 106; 20 J. P. 453; 2 Jur. N. S. 614; 4 W. R. 506; 139 E. R. 1314.

Annotations:—*Expld.* *Henderson v. Broomhead* (1859), 4 H. & N. 569; *Thomas v. Churton* (1862), 2 B. & S. 475. *Consd.* *Dawkins v. Rokeby* (1873), L. R. 8 Q. B. 255. *Expld.* *Seaman v. Netherclift* (1876), 1 C. P. D. 540. *Consd.* *Munster v. Lamb* (1883), 11 Q. B. D. 588. *Refd.* *Kennedy v. Hilliard* (1859), 1 L. T. 78; *Fitzjohn v. Mackinder* (1861), 9 C. B. N. S. 505; *Henwood v. Harrison* (1872), L. R. 7 C. P. 606. *Mentd.* *Parsons v. St Matthew, Bethnal Green, Vestry* (1867), 37 L. J. C. P. 62.

1379. ———.]—*HENDERSON v. BROOMHEAD*, No. 1393, *post*.

1380. ———.]—*MUNSTER v. LAMB*, No. 1368, *ante*.

1381. ——— *Written statements.*]—*DAWKINS v. ROKEBY* (LORD), No. 1339, *ante*.

1382. *Extent of privilege—Whether confined to statements relevant to issue.*]—*CHAMBERLAINES CASE* (1565), cited in *Palm.* at p. 145; 81 E. R. 1020.

Annotations:—*Refd.* *Ayres v. Sedgwick* (1620), *Palm.* 142; *Seaman v. Netherclift* (1876), 35 L. T. 784.

1383. ——— *Certificate sent to civil court—By superior military officer.*]—A military person cannot maintain an action against his officer for acts done by or under orders from his superiors, which they would have a right to give, & which he would be bound by military law to obey, unless, at all events, he has himself caused & procured such orders by means of reports or representations, malicious, or for some sinister & improper motive, & also without any reasonable or probable ground. It is not enough, in order to show malice, that the report is in some respect untrue in point of fact, unless it also appears to have been wilfully untrue, & without any reasonable ground. The circumstances that pltf., having been arrested under such orders, with a view to his trial, was detained in custody by deft. for a considerable period without being brought to trial, orders to bring him to trial not having been received, & that during his confinement the nature of his custody was changed from "open" to "close" arrest, on representations from the superior civil authorities, & that his release was so arranged with them as to facilitate his arrest on civil process for a large debt due to the Crown; & the further fact that deft., so far as appeared, voluntarily sent to the civil ct., before which pltf. was claiming his discharge, a certificate, which was relevant to the question before it, but might tend to prevent his discharge, & might be deemed defamatory or injurious:—*Held*: not sufficient, either to supply evidence of malice, or to sustain an action for libel.

I am clearly of opinion that no action for libel

could be maintained against deft. for sending that certificate to the ct. It would be mischievous in the last degree to hold that a person who gives evidence in a ct. as witness, is to give it under terror of an action against him for libel on account of any statement in it which may turn out to be untrue. I do not believe that any such action will lie (*WILLES, J.*).—*KEIGHLY v. BELL* (1866), 4 F. & F. 763, N. P.

Annotations:—*Refd.* *Dawkins v. Rokeby* (1866), 4 F. & F. 806. *Mentd.* *Dawkins v. Rokeby* (1873), L. R. 8 Q. B. 255; *Marks v. Frogley*, [1898] 1 Q. B. 888; *R. v. Army Council, Ex p. Ravenscroft*, [1917] 2 K. B. 504; *Fraser v. Balfour* (1918), 87 L. J. K. B. 1116; *Heddon v. Evans* (1919), 35 T. L. R. 642.

1384. ——— *Communication not on oath—For information of court.*]—If a person has a communication to make to an inquest for their information, not on oath, he is bound to do it in such a way as to satisfy a jury, if he is afterwards charged with slander, that he was only stating the fact for the information of the inquest, & that he did it in a proper manner.—*WILSON v. COLLINS* (1832), 5 C. & P. 373, N. P.

iv. Parties.

1385. *Words spoken—Denial of affidavit of other party.*]—*MOLTON v. CLAPHAM* (1639), *March*, 20; 82 E. R. 393; *sub nom.* *BOULTON v. CLAPHAM*, *W. Jo.* 431.

Annotations:—*Refd.* *Hodgson v. Scarlett* (1818), 1 B. & Ald. 232; *Kennedy v. Hilliard* (1859), 1 L. T. 78; *Thomas v. Churton* (1862), 2 B. & S. 475.

1386. ——— *In furtherance of case.*]—*MOLTON v. CLAPHAM* (1639), *March*, 20; 82 E. R. 393; *nom.* *BOULTON v. CLAPHAM*, *W. Jo.* 431.

Annotations:—*Refd.* *Hodgson v. Scarlett* (1818), 1 B. & Ald. 232; *Kennedy v. Hilliard* (1859), 1 L. T. 78; *Thomas v. Churton* (1862), 2 B. & S. 475.

1387. ———.]—Where A. having summoned B. his master, before a Ct. of Conscience for wages, B. there utters words imputing felony to A.:—*Held*: if this charge be necessary to B.'s defence no action can be maintained against him by A. for defamation. *Aliter*: if the words are spoken maliciously, though addressed to the ct.—*TROTMAN v. DUNN* (1815), 4 *Camp.* 211, N. P.

Annotations:—*Refd.* *Kennedy v. Hilliard* (1859), 1 L. T. 78; *Seaman v. Netherclift* (1876), 2 C. P. D. 53.

1388. ——— *In giving another in charge.*]—No action is maintainable for words spoken by a party in giving charge of another to an officer, or in preferring a complaint before a magistrate.—*JOHNSON v. EVANS* (1799), 3 *Esp.* 33, N. P.

Annotation:—*Refd.* *Seaman v. Netherclift* (1876), 1 C. P. D. 540.

1389. ——— *In preferring complaint.*]—*JOHNSON v. EVANS*, No. 1388, *ante*.

1390. ———.]—*DAWKINS v. ROKEBY* (LORD), No. 1339, *ante*.

1391. *Affidavit.*]—For libellous words contained in an affidavit produced in a ct. of justice on a defence against a charge, no action lies.—*ASTLEY*

BHIKUMBER SINGH v. BECHARAM SIRCAR (1888), 1 L. R. 15 *Calc.* 264.—*IND.*

r. ———.]—*WOOLFUN BIBI v. JESARAT SHEIKH* (1899), 1 L. R. 27 *Calc.* 262.—*IND.*

t. ———.]—*Re ALRAJA NAIDU* (1906), 1 L. R. 30 *Mad.* 222.—*IND.*

a. *Extent of privilege.*]—*PATERSON v. HESSE* (1914), 34 N. Z. L. R. 177.—*N.Z.*

b. ———.]—The privilege of a witness in giving evidence extends to statements made by a person on pre-cognition with a view to his giving evidence.—*WATSON v. M'EWAN* (1905), 7 F. (Ct. of Sess.) 109; 42 *Sc. L. R.* 837; 13 *S. L. T.* 340, H. L.—*SCOT.*

PART VI. SECT. 2, SUB-SECT. 2.—A. (c) iv.

c. *Words spoken—Without justification.*]—A complainant who, on being asked by a magistrate to state his grievance, deliberately makes a defamatory statement without the slightest justification, does not enjoy the protection given upon principles of public policy to an ordinary witness.—*DINSHAW EDALJI KARKARIA v. JEHangir COWASJI MISTRI* (1922), 1 L. R. 47 *Bom.* 15.—*IND.*

1390 i. ———.]—*SATISH CHANDRA CHAKRAVARTI v. RAM DOYAL DE* (1920), 1 L. R. 48 *Calc.* 388.—*IND.*

1390 ii ———.]—Comments in ct., made by a litigant *bond fide* during the

conduct of his case, upon the way in which evidence has been obtained by his opponent, are privileged, unless express malice is proved. This privilege extends to comments made by an applicant in person before a Licensing Court.—*JENSEN v. KONIG*, [1911] T. P. D. 133.—*S. AF.*

d. *Affidavit—Whether relevant or not.*]—No action lies on the contents of an affidavit made in a judicial proceeding, whether the contents of the affidavit be relevant to the matter in issue or not, nor even where the alleged libellous matter has been expunged by an order of the ct.—*KENNEDY v. HILLIARD* (1859), 1 L. T. 78.—*IR.*

e. *Statement in pleadings.*]—No

Sect. 2.—Absolute privilege: Sub-sect. 2, A. (c) iv., (d), & B. (a) & (b).]

v. YOUNGE (1759), 2 Burr. 807; 2 Keny. 536; 97 E. R. 572.

Annotations:—Consd. Henderson v. Broomhead (1859), 4 H. & N. 569; Dawkins v. Rokeby (1873), L. R. 8 Q. B. 255. Refd. Kennedy v. Hilliard (1859), 1 L. T. 78; Bremridge v. Latimer (1864), 4 New Rep. 285; Seaman v. Netherclift (1876), 1 C. P. D. 540.

1392. ——A., pltf., obtained a rule nisi for a criminal information against B., deft., for sending him a challenge, & A.'s affidavits contained matters of high censure against B. The affidavit of B., in showing cause against this rule, was recriminatory, & would, under other circumstances, have been libellous. In an action by A., against B., for the libel contained in B.'s affidavit:—**Held:** B. was justified in setting forth any such matters respecting A.'s past conduct as he might think would disincline the ct. to entertain the application for A.'s rule.—**DOYLE v. O'DOHERTY (1842), Car. & M. 418, N. P.**

1393. ——No action lies against a party who, in the course of a cause, makes an affidavit in support of a summons taken out in such cause, which is scandalous, false & malicious, though the person scandalised, & who complains, is not a party to the cause.—**HENDERSON v. BROOMHEAD (1859), 4 H. & N. 569; 28 L. J. Ex. 360; 33 L. T. O. S. 302; 5 Jur. N. S. 1175; 7 W. R. 492; 157 E. R. 964, Ex. Ch.**

Annotations:—Expld. Thomas v. Churton (1862), 2 B. & S. 475. Consd. Dawkins v. Rokeby (1873), L. R. 8 Q. B. 255; Munster v. Lamb (1883), 11 Q. B. D. 588. Refd. Fitzjohn v. Mackinder (1860), 8 C. B. N. S. 78; Mackay v. Ford (1860), 5 H. & N. 792; Fitzjohn v. Mackinder (1861), 9 C. B. N. S. 505; Henwood v. Harrison (1872), L. R. 7 C. P. 606; Seaman v. Netherclift (1876), 2 C. P. D. 53; Pedley & May v. Morris (1891), 65 L. T. 526.

1394. Written statement.]—DAWKINS v. ROKEBY (LORD), No. 1339, ante.

1395. Statement in particulars—Petition for order for reception of lunatic.]—A justice of the peace, or other judicial authority, to whom an application is made, under Lunacy Act, 1890 (c. 5), on a petition for an order for the reception & detention of a lunatic, is acting judicially, & consequently defamatory statements made in the course of the proceedings are not actionable.

The statement, therefore, is absolutely privileged & the statement of claim should be struck out & the action dismissed under R. S. C., Ord. 25, r. 4 (CHITTY, L.J.).—**HODSON v. PARE, [1899] 1 Q. B. 455; 68 L. J. Q. B. 309; 80 L. T. 13; 47 W. R. 241; 15 T. L. R. 171; 43 Sol. Jo. 223, C. A.**

Annotations:—Expld. Everett v. Griffiths, [1920] 3 K. B. 163. Refd. Law v. Llewellyn, [1906] 1 K. B. 487; Copartnership Farms v. Harvey-Smith, [1918] 2 K. B. 405.

(d) *To what Proceedings Applicable.*

1396. Proceedings in course of justice—Writ of forger.]—An action of *scandalum magnatum* will not lie for bringing a writ of forger of false deeds against a peer, more especially whilst that writ is pending.—**BEAUCHAMPS v. CROFT (1497), 3 Dyer, 285; Keil. 26; 73 E. R. 639.**

Annotations:—Folld. Buckley v. Wood (1591), 4 Co. Rep. 14 b. Refd. Townsend v. Hughes (1678), 1 Mod. Rep. 232;

action for slander lies for any statement in the pleadings or during the conduct of a suit against a party or witness in it.—**NATHUJI MULESHVAR v. LALBHAI RAVIDAT (1889), 1 L. R. 14 Bom. 97.—IND.**

f. Statement in reply to threat of legal proceedings.]—Held: the statements made in reply to a threat of legal proceedings & being a relevant defence to such proceedings fell within the degree of protection accorded to judicial slanders made upon record, & were therefore only actionable on

an averment of facts & circumstances sufficient to infer malice.—**CAMPBELL v. COCHRANE (1906), 8 F. (Ct. of Sess.) 205.—SCOT.**

g. Petition for change of venue—Defamatory charges against magistrates.]—MA MYA SHWE v. MAUNG MAUNG (1924), 1 L. R. 2 Ran. 333.—**IND.**

h. Prosecution before magistrate—Statement made by defendant's father.]—COWAN v. LANDELL (1886), 13 O. R. 13.—**CAN.**

Savill v. Roberts (1696), 1 Ld. Raym. 374; Hodgson v. Scarlett (1818), 1 B. & Ald. 232; Kennedy v. Hilliard (1859), 1 L. T. 78. Mentd. Hunter v. Allen (1621), Palm. 188; Jones v. Givin (1713), Gilb. 185; Parker v. Langley (1713), Gilb. 163.

1397. — Bill exhibited to Crown.]—HARE & MEIJER'S CASE (1587), 3 Leon. 163; 74 E. R. 607. Annotation:—Consd. Proctor v. Webster (1885), 16 Q. B. D. 112.

1398. — Articles of the peace.]—No allegation contained in articles of the peace exhibited to justices is actionable, it being a proceeding in the course of justice.—**CUTLER v. DIXON (1585), 4 Co. Rep. 14 b; 76 E. R. 886.**

Annotations:—Folld. Buckley v. Wood (1591), 4 Co. Rep. 14 b; Anfield v. Feverhill (1614), 2 Bulst. 269; Weston v. Dobniet (1617), Cro. Jac. 432. Refd. Wale v. Hill (1611), 1 Bulst. 149; Hunter v. Allen (1621), Palm. 188; Hodgson v. Scarlett (1818), 1 B. & Ald. 232; Henderson v. Broomhead (1859), 4 H. & N. 569; Pedley & May v. Morris (1891), 65 L. T. 526.

1399. — Issue of warrant by justice—Necessity for prior accusation of plaintiff.]—WINDHAM & CLÉERS CASE (1589), 1 Leon. 187; Cro. Eliz. 130; 74 E. R. 172.

Annotations:—Dttd. Morgan v. Hughes (1788), 2 Term Rep. 225. Refd. Mills v. Collett (1829), 6 Bing. 85.

1400. — Court without jurisdiction.]—To charge another with felony or piracy by bill in the Star Chamber is actionable, for that ct. not having jurisdiction in either of these offences, the exhibiting such a bill was not a proceeding in the course of justice.

They were not matters examinable in Star Chamber; & when he exhibited the bill maliciously in slander of pltf. for matters not examinable there, it is reason he should be punished; & especially when he spoke of the matters in the country, & published them & affirmed they were true (*per* CUR.).—**BUCKLEY v. WOOD (1591), 4 Co. Rep. 14 b; Cro. Eliz. 248; 2 And. 28; Moore, K. B. 705; 2 Brownl. 100; 78 E. R. 503.**

Annotations:—Consd. Kennedy v. Hilliard (1859), 1 L. T. 78. Refd. Waterer v. Freeman (1619), Hob. 266; Hunter v. Allen (1621), Palm. 188; Spigurnell v. Jene (1660), 1 Sid. 12; Gwinne v. Poole (1692), 2 Lut. 935 App. 1560; Hodgson v. Scarlett (1818), 1 B. & Ald. 232; Usill v. Hales, Usill v. Brearley, Usill v. Clarke (1878), 38 L. T. 65. Mentd. Wynne v. Boughey (1666), O. Bridg. 570.

1401. — Matter spoken outside court.]—BUCKLEY v. WOOD, No. 1400, *ante*.

1402. — Application for warrant—To justice.]—RAM v. LAMLEY (1632), Hut. 113; 123 E. R. 1139.

1403. Bill of costs—Delivered under judge's order.]—BRUTON v. DOWNES, No. 1237, *ante*.

1404. — Objections.]—Pltfs. & deft. acted as solrs. for parties to certain administration proceedings, in the course of which an order was made that the parties represented by deft. might attend the taxation of pltf.'s costs at the expense of the estate. Pltfs. delivered their bill of costs, & for the purpose of sustaining objections to the taxation thereof deft. lodged his objections in writing, pursuant to R. S. C. Ord. 65, r. 27 (39), (40). These objections contained a libel on pltfs., as solrs.:—**Held:** the occasion of publishing the libel was absolutely privileged.—**PEDLEY v. MORRIS**

k. Letter written to justice—By informer.]—LOWTHER v. BAXTER (1890), 22 N. S. R. (10 R. & G.) 372.—**CAN.**

PART VI. SECT. 2, SUB-SECT. 2.—

A. (d).

1. Complaint to magistrate.]—A defamatory statement in a complaint to a magistrate is absolutely privileged.—**Re MUTHUSAMI NAIDU (1912), 1 L. R. 37 Mad. 110.—IND.**

m. Letter to other party's solicitor—Settlement of outstanding claim.]—A communication by a party to a legal

(1891), 61 L. J. Q. B. 21; 65 L. T. 526; 40 W. R. 42; 8 T. L. R. 2; 36 Sol. Jo. 13, D. C.

1405. Affidavit in interlocutory proceedings.]—An affidavit in an interlocutory proceeding is privileged, & cannot form the subject of a civil action. Therefore, where it was alleged that deft. has libelled pltf. in such an affidavit:—*Held*: no action would lie against deft.—*GOMPAS v. WHITE* (1889), 54 J. P. 22; 6 T. L. R. 20, D. C.

1406. Complaint against solicitor—Sent to Law Society—Solicitors Act, 1888 (c. 65).]—A letter of complaint against a solr. in respect of his professional conduct, with affidavit of alleged charges attached, forwarded to the Registrar of the Incorporated Law Society, in accordance with Form I. in the schedule of the Rules under Solicitors Act, 1888 (c. 65), is so essentially a step in a judicial proceeding that statements in such letter or affidavit will be absolutely privileged.—*LILLEY v. RONEY* (1892), 61 L. J. Q. B. 727; 8 T. L. R. 642; 36 Sol. Jo. 595, D. C.

Annotation:—*Folld. Bottomley v. Brougham*, [1908] 1 K. B. 584.

1407. Preliminary examination of witness by solicitor—In preparing proof for trial.]—The privilege which protects a witness from an action of slander in respect of his evidence in the box also protects him against the consequence of statements made to the client & solr. in preparing the proof for trial.—*WATSON v. M'EWAN*, *WATSON v. JONES*, [1905] A. C. 480; 74 L. J. P. C. 151; 93 L. T. 489, H. L.

Annotations:—*Folld. Beresford v. White* (1914), 30 T. L. R. 591. *Distd. Gerhold v. Baker* (1918), 35 T. L. R. 102.

1408. ———.]—The preliminary examination of a witness by a solr. is within the same privilege as that which the witness would have if he had said the same thing in his sworn testimony in ct.—*BERESFORD v. WHITE* (1914), 30 T. L. R. 591; 58 Sol. Jo. 670, C. A.

1409. Report by official receiver—Under Companies Act, 1890 (c. 63).]—*BOTTOMLEY v. BROUGHAM*, No. 1329, *ante*.

1410. ———.]—*BURR v. SMITH*, No. 1334, *ante*.

1411. Report by Inspector-General in Bankruptcy—Under Companies Act, 1890 (c. 63).]—*BURR v. SMITH*, No. 1334, *ante*.

1412. Report of chief clerk—To judge in Chancery Division.]—*BURR v. SMITH*, No. 1334, *ante*.

1413. Notices of objection—Under Licensing Act, 1910 (c. 24).]—*ATTWOOD v. CHAPMAN*, No. 1341, *ante*.

B. Proceedings in Parliament.

(a) Statements by Members in Either House.

See, generally, PARLIAMENT.

1414. General rule.]—If a member of Parliament publish in the newspapers his speech as delivered in Parliament, & it contains charges of a slanderous nature against an individual, an information will lie for a libel; though had the words been merely delivered in Parliament, they

proceeding directly to the solr. of the other party, that communication being reasonably necessary for the purpose of enclosing money & settling an outstanding claim, must be regarded as a privileged one.—*WARD v. MCINTYRE* (1920), 48 N. B. R. 233; 56 D. L. R. 208.—CAN.

PART VI. SECT. 2, SUB-SECT. 2.—B. (a).

1414.1. General rule.]—No action for defamation will lie upon any question put by a member of a colonial parlia-

ment in the course of its proceedings.—*GIPPS v. MCLEHONE* (1881), 2 N. S. W. L. R. 18.—AUS.

PART VI. SECT. 2, SUB-SECT. 2.—B. (b).

n. General rule.]—An action for libel contained in communications to the govt. with a view of obtaining redress, cannot be sustained, unless the party making them acted maliciously & without probable cause.—*RODGERS v. SPALDING* (1844), 1 U. C. R. 258.—CAN.

would be dispunishable in the cts. at Westminster.—*R. v. ABINGDON (LORD)* (1794), 1 Esp. 226, N. P.

Annotations:—*Folld. R. v. Creevey* (1813), 1 M. & S. 273. *Apld. Flint v. Pike* (1825), 4 B. & C. 473. *Dbtd. Stockdale v. Hansard* (1839), 9 Ad. & El. 1. *Consd. Davison v. Duncan* (1857), 7 E. & B. 229. *Distd. Wason v. Walter* (1868), L. R. 4 Q. B. 73. *Refd. Hodgson v. Scarlett* (1817), Holt, N. P. 621; *R. v. Carlile* (1819), 3 B. & Ald. 167; *Lewis v. Walter* (1821), 4 B. & Ald. 605; *R. v. Harvey* (1823), 3 Dow. & Ry. K. B. 464; *Roberts v. Brown* (1834), 10 Bing. 519; *R. v. Munslow*, [1895] 1 Q. B. 758; *Jones v. Hulton*, [1909] 2 K. B. 444. *Mentd. R. v. Pembroke* (1842), 3 Q. B. 901.

1415. ———.]—A member of the House of Commons may be convicted upon an indictment for a libel in publishing in a newspaper the report of a speech delivered by him in that House, if it contain libellous matter, although the publication be a correct report of such speech, & be made in consequence of an incorrect publication having appeared in that & other newspapers.—*R. v. CREEVEY* (1813), 1 M. & S. 273; 105 E. R. 102.

Annotations:—*Folld. R. v. Harvey* (1823), 2 B. & C. 257. *Apld. Flint v. Pike* (1825), 4 B. & C. 473. *Dbtd. Stockdale v. Hansard* (1839), 9 Ad. & El. 1. *Distd. Wason v. Walter* (1868), L. R. 4 Q. B. 73. *Refd. R. v. Carlile* (1819), 3 B. & Ald. 167; *Lewis v. Walter* (1821), 4 B. & Ald. 605; *Saunders v. Mills* (1829), 6 Bing. 213; *Roberts v. Brown* (1834), 10 Bing. 519; *Davison v. Duncan* (1857), 7 E. & B. 229; *Steele v. Brannan* (1872), L. R. 7 C. P. 261. *Mentd. R. v. Bezan* (1839), 7 Dowl. 680; *King v. R.* (1849), 14 Q. B. 31.

1416. ———.]—It is clear that statements made by members of either House of Parliament in their places in the House, though they might be untrue to their knowledge, could not be made the foundation of civil or criminal proceedings, however injurious they might be to the interest of a third person (*COCKBURN, C.J.*).—*Ex p. WASON* (1869), L. R. 4 Q. B. 573; 10 B. & S. 580; 38 L. J. Q. B. 302; 17 W. R. 881.

Annotations:—*Mentd. R. v. Adamson, etc. Tynemouth JJ. & Spence* (1875), 24 W. R. 250; *Ex p. Reid* (1885), 49 J. P. 600; *Ex p. Lewis* (1888), 21 Q. B. D. 191; *Re Boaler, Re Vexatious Actions Act, 1896*, [1914] 1 K. B. 122.

1417. Subsequent publication of speech—By individual member.]—*R. v. ABINGDON (LORD)*, No. 1414, *ante*.

1418. ———.]—In consequence of previous incorrect publication.]—*R. v. CREEVEY*, No. 1415, *ante*.

(b) Petition to Either House.

1419. Presentation of scandalous petition—Whether indictable.]—Publishing a scandalous petition presented to the House of Lords, or a scandalous affidavit made in a ct. of justice is an indictable offence.—*R. v. SALISBURY* (1698), 1 Ld. Raym. 341; 91 E. R. 1124.

1420. Publication of copies of petition—To members concerned.]—If a petition to Parliament be referred to a committee, an action will not lie for printing & distributing a number of copies for the use of the members, although the matter be false & scandalous.—*LAKE v. KING* (1670), 1 Mod. Rep. 58; 1 Lev. 240; 1 Saund. 131; 86 E. R. 729.

Annotations:—*Consd. R. v. Creevey* (1813), 1 M. & S. 273; *Stockdale v. Hansard* (1839), 9 Ad. & El. 1. *Refd. Astley v. Younge* (1759), 2 Burr. 807; *Hodgson v. Scarlett* (1818), 1 B. & Ald. 232; *Lewis v. Walter* (1821), 4 B. &

c. Petition to Lieutenant-Governor.]

—A petition to the Lieutenant-Governor complaining of the conduct of comrs. of the ct. of requests, & charging them with partiality, corruption & connivance at extortion, signed by a number of persons, & praying for redress, is absolutely privileged, even though deft. had circulated it & been the means of obtaining signatures to it of individuals who knew nothing of the facts stated in it, & supposed it to be a totally different matter.—*STANTON v. ANDREWS* (1836), 5 O. S. 211.—CAN.

Sect. 2.—Absolute privilege: Sub-sect. 2, B. (b) & (c), & C. (a), (b) & (c).]

Ald. 605; *Flint v. Pike* (1825), 4 B. & C. 473; *Clement v. Chivis* (1829), 9 B. & C. 172; *Harrison v. Bush* (1855), 5 E. & B. 344; *Henderson v. Broomhead* (1859), 4 H. & N. 569; *Kennedy v. Hilliard* (1859), 1 L. T. 78; *Bremridge v. Latimer* (1864), 12 W. R. 878; *Wason v. Walter* (1868), L. R. 4 Q. B. 73; *Usill v. Hales*, *Usill v. Brearley*, *Usill v. Clarke* (1878), 38 L. T. 65; *Proctor v. Webster* (1885), 16 Q. B. D. 112. **Mentd.** *Howard v. Gossett*, *Gossett v. Howard* (1847), 6 State Tr. N. S. 319.

(c) Reports of Proceedings.

1421. Publication by Speaker.]—*R. v. WILLIAMS* (1886), 2 Show. 471; *Comb.* 18; 13 State Tr. 1370; 89 E. R. 1048; *subsequent proceedings PETERBOROUGH (EARL) v. WILLIAMS*, *Comb.* 43; 2 Show. 505.

Annotations:—*Consd.* *R. v. Wright* (1799), 8 Term Rep. 293. *N.F. Stockdale v. Hansard* (1839), 9 Ad. & El. 1. **Refd.** *R. v. Woodfall* (1770), 5 Burr. 2661.

1422. Publication by bookseller.]—The ct. refused to grant a criminal information against a bookseller for printing a report of the House of Commons, though it reflected on the character of an individual.—*R. v. WRIGHT* (1799), 8 Term Rep. 293; 101 E. R. 1396.

Annotations:—*Consd.* *R. v. Creevey* (1813), 1 M. & S. 273; *Stockdale v. Hansard* (1839), 9 Ad. & El. 1; *Wason v. Walter* (1868), L. R. 4 Q. B. 73. **Refd.** *R. v. Fisher* (1811), 2 Camp. 563; *Duncan v. Thwaites* (1824), 3 B. & C. 556; *Lewis v. Levy* (1858), E. B. & E. 537; *Allbutt v. Medical General Council* (1889), 23 Q. B. D. 400; *R. v. Evening News*, *Ex p. Hobbs*, [1925] 2 K. B. 158.

1423. Publication by printer—By order of the House of Commons.]—The House of Commons, in the years 1835 & 1836, made resolutions that Parliamentary papers & reports, printed for the use of the House, should be publicly sold by their printer; & afterwards a report from the Inspectors of Prisons was ordered by the House to be printed:—**Held:** if this report contained a libel on an individual, the printer of the House of Commons who sold it was liable to an action, & the resolutions of the house did not render this a privileged publication.—*STOCKDALE v. HANSARD* (1837), 7 C. & P. 731; 3 State Tr. N. S. 723; 2 Mood. & R. 9.

Annotation:—*Refd.* *Stockdale v. Hansard* (1839), 2 Per. & Dav. 1.

1424. ———.]—It is no defence in law to an action for publishing a libel, that the defamatory matter is part of a document which was, by order of the House of Commons, laid before the House, & thereupon became part of the proceedings of the House, & which was afterwards, by orders of the House, printed & published by deft.; & that the House of Commons heretofore resolved, declared, & adjudged "that the power of publishing such of its reports, votes, & proceedings as it shall deem necessary or conducive to the public interests is an essential incident to the constitutional functions of Parliament, more especially to the Commons' House of Parliament as the representative portion of it." On demurrer to a plea suggesting such a defence, a ct. of law is competent to determine whether or not the House of Commons has such privilege as will support the plea.—*STOCKDALE v. HANSARD* (1839), 9 Ad. & El. 1; 3 State Tr. N. S. 723; 2 Per. & Dav. 1; 8 L. J. Q. B. 294; 3 Jur. 905; 112 E. R. 1112.

Annotations:—*Consd.* *Wason v. Walter* (1868), L. R. 4 Q. B. 73; *Bradlaugh v. Erskine* (1883), 47 L. T. 618; *Bradlaugh v. Gossett* (1884), 12 Q. B. D. 271. **Refd.** *R. v. Howard* (1847), 10 Q. B. 411; *Henwood v. Harrison* (1872), L. R. 7 C. P. 606; *Mangena v. Lloyd* (1908), 98 L. T. 640. **Mentd.** *R. v. Millis* (1844), 10 Cl. & Fin. 534; *Handes* (1881), 8 H. & N. 218.

(1870), L. R. 3 P. C. 268.

See, now, Parliamentary Papers Act, 1840 (c. 9).

1425. ——— Speaker's certificate.]—Under Parliamentary Papers Act, 1840 (c. 9), s. 1, the ct. will stay proceedings in an action, upon a certificate by the Speaker, properly verified, that the publication mentioned in the declaration, reciting a description of it as therein given, & in respect of which the action is brought, was published by order & under the authority of the House of Commons; the declaration being verified by affidavit, & appearing to be for the publication of an alleged libel, the description of which corresponds with that in the Speaker's certificate. It is not necessary that the certificate itself should further describe the action or declaration. *Qu.*: whether the declaration need be verified at all.—*STOCKDALE v. HANSARD* (1840), 11 Ad. & El. 297; 8 Dowl. 669; 3 Per. & Dav. 346; 9 L. J. Q. B. 218; 4 Jur. 338; 113 E. R. 428.

Annotations:—*Refd.* *Howard v. Gossett* (1845), 9 J. P. 326, 342. **Mentd.** *Grubb v. Inclosure Comrs.* (1861), 3 L. T. 812.

Publication of extracts—From Parliamentary papers.]—See Sect. 3, sub-sect. 4, C., *post*.

C. Affairs of State.

(a) Advice to the Sovereign.

1426. General rule.]—(1) Plea to a declaration for libel, that deft. was the superior officer of pltf. & pltf. was under his command, & it was deft.'s duty as such superior officer to forward to the Adjutant-General of the Army letters written & sent to him as such superior officer, in relation to their military conduct, duties, & qualifications by the officers under his command, & to make, for the information of the Commander-in-Chief, reports in writing to the Adjutant-General on the subject of such letters; that deft., as such superior officer, had received from pltf. letters in relation to his military duties & to certain orders received by him as such officer, & which pltf. requested might be forwarded by deft. to the Adjutant-General; & deft., in the course of military duty & as an act of military duty, forwarded the letters to the Adjutant-General; & for the information of the Commander-in-Chief, when forwarding such letters, deft. made certain reports in writing in relation to the letters of pltf., which was the libel complained of. Replication, that the libel was written by deft. of actual malice, & without any reasonable, probable, or justifiable cause, & not *bonâ fide*, or in the *bonâ fide* discharge of deft.'s duty as such superior officer:—**Held:** the replication was bad; for that no action would lie against a military officer for an act done in the ordinary course of his duty as such officer, even if done maliciously & without reasonable or probable cause.

(2) Ministers of the Crown cannot, from reasons of the highest policy & convenience, be called to account in an action for any advice which they might think right to tender to the Sovereign, however prejudicial such advice may be to individuals (*MELLOR, L.J.*).—*DAWKINS v. PAULET (LORD)* (1869), L. R. 5 Q. B. 94; 9 B. & S. 768; 39 L. J. Q. B. 53; 21 L. T. 584; 34 J. P. 229; 18 W. R. 336.

Annotations:—*As to* (1) *Appld.* *Dawkins v. Rokeby* (1873), L. R. 8 Q. B. 255. **Refd.** *Hart v. Gumpach* (1872), L. R. 4 P. C. 439; *Henwood v. Harrison* (1872), L. R. 7 C. P. 606; *Dawkins v. Saxe Weimar (Prince Edward)*, *Dawkins v. Wynyard*, *Dawkins v. Stephenson* (1876), 24 W. R. 670; *Grant v. Secretary of State for India* (1877), 2 C. P. D. 445; *Marks v. Frogley*, [1898] 1 Q. B. 888; *Edmondson v. Rundle* (1903), 19 T. L. R. 356; *R. v. Army Council*, *Ex p. Ravenscroft*, [1917] 2 K. B. 504; *Frasor v. Balfour* (1918), 87 L. J. K. B. 1116.

1427. ———.]—*DAWKINS v. ROKEBY (LORD)*, No. 1339, *ante*.

(b) *Official Communications on State Matters.*

1428. Communication made by officer of state—In course of official duty.]—A communication relating to state matters made by one officer of state to another in the course of his official duty is absolutely privileged & cannot be made the subject of an action for libel.—*CHATTERTON v. SECRETARY OF STATE FOR INDIA IN COUNCIL*, [1895] 2 Q. B. 189; 64 L. J. Q. B. 676; 72 L. T. 858; 59 J. P. 596; 11 T. L. R. 462; 14 R. 504, C. A.

Annotation :—*Apld.* *Isaacs v. Cook*, [1925] 2 K. B. 391.

1429. ———.]—(1) A report by the High Commissioner of Australia in the United Kingdom made in his official capacity to the Prime Minister of Australia in the execution of his duty & in pursuance of the powers conferred & the duties imposed upon him in that behalf under the High Commissioner Act, 1909, of the Commonwealth of Australia, & the instructions given to him by the Prime Minister of Australia, is absolutely privileged as being a communication relating to State matters.

(2) A communication may be absolutely privileged as an act of State although it relates to commercial matters.—*ISAACS (M.) & SONS, LTD. v. COOK*, [1925] 2 K. B. 391; 94 L. J. K. B. 886; 41 T. L. R. 647; 69 Sol. Jo. 810.

——— *Foreign state.*]—*See* No. 1444, *post*.

As to privilege attaching to production of official documents.]—*See* EVIDENCE, Vol. XXII., pp. 392 *et seq.*

(c) *Reports of Naval and Military Officers.*

1430. Reports made at military courts.]—*JEKYLL v. MOORE*, No. 1338, *ante*.

1431. ———.]—The Commander-in-Chief of the Army, having directed an assemblage of commissioned military officers to hold an inquiry into the conduct of H., a commissioned officer in the Army; & H. having sued the president of the inquiry for a libel stated to be contained in the report thereupon made:—*Held*: this report was a privileged communication; it was properly rejected as evidence at the trial; & an office copy of same was also properly rejected.—*HOME v. BENTINCK* (1820), 2 Brod. & Bing. 130; 8 Price, 225; 1 State Tr. N. S. App. A. 1348; 4 Moore, C. P. 563; 129 E. R. 907, Ex. Ch.

Annotations :—*Distd.* *Blake v. Pilfold* (1832), 1 Mood. & R. 198. *Folld.* *Dawkins v. Rokeby* (1873), L. R. 8 Q. B. 255. *Consd.* *Hennessey v. Wright* (1888), 21 Q. B. D. 509. *Apld.* *Chatterton v. Secretary of State for India in Council*, [1895] 2 Q. B. 189. *Refd.* *Dawkins v. Paulet* (1869), 9 B. & S. 768; *Isaacs v. Cook*, [1925] 2 K. B. 391.

1432. ———.]—*DAWKINS v. ROKEBY* (LORD), No. 1339, *ante*.

1433. Reports made to superior officers—Conversation thereon with Member of Parliament.]—*DICKSON v. WILTON* (EARL), No. 1881, *post*.

1434. ———.]—In an action against a late Secretary of State for War, a Lord Lieutenant (Commandant of the Militia of the district) & the Colonel of a regiment of Militia, for causing, by means of false charges, the removal of pltf. from the office of Lieutenant-Colonel of the regiment; the first count being for a conspiracy to cause his removal, & making such charges in pursuance of the conspiracy; & the second for making such

charges, maliciously & without reasonable or probable cause; it appeared that charges, chiefly of neglect, based on a report of a regimental board, had been sent by the Colonel to pltf., in writing, for the purpose of being answered by him, & that the charges, & his written answers, in effect admitting a certain amount of neglect of military duty, were, with all the papers he appended thereto, sent by the Colonel-in-Chief to the Commandant, who first saw the Colonel, & then pltf., upon the subject, & heard their statements & counter-statements; & afterwards, & at the instance of the Colonel, & after both of them had applied to, & had an interview with, the Secretary of War, with a view to pltf.'s removal, sent to the Secretary of War a formal list of charges drawn up by the Colonel, & including some which were new & of a graver character, & as to which there had been no inquiry; but which, with the others, had been sent to pltf. for his answers, & were sent, with his answers in writing: & the Secretary of State thereupon, after perusing the charges & written answers, without further inquiry declared that pltf. must be desired to resign; & afterwards, on remonstrance, appointed a military board of inquiry, before whom pltf. was fully heard, but against whose conduct of the inquiry certain complaints were made by pitf.; & ultimately, after their report, directed the dismissal of pltf. upon the charges of neglect, as admitted upon his own statements:—*Held*: (1) as there was a discretionary power of removal vested in the Crown, there was no necessity for any judicial inquiry; (2) the action could not be maintained against the Secretary of State unless he had acted dishonestly; of which there was no evidence, & therefore, there was no case as against him; (3) any irregularities in the conduct of the inquiry would not be evidence even against him, unless he were shown to have been aware of & to have sanctioned them: nor unless they amounted to a wilful & substantial denial of justice; (4) to sustain a verdict for pltf. upon the first count, both the other two defts. must be convicted, as it charged, in substance, a conspiracy; but, on the other count, either might be convicted; (5) assuming the charges (or those of them on which pltf. was really dismissed) were founded upon facts, as they appeared, or were represented, to the Colonel, there was reasonable ground for preferring them; (6) if the Commandant acted honestly on the representation made to him by the Colonel, he was not liable; (7) therefore, on either count, the question for the jury, in substance, was, whether defts. acted honestly & *bonâ fide*; or without any belief in the truth of the charges, & from a bad & improper motive.—*DICKSON v. COMBERMERE* (VISCOUNT) (1863), 3 F. & F. 527, N. P.

Annotations :—*As to* (2) *Refd.* *Grant v. Secretary of State for India* (1877), 2 C. P. D. 445. *As to* (7) *Refd.* *Dawkins v. Paulet* (1869), L. R. 5 Q. B. 94.

1435. ———.]—*DAWKINS v. PAULET* (LORD), No. 1426, *ante*.

1436. Report not made in course of official duty.]—An officer in the Navy has no right to make communications upon subjects, with which he becomes acquainted in his professional capacity, except to the Govt., & therefore, a letter, written

PART VI. SECT. 2, SUB-SECT. 2.—
C. (b).

1428 i. Communication made by officer of state—In course of official duty.]—*CURSETJI v. SECRETARY OF STATE FOR INDIA* (1902), 1 L. R. 27 Bom. 189.—*IND.*

*p. Government surveyor to Provincial Secretary.]—*Pltf. was a land surveyor, appointed by the govt. of the province, & deft. wrote a letter to the Provincial Secretary, complaining of pltf.'s conduct & making certain charges against him, whereupon pltf. proceeded against him for

libel. Deft. pleaded that his letter was a privileged communication. The Comr. of Crown Lands, & not the Provincial Secretary, was the person to whom the letter should properly have been addressed:—*Held*: a privileged communication.—*KEER v. DAVISON* (1873), 9 N. S. R. 354.—*CAN.*

*Sect. 2.—Absolute privilege: Sub-sect. 2, C. (c).
Sect. 3: Sub-sect. 1, A.]*

to Lloyd's coffee house, about the conduct of the captain of a transport ship, by a lieutenant, who was superintendent on board, is not a privileged communication; nor can evidence of its being the practice for persons so circumstanced to make communications to Lloyd's, be received in an action for libel against such a person, either as furnishing a defence, in conjunction with other circumstances, or in mitigation of the damages to be recovered.—*HARWOOD v. GREEN* (1827), 3 C. & P. 141, N. P.

SECT. 3.—QUALIFIED PRIVILEGE.

SUB-SECT. 1.—NATURE OF DEFENCE.

A. In General.

1437. General rule.]—(1) A communication made *bonâ fide* in performance of a duty or with a fair & reasonable purpose of protecting the interest of the party making it is privileged, & the *onus* of proving malice lies on pltf.

Where deft. had dismissed pltf. from his service on suspicion of theft, & upon the latter coming to his counting-house for his wages, called in two other of his servants, & addressing them in the presence of pltf., said, "I have dismissed that man for robbing me: do not speak to him any more, in public or in private, or I shall think you as bad as him:—"—*Held*: a privileged communication; for, that it was the duty of deft., & also his interest, to prevent his servants from associating with a person of such a character as the words imputed to pltf., inasmuch as such association might reasonably be apprehended to be likely to be followed by injurious consequences, both to the servants & to deft. himself.

(2) To entitle pltf. in such a case to have the question of malice left to the jury, it is not enough that the facts proved are consistent with the presence of malice as well as with its absence; for, in cases of privileged communication, malice, must be proved, & therefore its absence must be presumed until such proof is given.—*SOMERVILLE v. HAWKINS* (1851), 10 C. B. 583; 20 L. J. C. P. 131; 16 L. T. O. S. 283; 15 Jur. 450; 138 E. R. 231.

Annotations:—As to (1) Consd. Taylor v. Hawkins (1851), 16 Q. B. 308. *Distd.* Senior v. Medland (1858), 4 Jur. N. S. 1039. *Apld.* Lawless v. Anglo-Egyptian Cotton Co. (1869), L. R. 4 Q. B. 262; Hunt v. G. N. Ry. (1890), 55 J. P. 234. *Refd.* Harrison v. Bush (1856), 5 E. & B. 344; Revis v. Smith (1856), 20 J. P. 453; Henwood v. Harrison (1872), L. R. 7 C. P. 606. *As to (2) Consd.* Taylor v. Hawkins (1851), 16 Q. B. 308; Harris v. Thompson (1853), 13 C. B. 333. *Apld.* Caulfield v. Whitworth (1868), 18 L. T. 527; Laughton v. Sodor & Man (Bp.) (1872), L. R. 4 P. C. 495. *Distd.* Clark v. Molyneux (1877), 3 Q. B. D. 237. *Consd.* Murdock v. Funduklian (1885), 2 T. L. R. 215. *Refd.* Gilpin v. Fowler (1854), 9 Exch. 615; Cooke v. Wildes (1855), 5 E. & B. 328; Senior v. Medland (1858), 4 Jur. N. S. 1039; Jackson v. Hopperton (1864), 16 C. B. N. S. 829; Nevill v. Fine Arts & General Insce., [1895] 2 Q. B. 156.

1438. —.]—TAYLOR v. HAWKINS, No. 1931, *post*.

1439. —.]—HARRISON v. BUSH, No. 1550, *post*.

1440. —.]—MORGAN v. LINGEN, No. 106, *ante*.

1441. —.]—WHITELEY v. ADAMS, No. 1615, *post*.

1442. —.]—W. was surveyor to the owner of an estate, to which estate he, W., also acted as steward. The owner directed W. to make inquiries as to the existence on the estate of a house of bad character. W. in the course of his inquiries was referred to the house of B., but doubt-

ing the accuracy of his information made further inquiries & in the course of doing so mentioned what he had heard of the character of B.'s house. He then ascertained that the address of B.'s house had been given him erroneously, & that, by a mistake in the number of the street, a reference had been made to B.'s house which was intended for another residence. In an action filed for libel by B. against W. for the statements made by W. while following up the inquiries directed by his employer, & the further pursuit of which inquiries had been suggested by the erroneous information he W. had received as to B.'s house, the judge directed the jury to consider whether the statements made by W. had been made in the course of the inquiries he had been directed by his employer to make, & whether such inquiries were in excess of his duty, & beyond the directions he had received from his employer or not, but did not direct them, that if the statements relied upon as slanderous were only made in the necessary course of pursuing the inquiries he had been directed by his employer to make, he would have been within his duty, & they, the jury, should then consider whether there was any proof of express malice or not:—*Held*: this direction was wrong, & in the absence of evidence of actual malice, the judge ought to have pointed out to the jury all the evidence bearing upon the character of deft.'s employment & the course of duty in which the statements charged as slanderous were made, in order that the jury might have expressly found whether such statements were or were not made in pursuance of his duties under his employment, & the ct. have been enabled to decide upon such finding whether there was or was not existing such malice as would be implied by law & which might be rebutted by the character of privileged communication attaching to such statements.—*BRETT v. WATSON* (1872), 20 W. R. 723.

1443. —.]—LAUGHTON v. SODOR & MAN (Bp.), No. 1451, *post*.

1444. —.]—In an action brought in Her Majesty's Supreme Ct. for China & Japan, for false representations made by the deft., occupying an official post in the service of the Emperor of China, to the Tsung-li-Yamen, the head of the Foreign Board at Peking, respecting the conduct of pltf. as a professor in the college established there, which led to his dismissal by that Board, the alleged misrepresentations being, that pltf. had asked to be relieved from his duties & declined to perform them, & that he had absented himself from Peking at a time when his active services might be required at the college. Deft., in reply, denied that he had made any false representations, & asserted that such representations as he had made were contained in a report made by him in the course of his duty as an officer of the Chinese Govt. The judge, in his summing up, directed the jury that, whether deft. had made false representations, & the Chinese Govt. had dismissed pltf. in consequence, was a thing specially for the jury to consider, & whether the representations were warranted by facts. The jury found for pltf. & gave large damages. A rule *nisi* was afterwards obtained for a nonsuit or new trial, on the ground of misdirection, & that the verdict was against evidence. The misdirections complained of were (a) that the judge did not direct the jury that the representations were privileged; (b) not leaving to the jury the question whether the representations were wilfully false; & (c) that there was no evidence to go to the jury that the representations were wilfully false. The Supreme Ct. discharged the rule.

On appeal:—*Held*: (1) the judge's summing up was erroneous, the representations complained of were privileged communications, the judge ought to have explained to the jury the relation & position of the parties, & have told them that the action would not lie, if the statements were made honestly & in a belief of their truth, without proof of express malice, & not whether they were warranted in fact; (2) the burden was on pltf. to prove that they were not so made.—*HART v. GUMPACH* (1873), L. R. 4 P. C. 439; 9 Moo. P. C. C. N. S. 241; 42 L. J. P. C. 25; 21 W. R. 365; 17 E. R. 505, P. C.

1445. —.]—A. interested herself in obtaining subscriptions for the relief of pltf., a lady in distressed circumstances. B., who was interested in the case, applied to deft., the secretary of the charity organisation society, for information as to pltf.'s character, & received an unfavourable report which, by leave of the secretary, she communicated to A. The subscriptions were thereupon withdrawn. Pltf. then sued the secretary for libel. The society was formed for the purpose (*inter alia*) of investigating the cases of applicants for charitable relief [*i.e.* for the suppression of mendicity]:—*Held*: (1) the report was a privileged communication, & in the absence of proof of malice, the action could not be maintained.

(2) According to *Harrison v. Bush*, No. 1550, *post*, a communication which a person makes *bond fide* in discharge of a moral or social duty of imperfect obligation, is privileged. To which I may add, that such is the case where the person giving the information *bond fide* thinks that he is discharging a moral or social duty, & this is so whether the communication is made in answer to an inquiry or voluntarily (*JESSEL, M.R.*).—*WALLER v. LOCH* (1881), 7 Q. B. D. 619; 51 L. J. Q. B. 274; 45 L. T. 242; 46 J. P. 484; 30 W. R. 18.

Annotations:—As to (1) *Reid*. London Asscn. for Protection of Trade v. Greenlands, [1916] 2 A. C. 15. As to (2) *Dbtd*. Stuart v. Bell, [1891] 2 Q. B. 341. His [*JESSEL M.R.*] observation, if intended to apply to privileged occasions, is not in conformity with other authorities (*LINDLEY, L.J.*).

1446. —.]—The rule as to a privileged communication is that it must be made "in discharge of a moral or social duty of imperfect obligation," *i.e.* as between the person who makes the communication & the person to whom it is made.—*JONES v. WILLIAMS* (1885), 1 T. L. R. 572, D. C.

1447. Necessity for absence of malice.]—*WRIGHT v. WOODGATE*, No. 1635, *post*.

1448. —.]—(1) In an action for slander, deft. pleaded a confidential communication, justified by circumstances, & a firm belief upon his part in the truth of that which he communicated. Upon special demurrer:—*Held*: the plea was bad, inasmuch as, to render a confidential communication a complete defence to an action, there should be a combination of two circumstances, the propriety of the occasion on which the communication is made, & the absence of express malice or malice in fact against pltf.; & the plea did not negative, either in express terms, or impliedly, the absence of such malice, but confined itself to the grounds of a communication justified by circumstances, & deft.'s belief in the truth of that which he had asserted.

(2) A plea in bar which merely denies that pltf. has sustained special damage is bad, where the words are actionable in themselves.—*SMITH v. THOMAS* (1835), 2 Bing. N. C. 372; 4 Dowl. 333; 1 Hodg. 353; 2 Scott, 546; 5 L. J. C. P. 52; 132 E. R. 146.

—As to (1) *Reid*. Delegal v. Highley (1837), 3 Hodg. 158.

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1449. —.]—*MORGAN v. LINGEN*, No. 106, *ante*.

1450. —.]—(1) In an action for slander, where the words are spoken on a privileged occasion, pltf. will be nonsuited, unless evidence of express malice is given.

(2) Proof that the words are false, without evidence that they are false to deft.'s knowledge will not entitle pltf. to have the question of malice left to the jury.

(3) The mere pleading a justification is no evidence of malice.—*CAULFIELD v. WHITWORTH* (1868), 18 L. T. 527; 16 W. R. 936.

Annotation:—As to (3) *Reid*. Mangena v. Lloyd (1908), 98 L. T. 640.

1451. —.]—(1) The charge of a bishop to his clergy in Convocation is, in the ordinary sense of the term, a privileged communication; on the well known principle that a communication made *bond fide* upon any subject-matter in which the party has an interest, or in reference to which he has, or honestly believes he has, a duty, is privileged, or made to a person having a corresponding interest or duty, although it contains criminatory matter which without that privilege would be defamatory & actionable; provided that the occasion on which the communication is made rebuts the *prima facie* inference of malice in fact arising from a statement prejudicial to the character of pltf., & the *onus* is upon him to prove that there was actual malice, that deft. was actuated by motives of personal spite or ill will independent of the occasion on which the communication was made. So, held, where the Bishop of Sodor & Man, in a charge to his clergy in Convocation, commented on a speech made by a barrister in his character of an advocate instructed to oppose a bill before the House of Keys promoted by the Govt., vesting additional ecclesiastical patronage in the bishop, in which he impugned the conduct of the bishop, & attributed to him motives & conduct unworthy of his character & position.

(2) The circumstances of the case warranted the bishop in sending such charge to a newspaper for publication; & such course being in self-defence rebutted any presumption of malice on the part of the bishop.

(3) Some expressions here used undoubtedly go beyond what was necessary for self-defence, but it does not therefore follow that they afford evidence of malice for a jury. To submit the language of privileged communications to a strict scrutiny, & to hold all excess beyond the absolute exigency of the occasion to be evidence of malice would in effect greatly limit, if not altogether defeat, that protection which the law throws over privileged communications (*SIR ROBERT COLLIER*).—*LAUGHTON v. SODOR & MAN* (BP.) (1872), L. R. 4 P. C. 495; 9 Moo. P. C. C. N. S. 318; 42 L. J. P. C. 11; 28 L. T. 377; 37 J. P. 244; 21 W. R. 204; 17 E. R. 534, P. C.

Annotations:—As to (1) *Appld*. Adam v. Ward, [1917] A. C. 309. *Reid*. Hart v. Gumpach (1873), L. R. 4 P. C. 439; Murdock v. Funduklian (1885), 2 T. L. R. 215. As to (3) *Consd*. Jenoure v. Delmege, [1891] A. C. 73. *Apprvd*. Nevill v. Fine Arts & General Insce., [1895] 2 Q. B. 156. *Consd*. Adam v. Ward, [1917] A. C. 309. *Reid*. Gerhold v. Baker (1918), 63 Sol. Jo. 135.

1452. —.]—*TURNER v. BOWLEY & SON* (1896), 12 T. L. R. 402, C. A.

1453. —.]—*Applts.* were merchants in England & had customers in South America. *Resps.* were a German banking co. with a branch in London & were agents for the South American branches of another German bank. When war broke out in Aug. 1914, *resps.* held bills drawn upon *applts.* & *applts.* held bills drawn in their

Sect. 3.—Qualified privilege: Sub-sect. 1, D.; sub-sect. 2, A. & B. (a).]

1478. — Through misdirection of letter.]—Deft. wrote defamatory statements of pltf. in a letter to W. under circumstances which made the publication of the letter to W. privileged, but by mistake deft. placed it in an envelope directed to another person who received & read the letter. In an action for libel:—*Held*: the letter having been written to W. under circumstances which caused the legal implication of malice to be rebutted, the publication to the other person, though made through the negligence of deft., was privileged in the absence of malice in fact on his part.—*TOMPSON v. DASHWOOD* (1883), 11 Q. B. D. 43; 52 L. J. Q. B. 425; 48 L. T. 943; 48 J. P. 55, D. C.

Annotations:—*Apld.* Jones v. Thomas (1885), 53 L. T. 678. *Distd.* Hebditch v. MacIlwaine, [1894] 2 Q. B. 54.

SUB-SECT. 2.—EFFECT OF PRESENCE OF THIRD PARTY.

A. Action for Libel.

1479. Occasion privileged—No evidence of malice.]—Deft., the manager of a business of which A. was owner, at the request of B., wrote down & signed as a witness a confession wherein B. declared himself guilty of having robbed A. his late employer, & implicated pltf. who had been discharged from the service of A. three weeks before, as having shared with him, B., in the proceeds of the theft. There were present, when the document was written, B., A., deft., deft.'s wife, & one C., a person also in the employ of A. Pltf. brought an action for damages for libel against deft., which was tried in the county ct., where he recovered a verdict & £10 damages:—*Held*: (1) deft. had acted in performance of a social duty, & there being no inference of malice, the communication was privileged by reason of the occasion being privileged; (2) the fact of deft.'s wife & C. being present did not divest the occasion of being privileged.—*JONES v. THOMAS* (1885), 53 L. T. 678; 50 J. P. 149; 34 W. R. 104; 2 T. L. R. 95, D. C.

Annotation:—*As to* (2) *Refd.* Wennhak v. Morgan (1888), 57 L. J. Q. B. 241.

1480. —.]—*PULLMAN v. HILL & Co.*, No. 1069, ante.

1481. Whether privilege avoided—Mode of publication reasonable & necessary—Causing report to be printed.]—Pltf. was the agent of defts., a trading co., & it was part of his duty to furnish them with an account of his transactions, to enable them to prepare the balance sheet for the inspection of the shareholders. This balance sheet was prepared & duly referred to the auditors, who reported that there was a deficiency for which pltf. was responsible, & that his accounts had been badly kept. There was evidence that an explanation had been offered to the auditors, which they had disregarded; but no evidence that the directors had any knowledge of this explanation. The directors, after laying the accounts before a general meeting of the shareholders, caused a letter containing the part of the report which affected the character of pltf. to be printed & forwarded to the absent shareholders:—*Held*: (1) this letter was published on a privileged occasion, as it was the duty of defts. to communicate to all the share-

holders any part of the report of the auditors which materially affected the accounts of the co.; (2) there was no intrinsic or extrinsic evidence of malice to be left to the jury, as the report of the auditors was published without comment, & the explanations offered to the auditors did not come before defts.; & causing the letter to be printed was a reasonable & necessary mode of publishing it to the absent shareholders.—*LAWLESS v. ANGLO-EGYPTIAN COTTON CO.* (1869), L. R. 4 Q. B. 262; 10 B. & S. 226; 38 L. J. Q. B. 129; 33 J. P. 693; 17 W. R. 498.

Annotations:—*As to* (1) *Refd.* Edmondson v. Birch & Horner, [1907] 1 K. B. 371. *As to* (2) *Apld.* Edmondson v. Birch & Horner, [1907] 1 K. B. 371. *Generally, Refd.* Henwood v. Harrison (1872), L. R. 7 C. P. 606; Pittard v. Oliver, [1891] 1 Q. B. 474.

1482. — Transmission by cable.]—The transmission unnecessarily by a post office telegram of libellous matter, which would have been privileged if sent in a sealed letter, avoids the privilege.—*WILLIAMSON v. FREER* (1874), L. R. 9 C. P. 393; 43 L. J. C. P. 161; 30 L. T. 332; 22 W. R. 878.

Annotations:—*Distd.* Pittard v. Oliver, [1891] 1 Q. B. 474. *Refd.* Sadgrove v. Hole, [1901] 2 K. B. 1.

1483. —.]—*EDMONDSON v. BIRCH & Co., LTD. & HORNER*, No. 1486, post.

1484. — Transmission by post card—Words not understood by third party in defamatory sense.]—Deft. sent a post card through the post on an occasion which, as between deft. & the person to whom the post card was sent, was privileged. The statements contained in the post card had reference to pltf., & would, if connected with him, have been defamatory of him, but the post card did not disclose the name of pltf. or contain any indication that the statements in it referred to him, & no evidence was produced to show that those statements were understood to refer to the pltf. by any person through whose hands the post card passed except the person to whom the post card was sent:—*Held*: pltf. had failed to show publication of a libel on him other than on a privileged occasion, & though the mere fact that a communication had been sent by a post card instead of by a closed letter would generally be evidence of malice, in the present case, inasmuch as the communication would not be understood by the persons through whose hands it passed as referred to pltf., there was no evidence of express malice to avoid the privilege.—*SADGROVE v. HOLE*, [1901] 2 K. B. 1; 70 L. J. K. B. 455; 84 L. T. 647; 49 W. R. 473; 17 T. L. R. 332; 45 Sol. Jo. 342, C. A.

Annotation:—*Consd.* Huth v. Huth, [1915] 3 K. B. 32.

1485. — Letter dictated to clerk—Copied by another.]—A solr., acting on behalf of his client, wrote & sent to pltf. a letter containing defamatory statements about her; the letter was dictated to one clerk & copied into the letter-book by another:—*Held*: the occasion was privileged, since the communication, if made by the solr. direct to pltf., would have been privileged, & the publication to the clerks was necessary & usual in the discharge of his duty to his clients, & was made in the interest of his client.

It seems to me clear that there was evidence of publication by communicating the letter to the clerks (*LOPES, L.J.*).—*BOXSIUS v. GOBLET FRÈRES*, [1894] 1 Q. B. 842; 63 L. J. Q. B. 401; 70 L. T. 368; 58 J. P. 670; 42 W. R. 392; 10 T. L. R. 324; 38 Sol. Jo. 311; 9 R. 224, C. A.

Annotations:—*Consd.* Edmondson v. Birch & Horner,

by a person believing he was acting as a constable in an endeavour to ferret out a crime & bring the guilty party

to justice, but who was as a matter of fact not a constable, & was not acting under orders from any person

authority, is not privileged.—*TRAFTON v. DESCHENS* (1917), 44 N. B. R. 552;

1907] 1 K. B. 371. *Appld. Morgan v. Wallis* (1917), 33 L. L. R. 495; *Isaacs v. Cook*, [1925] 2 K. B. 391. *Reid. Greenlands v. Wilmshurst & London Asscn. for Protection of Trade*, [1913] 3 K. B. 507; *Roff v. British & French Chemical Manufacturing Co. & Gibson*, [1918] 2 K. B. 677.

1486. ————.]—A co. in Japan engaged pltf. as their mining manager for three months, the engagement to be continued permanently if their correspondents, a London co., approved. The former co. having consulted the latter, the managing director of the latter sent in reply a letter, in which he expressed a fear that pltf. might acquire information at his employers' expense & use it not for their benefit, but his own; & he subsequently sent a cablegram in code words meaning that the Japanese co. should have no dealings with pltf., but should give him notice of dismissal. The letter was dictated by the managing director to a clerk in the employment of his co., by whom it was taken down in shorthand, typewritten, & copied into the co.'s open letter book; & the cablegram was dictated to a clerk, by whom it was typewritten, & along with its translation, copied into the co.'s cable book; & it was then delivered to the employees of the telegraph co., by whom it was transmitted to the Japanese co. Pltf. brought an action for libel against the London co., in respect of the statements in the letter & the cablegram. The evidence showed that these communications had been sent in accordance with the ordinary course of business in the offices of the London co., & that it was necessary in the circumstances to send the second communication by cable:—*Held*: the publication by defts. of the statements complained of to the Japanese company was privileged; & as they had been transmitted to that co. by the usual & necessary means, their incidental publication to the clerks of the London co. & of the telegraph co. was also privileged.—*EDMONDSON v. BIRCH & Co., LTD., & HORNER*, [1907] 1 K. B. 371; 76 L. J. K. B. 346; 96 L. T. 415; 23 T. L. R. 234; 51 Sol. Jo. 207, C. A.

Annotations:—*Appld. Roff v. British & French Chemical Manufacturing Co. & Gibson*, [1918] 2 K. B. 677; *Isaacs v. Cook*, [1925] 2 K. B. 391.

1487. ———— *Letter opened in ordinary course of business—By addressee's clerk.*]—A dispute with reference to a commercial transaction between defts. & M. & C. having been referred to arbitration, M. & C. proposed to appoint pltf. as their arbitrator. Defts. objected to his appointment & wrote to M. & C. a letter containing defamatory statements concerning pltf. The letter was opened in the ordinary course of business by a clerk of the firm, who placed it on the desk of another clerk, who handed it to one of the principals. In an action for libel defts. pleaded that the letter was written on a privileged occasion. At the trial the jury found that the letter was a libel, but that there was no malice, & assessed the damages. Upon these findings judgment was given for pltf.:—*Held*: (1) the letter was a communication between parties having a common interest in its subject-matter, the occasion was therefore privileged; (2) the privilege was not lost by the publication to the clerks of M. & C., & judgment ought therefore to be entered for defts.—*ROFF v. BRITISH & FRENCH CHEMICAL MANU-*

FACTURING CO. & GIBSON, [1918] 2 K. B. 677; 87 L. J. K. B. 996; 119 L. T. 436; 34 T. L. R. 485; 62 Sol. Jo. 620, C. A.

B. Action for Slander.

(a) In General.

1488. Liability for false charges.]—If an apprentice, whose master's business lies in precious articles constantly lying about, is an habitual thief, the master may discharge him; & charges of theft made to his father will be privileged, but the master will be liable in slander for false charges made to third parties.—*COX v. MATHEWS* (1861), 2 F. & F. 397, N. P.

Annotations:—*Mentd. Lewis v. Peacey* (1862), 10 W. R. 797; *Learoyd v. Brook*, [1891] 1 Q. B. 431.

1489. Whether privilege avoided — Proof of malice.]—A., the tenant of a farm, required some repairs to be done at the farm house, & B., the agent of the landlord, directed C. to do the work. C. did it, but in a negligent manner, & during the progress of it, got drunk; & some circumstances occurred which induced A. to believe that C. had broken open his cellar door & obtained access to his cyder. A., two days afterwards, met C. in the presence of D. & charged him with having broken his cellar door, & with having got drunk & spoilt the work. A., afterwards told D. in the absence of C. that he was confident C. had broken open the door. On the same day A. complained to B. that C. had been negligent in his work, had got drunk, & he thought he had broken open his cellar door:—*Held*: (1) the complaint to B. was a privileged communication, if made *bonâ fide*, & without any malicious intention to injure C.; (2) the statement made to C. in the presence of D. was also privileged, if done honestly & *bonâ fide*; & the circumstance of its being made in the presence of a third person does not of itself make it unauthorised, & it was a question to be left to the jury to determine from the circumstances, including the style & character of the language used, whether A. acted *bonâ fide*, or was influenced by malicious motives; (3) the statement to D. in the absence of C. was unauthorised & officious, & therefore not protected, although made in the belief of its truth, if it were in point of fact false.

(4) The law considers such publication as malicious, unless it is fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs, in matters where his interest is concerned. In such cases, the occasion prevents the inference of malice, which the law draws from unauthorised communications, & affords a qualified defence depending upon the absence of actual malice. If fairly warranted by any reasonable occasion or exigency, & honestly made, such communications are protected for the common convenience & welfare of society; & the law has not restricted the right to make them within any narrow limits (*PARKE, B.*).—*TOOGOOD v. SPYRING* (1834), 1 Cr. M. & R. 181; 4 Tyr. 582; 3 L. J. Ex. 347; 149 E. R. 1044.

Annotations:—*As to* (1) *Consd. Stuart v. Bell*, [1891] 2 Q. B. 341. *As to* (2) *Folld. Padmore v. Lawrence* (1840), 11 Ad. & El. 380; *Taylor v. Hawkins* (1851), 16 Q. B. 308. *Consd. Jackson v. Hopperton* (1864), 16 C. B. N. S.

PART VI. SECT. 3, SUB-SECT. 2.— B. (a).

**1489 i. Whether privilege avoided—
of malice.**]—*ROBB v. MORRISON* (1920), 20 S. R. N. S. W. 163; 37 N. S. W. W. N. 21.—*AUS.*

1489 ii. ————.]—*MACINTOSH v.*

COHEN (1904), 24 N. Z. L. R. 625.—*N.Z.*

1489 iii. ————.]—*HILL v. BALKIND*, [1918] N. Z. L. R. 740.—*N.Z.*

1489 iv. ————.]—Where a defamatory publication is addressed to some person to whom the speaker is privileged to make it, the presence

of other people does not destroy the privilege, unless the fact that the statement was made in their hearing is sufficient either alone, or with other circumstances of the case, to prove the existence of actual malice on the part of the speaker.—*TOSSEL v. FARRANT* (1909), T. S. 693.—*S. AF.*

Sect. 3.—Qualified privilege: Sub-sect. 1, D.; sub-sect. 2, A. & B. (a).]

1478. — Through misdirection of letter.]

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Annotations:—*Appld.* *Jones v. Thomas* (1885), 53 L. T. 678. *Dbtd.* *Hebditch v. MacIlwaine*, [1894] 2 Q. B. 54.

SUB-SECT. 2.—EFFECT OF PRESENCE OF THIRD PARTY.

A. Action for Libel.

1479. Occasion privileged—No evidence of malice.]—Deft., the manager of a business of which A. was owner, at the request of B., wrote down & signed as a witness a confession wherein B. declared himself guilty of having robbed A. his late employer, & implicated pltf. who had been discharged from the service of A. three weeks before, as having shared with him, B., in the proceeds of the theft. There were present, when the document was written, B., A., deft., deft.'s wife, & one C., a person also in the employ of A. Pltf. brought an action for damages for libel against deft., which was tried in the county ct., where he recovered a verdict & £10 damages:—*Held*: (1) deft. had acted in performance of a social duty, & there being no inference of malice, the communication was privileged by reason of the occasion being privileged; (2) the fact of deft.'s wife & C. being present did not divest the occasion of being privileged.—*JONES v. THOMAS* (1885), 53 L. T. 678; 50 J. P. 149; 34 W. R. 104; 2 T. L. R. 95, D. C.

Annotation:—*As to* (2) *Refd.* *Wonnhak v. Morgan* (1888), 57 L. J. Q. B. 241.

1480. —.]—*PULLMAN v. HILL & Co.*, No. 1069, ante.

1481. Whether privilege avoided—Mode of publication reasonable & necessary—Causing report to be printed.]—Pltf. was the agent of defts., a trading co., & it was part of his duty to furnish them with an account of his transactions, to enable them to prepare the balance sheet for the inspection of the shareholders. This balance sheet was prepared & duly referred to the auditors, who reported that there was a deficiency for which pltf. was responsible, & that his accounts had been badly kept. There was evidence that an explanation had been offered to the auditors, which they had disregarded; but no evidence that the directors had any knowledge of this explanation. The directors, after laying the accounts before a general meeting of the shareholders, caused a letter containing the part of the report which affected the character of pltf. to be printed & forwarded to the absent shareholders:—*Held*: (1) this letter was published on a privileged occasion, as it was the duty of defts. to communicate to all the share-

holders any part of the report of the auditors which materially affected the accounts of the co.; (2) there was no intrinsic or extrinsic evidence of malice to be left to the jury, as the report of the auditors was published without comment, & the explanations offered to the auditors did not come before defts.; & causing the letter to be printed was a reasonable & necessary mode of publishing it to the absent shareholders.—*LAWLESS v. ANGLO-EGYPTIAN COTTON CO.* (1869), L. R. 4 Q. B. 262; 10 B. & S. 226; 38 L. J. Q. B. 129; 33 J. P. 693; 17 W. R. 498.

Annotations:—*As to* (1) *Refd.* *Edmondson v. Birch & Horner*, [1907] 1 K. B. 371. *As to* (2) *Appld.* *Edmondson v. Birch & Horner*, [1907] 1 K. B. 371. *Generally, Refd.* *Henwood v. Harrison* (1872), L. R. 7 C. P. 606; *Pittard v. Oliver*, [1891] 1 Q. B. 474.

1482. — Transmission by cable.]—The transmission unnecessarily by a post office telegram of libellous matter, which would have been privileged if sent in a sealed letter, avoids the privilege.—*WILLIAMSON v. FREER* (1874), L. R. 9 C. P. 393; 43 L. J. C. P. 161; 30 L. T. 332; 22 W. R. 878.

Annotations:—*Distd.* *Pittard v. Oliver*, [1891] 1 Q. B. 474. *Refd.* *Sadgrove v. Hole*, [1901] 2 K. B. 1.

1483. —.]—*EDMONDSON v. BIRCH & Co., LTD. & HORNER*, No. 1486, post.

1484. — Transmission by post card—Words not understood by third party in defamatory sense.]—Deft. sent a post card through the post on an occasion which, as between deft. & the person to whom the post card was sent, was privileged. The statements contained in the post card had reference to pltf., & would, if connected with him, have been defamatory of him, but the post card did not disclose the name of pltf. or contain any indication that the statements in it referred to him, & no evidence was produced to show that those statements were understood to refer to the pltf. by any person through whose hands the post card passed except the person to whom the post card was sent:—*Held*: pltf. had failed to show publication of a libel on him other than on a privileged occasion, & though the mere fact that a communication had been sent by a post card instead of by a closed letter would generally be evidence of malice, in the present case, inasmuch as the communication would not be understood by the persons through whose hands it passed as referred to pltf., there was no evidence of express malice to avoid the privilege.—*SADGROVE v. HOLE*, [1901] 2 K. B. 1; 70 L. J. K. B. 455; 84 L. T. 647; 49 W. R. 473; 17 T. L. R. 332; 45 Sol. Jo. 342, C. A.

Annotation:—*Consd.* *Huth v. Huth*, [1915] 3 K. B. 32.

1485. — Letter dictated to clerk—Copied by another.]—A solr., acting on behalf of his client, wrote & sent to pltf. a letter containing defamatory statements about her; the letter was dictated to one clerk & copied into the letter-book by another:—*Held*: the occasion was privileged, since the communication, if made by the solr. direct to pltf., would have been privileged, & the publication to the clerks was necessary & usual in the discharge of his duty to his clients, & was made in the interest of his client.

It seems to me clear that there was evidence of publication by communicating the letter to the clerks (*LOPES, L.J.*).—*BOXSIUS v. GOBLET FRÈRES*, [1894] 1 Q. B. 842; 63 L. J. Q. B. 401; 70 L. T. 368; 58 J. P. 670; 42 W. R. 392; 10 T. L. R. 324; 38 Sol. Jo. 311; 9 R. 224, C. A.

Annotations:—*Consd.* *Edmondson v. Birch & Horner*,

to justice, but who was as a matter of fact not a constable, & was not acting on orders from any person with party

authority, is not privileged.—*TRAFTON v. DESCHENE* (1917), 44 N. B. R. 552; 36 D. L. R. 433.—*CAN.*

1907] 1 K. B. 371. *Apld.* Morgan v. Wallis (1917), 33 L. R. 495; Isaacs v. Cook, [1925] 2 K. B. 391. *Reid.* Greenlands v. Wilmshurst & London Assn. for Protection of Trade, [1913] 3 K. B. 507; Roff v. British & French Chemical Manufacturing Co. & Gibson, [1918] 2 K. B. 677.

1486. co. in Japan engaged pltf. as their mining manager for three months, the engagement to be continued permanently if their correspondents, a London co., approved. The former co. having consulted the latter, the managing director of the latter sent in reply a letter, in which he expressed a fear that pltf. might acquire information at his employers' expense & use it not for their benefit, but his own; & he subsequently sent a cablegram in code words meaning that the Japanese co. should have no dealings with pltf., but should give him notice of dismissal. The letter was dictated by the managing director to a clerk in the employment of his co., by whom it was taken down in shorthand, typewritten, & copied into the co.'s open letter book; & the cablegram was dictated to a clerk, by whom it was typewritten, & along with its translation, copied into the co.'s cable book; & it was then delivered to the employees of the telegraph co., by whom it was transmitted to the Japanese co. Pltf. brought an action for libel against the London co., in respect of the statements in the letter & the cablegram. The evidence showed that these communications had been sent in accordance with the ordinary course of business in the offices of the London co., & that it was necessary in the circumstances to send the second communication by cable:—*Held*: the publication by defts. of the statements complained of to the Japanese company was privileged; & as they had been transmitted to that co. by the usual & necessary means, their incidental publication to the clerks of the London co. & of the telegraph co. was also privileged.—*EDMONDSON v. BIRCH & Co., LTD., & HORNER*, [1907] 1 K. B. 371; 76 L. J. K. B. 346; 96 L. T. 415; 23 T. L. R. 234; 51 Sol. Jo. 207, C. A.

Annotations:—*Apld.* Roff v. British & French Chemical Manufacturing Co. & Gibson, [1918] 2 K. B. 677; Isaacs v. Cook, [1925] 2 K. B. 391.

1487. ——— Letter opened in ordinary course of business—By addressee's clerk.]—A dispute with reference to a commercial transaction between defts. & M. & C. having been referred to arbitration, M. & C. proposed to appoint pltf. as their arbitrator. Defts. objected to his appointment & wrote to M. & C. a letter containing defamatory statements concerning pltf. The letter was opened in the ordinary course of business by a clerk of the firm, who placed it on the desk of another clerk, who handed it to one of the principals. In an action for libel defts. pleaded that the letter was written on a privileged occasion. At the trial the jury found that the letter was a libel, but that there was no malice, & assessed the damages. Upon these findings judgment was given for pltf.:—*Held*: (1) the letter was a communication between parties having a common interest in its subject-matter, the occasion was therefore privileged; (2) the privilege was not lost by the publication to the clerks of M. & C., & judgment ought therefore to be entered for defts.—*ROFF v. BRITISH & FRENCH CHEMICAL MANU-*

FACTURING CO. & GIBSON, [1918] 2 K. B. 677; 87 L. J. K. B. 996; 119 L. T. 436; 34 T. L. R. 485; 62 Sol. Jo. 620, C. A.

B. Action for Slander.

(a) In General.

1488. Liability for false charges.]—If an apprentice, whose master's business lies in precious articles constantly lying about, is an habitual thief, the master may discharge him; & charges of theft made to his father will be privileged, but the master will be liable in slander for false charges made to third parties.—*COX v. MATHEWS* (1861), 2 F. & F. 397, N. P.

Annotations:—*Mentd.* Lewis v. Peacey (1862), 10 W. R. 797; Learoyd v. Brook, [1891] 1 Q. B. 431.

1489. Whether privilege avoided — Proof of malice.]—A., the tenant of a farm, required some repairs to be done at the farm house, & B., the agent of the landlord, directed C. to do the work. C. did it, but in a negligent manner, & during the progress of it, got drunk; & some circumstances occurred which induced A. to believe that C. had broken open his cellar door & obtained access to his cyder. A., two days afterwards, met C. in the presence of D. & charged him with having broken his cellar door, & with having got drunk & spoilt the work. A., afterwards told D. in the absence of C. that he was confident C. had broken open the door. On the same day A. complained to B. that C. had been negligent in his work, had got drunk, & he thought he had broken open his cellar door:—*Held*: (1) the complaint to B. was a privileged communication, if made *bonâ fide*, & without any malicious intention to injure C.; (2) the statement made to C. in the presence of D. was also privileged, if done honestly & *bonâ fide*; & the circumstance of its being made in the presence of a third person does not of itself make it unauthorised, & it was a question to be left to the jury to determine from the circumstances, including the style & character of the language used, whether A. acted *bonâ fide*, or was influenced by malicious motives; (3) the statement to D. in the absence of C. was unauthorised & officious, & therefore not protected, although made in the belief of its truth, if it were in point of fact false.

(4) The law considers such publication as malicious, unless it is fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs, in matters where his interest is concerned. In such cases, the occasion prevents the inference of malice, which the law draws from unauthorised communications, & affords a qualified defence depending upon the absence of actual malice. If fairly warranted by any reasonable occasion or exigency, & honestly made, such communications are protected for the common convenience & welfare of society; & the law has not restricted the right to make them within any narrow limits (*PARKE, B.*).—*TOOGOOD v. SPYRING* (1834), 1 Cr. M. & R. 181; 4 Tyr. 582; 3 L. J. Ex. 347; 149 E. R. 1044.

Annotations:—*As to* (1) *Consd.* Stuart v. Bell, [1891] 2 Q. B. 341. *As to* (2) *Foll.* Padmore v. Lawrence (1840), 11 Ad. & El. 380; Taylor v. Hawkins (1851), 16 Q. B. 308. *Consd.* Jackson v. Hopperton (1864), 16 C. B. N. S.

PART VI. SECT. 3, SUB-SECT. 2.— B. (a).

1489 i. Whether privilege avoided—Proof of malice.]—*ROBB v. MORRISON* (1920), 20 S. R. N. S. W. 163; 37 N. S. W. W. N. 21.—*AUS.*

1489

COHEN (1904), 24 N. Z. L. R. 625.—*N.Z.*

1489 iii. ———.]—*HILL v. BALKIND*, [1918] N. Z. L. R. 740.—*N.Z.*

1489 iv. ———.]—Where a defamatory publication is addressed to some person to whom the speaker is privileged to make it, the presence

of other people does not destroy the privilege, unless the fact that the statement was made in their hearing is sufficient either alone, or with other circumstances of the case, to prove the existence of actual malice on the part of the speaker.—*TOSSEL v. FARRANT* (1909), T. S. 693.—*S. AF.*

Sect. 3.—Qualified privilege: Sub-sect. 2, B. (a) & (b); sub-sect. 3, A. (a) & (b) i.]

829; *Adam v. Ward*, [1917] A. C. 309. *Refd.* *Griffiths v. Lewis* (1845), 7 Q. B. 61; *Cooke v. Wildes* (1855), 5 E. & B. 328; *Senior v. Medland* (1858), 4 Jur. N. S. 1039; *Lawless v. Anglo-Egyptian Cotton Co.* (1869), L. R. 4 Q. B. 262; *Henwood v. Harrison* (1872), L. R. 7 C. P. 606. *As to (3)* *Refd.* *Kine v. Sewell* (1838), 3 M. & W. 297; *Manby v. Witt* (1856), 18 C. B. 544. *As to (4)* *Apld.* *Kine v. Sewell* (1838), 3 M. & W. 297; *Blackham v. Pugh* (1846), 2 C. B. 611. *Consd.* *Coxhead v. Richards* (1846), 2 C. B. 569; *Harrison v. Bush* (1855), 5 E. & B. 344. *Apld.* *Croft v. Stevens* (1862), 7 H. & N. 570; *Whiteley v. Adams* (1863), 15 C. B. N. S. 392. *Consd.* *Cowles v. Potts* (1865), 6 New Rep. 289. *Apld.* *Harrison v. Fraser* (1881), 29 W. R. 652. *Consd.* *Capital & Counties Bank v. Henty* (1882), 7 App. Cas. 741. *Apld.* *Jones v. Thomas* (1885), 53 L. T. 678; *Stuart v. Bell*, [1891] 2 Q. B. 341. *Apprvd.* *Macintosh v. Dun*, [1908] A. C. 390. *Apld.* *London Assocn. for Protection of Trade & Greenlands*, [1916] 2 A. C. 15. *Refd.* *Bennett v. Deacon* (1846), 2 C. B. 628; *Taylor v. Hawkins* (1851), 16 Q. B. 308; *Revis v. Smith* (1856), 20 J. P. 453; *Crisp v. Gill* (1857), 5 W. R. 494; *Shufflebottom v. Allday* (1857), 28 L. T. O. S. 292; *Senior v. Medland* (1858), 4 Jur. N. S. 1039; *Hamon v. Falle* (1879), 4 App. Cas. 247; *Hebditch v. MacIlwaine*, [1894] 2 Q. B. 54.

1490. ———.] — *TAYLOR v. HAWKINS*, No. 1931, *post*.

.] — Deft., who had purchased a piece of lamb from a butcher, went into the butcher's shop on the following day, & in the hearing of several persons, said to the butcher, "I meant to have dealt with you in future; but you changed a piece of lamb I bought yesterday & substituted a coarse piece of mutton":—*Held*: if used honestly the words were privileged by reason of occasion.—*CRISP v. GILL* (1857), 29 L. T. O. S. 82; 5 W. R. 494.

1492. ———.] — *DAVIES v. SNEAD*, No. 1455, *ante*.

1493. ——— *Not made to more persons than necessary.*—Deft., in the presence of a third person, not an officer of justice, charged pltf. with having stolen his property, & afterwards repeated the charge to another person, also not an officer of justice, who was called in to search pltf. with the consent of the latter:—*Held*: the charge was privileged, if deft. believed in its truth, acted *bonâ fide*, & did not make the charge before more persons, or in stronger language, than was necessary; & that it was a question for the jury, & not the judge, whether the facts brought the case within this rule.—*PADMORE v. LAWRENCE* (1840), 11 Ad. & El. 380; 2 Per. & Dav. 209; 9 L. J. Q. B. 137; 4 J. P. 42; 4 Jur. 458; 113 E. R. 460.

Annotations:—*Apld.* *Jones v. Thomas* (1885), 53 L. T. 678. *Refd.* *Griffiths v. Lewis* (1845), 7 Q. B. 61; *Taylor v. Hawkins* (1851), 15 Jur. 746; *Campbell v. Spottiswoode* (1863), 27 J. P. 501; *Collins v. Cooper* (1902), 19 T. L. R. 118.

1494. ——— *Warning plaintiff's fellow servants.*—*SOMERVILLE v. HAWKINS*, No. 1437, *ante*.

1495. ——— *Presence of reporters at meeting.*—A shareholder of a railway co. having summoned a meeting of shareholders which he invited others, & especially the reporters for the public press, to attend, & at this meeting made defamatory comments on the conduct of pltf., one of the directors, relating to the affairs of the co.:—*Held*: though a discussion of the matter before a meeting of shareholders would have been excused, there

1494 i. ——— *Warning plaintiff's fellow servants.*—*A. B. v. X. Y.*, C. D. v. X. Y., [1917] S. C. 15.—*SCOT*.

Strangers at meeting.—*HODGES v. GLASS* (1879), O. B. & F. 66.—*N.Z.*

Overhearing a remote possibility.—Words charging the offence of adultery uttered in the presence of the accused persons constitute a privileged communication, & the privilege is not lost by the fact that the words might have been overheard

by third persons, in the absence of evidence that the words were overheard by them.—*GORMAN v. URQUHART* (1897), 34 N. B. R. 322.—*CAN.*

PART VI. SECT. 3, SUB-SECT. 3.—A. (a).

1500 i. General rule.—*BOURGARD v. BARTHELMES* (1897), 24 A. R. 431.—*CAN.*

1500 ii. ———.]—An occasion is privi-

was not excuse for a publication to others than shareholders.—*PARSONS v. SURGEY* (1864), 4

1496. ———.]—At a meeting of a board of guardians, of which pltf. had been the clerk, a member of the board, in the course of a discussion concerning pltf.'s accounts, made certain defamatory statements concerning pltf., without malice & *bonâ fide* believing that what he said was true. In accordance with the regular custom of the board, reporters were present at the meeting:—*Held*: the privilege which would have attached to the statements, if made in the presence of guardians only, was not taken away by the presence at the meeting of reporters or persons other than guardians.—*PITTARD v. OLIVER*, [1891] 1 Q. B. 474; 60 L. J. Q. B. 219; 64 L. T. 758; 55 J. P. 100; 39 W. R. 311; 7 T. L. R. 188, C. A.

Annotation:—*Mentd.* *Tenby Corpn. v. Mason* (1908), 6 L. G. R. 233.

(b) Answers to Inquiries.

1497. Whether privilege avoided—Answer in presence of third party.—Pltf., a dissenting minister, accompanied by a friend, went to deft., who, in answer to questions put by pltf. & his friend, stated that his, deft.'s, wife had been cautioned against pltf. as a drunkard, etc.:—*Held*: (1) this was a privileged communication, & slanderous expressions used in it were not actionable, if deft. spoke *bonâ fide*, & was not actuated by malice; (2) it was incumbent on pltf. to prove that deft. was actuated by malicious motives.—*WARR v. JOLLY* (1834), 6 C. & P. 496, N. P.

Annotation:—*As to (1)* *Consd.* *Griffiths v. Lewis* (1845), 7 Q. B. 61.

1498. ———.] — *TAYLOR v. HAWKINS*, No. 1931, *post*.

1499. ——— *Answer a repetition of the slander.*—Pltf. inquired of deft. if he had accused her of using false weights in her trade. Deft., in presence of a third person, answered: "To be sure I did. You have done it for years":—*Held*: the latter words were actionable, & not privileged by reason of pltf.'s inquiry; the evidence showing that such inquiry was caused by a former statement of deft. himself.—*GRIFFITHS v. LEWIS* (1845), 7 Q. B. 61; 14 L. J. Q. B. 197; 5 L. T. O. S. 52; 9 Jur. 370; 115 E. R. 411; *subsequent proceedings* (1846), 8 Q. B. 841.

SUB-SECT. 3.—TO WHAT STATEMENTS PRIVILEGE EXTENDS.

A. Statements in Discharge of Public or Private Duty.

(a) In General.

1500. General rule.—Every wilful unauthorised publication, injurious to the character of another, is a libel; but where the writer is acting on any duty, legal or moral, towards the person to whom he writes, or where he has, by his situation, to protect the interest of that person, that which he

leged where the person who makes a communication has an interest or a duty to make it to the person to whom he does make it, & the person to whom he does make it has a corresponding interest or duty to receive it.—*BANCROFT v. CANADIAN PACIFIC RY. Co.* (1920), 2 W. W. R. 865; 53 D. L. R. 272; 30 Man. L. R. 401.—*CAN.*

1500 iii. ———.]—*OWENS v. ROBERTS* (1857), 29 L. T. O. S. 39.—*IR.*

writes under such circumstances is a privileged communication, & no action will lie for what is thus written, unless the writer be actuated by malice.

A., being a tenant of B., was desired by B. to inform him if he saw or heard anything respecting the game. A. wrote a letter to B., informing B. that his gamekeeper sold game:—*Held*: if A. had been so informed, & believed the fact to be so, this was a privileged communication, & the gamekeeper could not maintain any action for a libel.—*COCKAYNE v. HODGKISSON* (1833), 5 C. & P. 543.

Annotation:—*Consd.* *Coxhead v. Richards* (1846), 2 C. B. 569.

1501. —.]—*SHIPLEY v. TODHUNTER*, No. 896, *ante*.

1502. —.]—*DAVIES v. SNEAD*, No. 1455, *ante*.

(b) *In Answer to Inquiries.*

i. *Statements in Character given to Servant.*

1503. *Whether privileged.*—*EDMONDSON v. STEPHENSON* (1766), Bull. N. P. 8.

Annotations:—*Folld.* *Rogers v. Clifton* (1803), 3 Bos. & P. 587; *Child v. Affleck* (1829), 9 B. & C. 403. *Refd.* *Bromage v. Prosser* (1825), 4 B. & C. 247; *Blackburn v. Blackburn* (1827), 4 Bing. 395; *Coxhead v. Richards* (1846), 2 C. B. 569; *Jackson v. Hopperton* (1864), 16 C. B. N. S. 829.

1504. —.]—*LOWRY v. AIKENHEAD* (1768), cited in 3 Bos. & P. at p. 594; 127 E. R. 321.

Annotations:—*Consd.* *Rogers v. Clifton* (1803), 3 Bos. & P. 587. *Refd.* *Coxhead v. Richards* (1846), 2 C. B. 569.

1505. —.]—A servant cannot maintain an action against his former master for words spoken, or a letter written, by him, in giving a character of the servant, unless the latter prove the malice as well as falsehood of the charge; even though the master make specific charges of fraud.—*WEATHERSTON v. HAWKINS* (1786), 1 Term Rep. 110; 99 E. R. 1001.

Annotations:—*Folld.* *Rogers v. Clifton* (1803), 3 Bos. & P. 587. *Consd.* *Bromage v. Prosser* (1825), 4 B. & C. 247; *Blackburn v. Blackburn* (1827), 1 Moo. & P. 33. *Refd.* *Pearson v. Le Maitre* (1843), 12 L. J. C. P. 253.

1506. —.]—If pltf. has applied to the undersheriff of Middlesex to appoint him a sheriff's officer, & in answer to the inquiries of the undersheriff as to his fitness, deft., another officer, to whom pltf. had been a bailiff's follower, says he robbed him; such communication is confidential, & is as much privileged as the communication of a master in giving a character to a servant; & in such a case it is competent to the master, under the general issue, to put in proof any part which goes to show, that, in making the slanderous assertions, he was not actuated by malice.—*SIMS v. KINDER* (1824), 1 C. & P. 279, N. P.

1507. —.]—A. having discharged his servant, & hearing that he was about to be engaged by B., wrote a letter to B. & informed him that he had discharged him for misconduct. B., in answer, desired further information. A. then wrote a second letter to B. stating the grounds on which he had discharged the servant. In an action by the servant against A. for a libel contained in this letter:—*Held*: assuming the letter to be a privi-

leged communication, it was properly left to the jury to consider, whether the second letter was written by A. *bond fide*, or with an intention to injure the servant.

Semble: a character of a servant, if given *bond fide*, is a privileged communication, although it had not been applied for.—*PATTISON v. JONES* (1828), 8 B. & C. 578; 3 C. & P. 383; 3 Man. & Ry. K. B. 101; 7 L. J. O. S. K. B. 26; 108 E. R. 1157.

Annotations:—*Consd.* *Coxhead v. Richards* (1846), 2 C. B. 569. *Refd.* *Brooks v. Blanshard* (1833), 1 Cr. & M. 779; *Toogood v. Spyring* (1834), 4 Tyr. 582; *Fryer v. Kinnersley* (1863), 15 C. B. N. S. 422; *Henwood v. Harrison* (1872), L. R. 7 C. P. 606; *Stuart v. Bell*, [1891] 2 Q. B. 341.

1508. —.]—In an action for libel, it appeared that deft., with whom pltf. had lived as servant, in answer to inquiries respecting her character, wrote a letter imputing misconduct to her whilst in that service, & after she left it; & deft. also made similar parol statements to two persons that had recommended pltf. to her:—*Held*: neither the letter itself nor the parol statements proved malice, & consequently, the letter was a privileged communication, & pltf. not entitled to recover.—*CHILD v. AFFLECK* (1829), 9 B. & C. 403; 4 Man. & Ry. K. B. 338; 7 L. J. O. S. K. B. 272; 109 E. R. 150.

Annotations:—*Consd.* *Coxhead v. Richards* (1846), 2 C. B. 569. *Refd.* *Toogood v. Spyring* (1834), 4 Tyr. 582; *Fountain v. Boodle* (1842), 3 Q. B. 5; *Wenman v. Ash* (1853), 13 C. B. 836; *Jackson v. Hopperton* (1864), 16 C. B. N. S. 829.

1509. —.]—*COCKAYNE v. HODGKISSON*, No. 1500, *ante*.

1510. —.]—*RUMSEY v. WEBB*, No. 1541, *post*.

1511. —.]—In answer to an inquiry as to the character of a governess deft. wrote a letter in which she said, "I parted with her on account of her incompetency, & not being ladylike nor good tempered."

To this letter there was the following postscript: "May I trouble you to tell her that, this being the third time I have been referred to, I beg to decline any further applications." In an action by the governess against deft. for writing this letter, she gave evidence tending to negative the statement in it of her qualifications, & she proved that previously the writer had recommended her as a governess. The judge directed the jury that the letter being an answer to an inquiry into the character of a servant *prima facie* it was privileged, but that the letter itself & the facts proved were some evidence for them, that the writer was actuated by express malice, to rebut any inference of which deft. might have given evidence to show that the statement itself of the character was a true one, or that she believed or had reason to believe it to be a true one:—*Held*: this direction was right.—*FOUNTAIN v. BOODLE* (1842), 3 Q. B. 5; 2 Gal. & Dav. 455; 114 E. R. 408.

Annotations:—*Refd.* *Brine v. Bazalgette* (1849), 3 Exch. 692; *Gardner v. Slade* (1849), 13 Q. B. 796; *Harris v. Thompson* (1853), 13 C. B. 333; *British Ry. Traffic & Electric Co. v. C. R. C. Co. & L. C. C.*, [1922] 2 K. B. 260.

1512. —.]—*JACKSON v. HOPPERTON*, No. 1942, *post*.

1500iv. —.]—*BRADNEY v. VIRTUE* (1909), 28 N. Z. L. R. 828.—N. Z.

1500 v. —.]—*KINGAN v. WATSON* (1828), 4 Murr. 485.—SCOT.

1500 vi. —.]—*HILL v. THOMSON* (1892), 19 R. (Ct. of Sess.) 377; 29 Sc. L. R. 317.—SCOT.

1500 vii. —.]—*DIPPENAR v. HAUMAN* (1878), Buch. 135.—S. AF.

b. *Misrepresentation not protected*

by privilege—*As between banker & customer.*—*MCNICKLE v. BANK OF NEW SOUTH WALES* (1881), 2 N. S. W. L. R. 7.—AUS.

PART VI. SECT. 3, SUB-SECT. 3.—A. (b) i.

1503 i. *Whether privileged.*—When application is made for the character of a servant, the law does not compel

the master to give a character, but by law he is justified in giving a true one. He is not, however, entitled to publish it at his jovial meetings, or anywhere without sufficient cause for stating it.—*CHRISTIAN v. KENNEDY* (LORD) (1818) 1 Murr. 427.—SCOT.

c. — *Inconsistent statements.*—*MACDONALD v. M'COLL* (1901), F. (Ct. of Sess.) 1082; 38 Sc. L. R. 781; 9 S. L. T. 146.—SCOT.

Sect. 3.—Qualified privilege: Sub-sect. 3, A.
ii. & iii., & (c) i. & ii.]

1513. —.]—A letter written in answer to inquiries about the character of a servant is privileged in this sense only, that although it contains defamatory statements it will not support an action for libel unless malice is shown; but it is not privileged in the sense of being privileged from production, such privilege being confined to communications with the legal advisers of the party.—**WEBB v. EAST** (1880), 5 Ex. D. 108; 49 L. J. Q. B. 250; 41 L. T. 715; 44 J. P. 200; 28 W. R. 336, C. A.

Annotations:—Mentd. McLean & Rigg v. Jones (1892), 66 L. T. 653; Spokes v. Grosvenor Hotel Co., [1897] 2 Q. B. 124.

1514. —.]—EDMONDSON v. BIRCH & Co., LTD., & HORNER, No. 1486, *ante*.

1515. —. **Inquiry with view of obtaining actionable answer.]—**Though a letter, giving a false character of a servant, may be the ground of an action, yet if written as an answer to a letter sent, not with a view of obtaining a character, but with an intention of obtaining such an answer as should be the ground of an action, no action can be sustained.—**KING v. WARING** (1803), 5 Esp. 13, N. P.

Volunteered statements as to servants.]—See Sub-sect. 3, A. (c), *post*.

ii. Statements as to Credit of Traders.

1516. Whether privileged.]—STOREY v. CHALLANDS, No. 2144, *post*.

1517. —.]—KING v. WATTS, No. 2145, *post*.

1518. —.]—A. having contracted to build a house for B. employed C., a carpenter, to do some wood work, for which A. had given an estimate. The amount of the bill for this work exceeded the estimate, & B. applied to D. to recommend him a surveyor, upon which D. told B. that he had seen C. take away some of the quarterings. B. informed A. of it, who came to D., & asked him if he said so, & D. replied "Yes, I saw the man employed by you, take from B.'s house two long pieces of quartering. I hallooed to the man." In an action of slander brought by C. against D.:—**Held:** this was a privileged communication, & pltf. could not recover unless it appeared that deft. was actuated by malicious motives.—**KINE v. SEWELL** (1838), 3 M. & W. 297; 1 Horn & H. 83; 7 L. J. Ex. 92; 150 E. R. 1157.

Annotation:—Refd. Henwood v. Harrison (1872), L. R. 7 C. P. 606.

1519. —.]—Deft., manager of a bank, having been applied to for information respecting pltf., who had had business transactions with the bank in which appct. was interested, gave to appct. an anonymous letter, which he had received a year previously, & which contained libellous charges against pltf.:—**Held:** the communication was privileged.—**ROBSHAW v. SMITH** (1878), 38 L. T. 100.

Annotations:—Consd. Waller v. Loch (1881), 51 L. J. Q. B. 274. **N.F.** Greenlands v. Wilmshurst & London Asscn. for Protection of Trade, [1913] 3 K. B. 507.

1520. —. **Communications by trade protection society.]—**A verdict for damages having been obtained in an action for libel against resps., who carried on the business of a trade protection society, that is, of obtaining information with reference to the commercial standing & position of persons in New South Wales & elsewhere, & in communicating such information confidentially

to subscribers to the agency in response to their specific & confidential inquiries, the Full Ct. of New South Wales ordered a new trial, & the High Ct. of Australia entered judgment for resps.:—**Held:** the orders of both Cts. must be reversed. The occasion was privileged if the communication injurious to pltf.'s character was made in the general interest of society & from sense of duty; not so, if it was made from motives of self-interest by those who for the convenience of a class trade for profit in the characters of other persons, & who offer for sale information which, however cautiously & discreetly sought, may have been improperly obtained.—**MACINTOSH v. DUN**, [1908] A. C. 390; 77 L. J. P. C. 113; 99 L. T. 64; 24 T. L. R. 705, P. C.

Annotations:—Apld. Elkington v. London Asscn. for Protection of Trade (1911), 28 T. L. R. 117. **Distd.** London Asscn. for Protection of Trade v. Greenlands, [1916] 2 A. C. 15.

1521. —.]—An unincorporated body called the London Asscn. for Protection of Trade, now comprising over 6,000 members, was formed for the purpose (*inter alia*) of making inquiries as to the commercial standing & credit of traders. No qualification for membership was required beyond the payment of an annual subscription, which entitled each member to a certain number of inquiries free, & to a further number for an additional payment, but subject to a condition in every case against divulging the information so acquired. The asscn. did not trade for profit. A member of the asscn. applied for information as to the commercial credit of a trading co. with whom he proposed to deal. The secretary of the asscn. having applied to W. for the information, W. made a report, for which he was paid a small fee, containing untrue & defamatory statements of the co. The secretary sent a report in substantially the same terms to the member. In respect of the secretary's report the co. brought an action for libel against W., the asscn., & the secretary. The jury returned a verdict of £750 against W. against whom they found express malice, & of £1,000 against the asscn. & the secretary, & judgment was entered accordingly. An application to the Ct. of Appeal by the two latter defts. for judgment on the ground that the report was published on a privileged occasion was refused. In the House of Lords pltf. co. consented to the judgment obtained by them against the asscn. being set aside:—**Held:** the secretary in making the inquiry & the report was acting, not as the agent of the asscn. as a whole, but as the confidential agent of the particular member, & the publication was therefore made on a privileged occasion.—**LONDON ASSCN. FOR PROTECTION OF TRADE v. GREENLANDS, LTD.**, [1916] 2 A. C. 15; 85 L. J. K. B. 698; 114 L. T. 434; 32 T. L. R. 281; 60 Sol. Jo. 272, H. L.; *reversg.* S. C. *sub nom.* GREENLANDS, LTD. v. WILMSHURST & LONDON ASSCN. FOR PROTECTION OF TRADE, [1913] 3 K. B. 507, C. A.

Annotations:—Apld. Adam v. Ward, [1917] A. C. 309. **Mentd.** Hobson v. Leng, [1914] 3 K. B. 1245; Wiffen v. Bailey & Romford U. D. C. (1914), 112 L. T. 274; Thomas v. Moore, [1918] 1 K. B. 555; Pratt v. British Medical Asscn., [1919] 1 K. B. 244.

See, also, Nos. 1582-1589, *post*.

iii. Other Cases.

1522. Statement substantiating previous volunteered statement.]—Where a person originates

PART VI. SECT. 3, SUB-SECT. 3.—
A. (b) ii.

d. Whether privileged — Company for protection of traders.]—BAYNE & THOMSON v. STUBBS, LTD. (1901), 3

F. (Ct. of Sess.) 408; 38 Sc. L. R. 308; 8 S. L. T. 412.—**SCOT.**

e. — Mercantile inquiry agents.]—FITZSIMONS v. DUNCAN & KEMP Co., [1908] 2 I. R. 507.—**IR.**

PART VI. SECT. 3, SUB-SECT. 3.
A. (b) iii.

1. Statement by shopkeeper—
ing removal of portrait from

false reports prejudicial to a tradesman, & being called on by the employers of the tradesman to examine the matters complained of, repeats to them the false statements, such statements are not privileged communications.—SMITH v. MATHEWS (1831), 1 Mood. & R. 151, N. P.

Annotations:—Appld. Griffiths v. Lewis (1845), 7 Q. B. 61. Refd. Greenlands v. Wilmshurst (1912), 29 T. L. R. 64.

1523. Statement by subscriber to charity—In answer to inquiry by another subscriber.]—MARTIN v. STRONG, No. 1602, *post*.

1524. Report by public society—Society for suppression of mendicancy.]—WALLER v. LOCH, No. 1445, *ante*.

1525. Statement by servant—As to character of fellow servant—In answer to inquiry by master.]—Statements made by a servant in answer to inquiries made by her mistress with reference to the conduct & character of another servant are privileged.—MEAD v. HUGHES (1891), 7 T. L. R. 291.

1526. Statement to military representative—Pending appeal—Against refusal of exemption from military service.]—Pltf. who had been refused exemption from military service by the local tribunal, appealed to the appeal tribunal. While the appeal was pending, defts. in answer to a letter from the military representative, wrote a letter, which pltf. alleged was a libel on him. The judge held that the letter was entitled to qualified, but not to absolute, privilege. The jury found malice, & awarded damages:—*Held*: on the facts, the privilege was not absolute, but there was no evidence on which any reasonable man could find malice, & therefore deft. was entitled to judgment.—GERHOLD v. BAKER (1918), 35 T. L. R. 102; 63 Sol. Jo. 135; 82 J. P. Jo. 549, C. A.

(c) *Volunteered Statements.*

i. *By Master concerning his Servants.*

1527. Statements to fellow servants.]—Deft. having given notice of dismissal to his footman & cook, they separately went to him & asked his reason for discharging them, when he told each, in the absence of the other, that he, or she, was discharged because both had been robbing him; whereupon each brought an action for the words so spoken to the other:—*Held*: a privileged communication.—MANBY v. WITT, EASTMEAD v. WITT (1858), 18 C. B. 544; 25 L. J. C. P. 204; 27 L. T. O. S. 187; 20 J. P. 646; 2 Jur. N. S. 1004; 4 W. R. 613; 139 E. R. 1482.

Annotations:—Expld. Henwood v. Harrison (1872), L. R. 7

C. P. 606. Refd. Senior v. Medland (1858), 4 Jur. N. S. 1039; Caulfield v. Whitworth (1868), 18 L. T. 527; Davies v. Sneed (1870), L. R. 5 Q. B. 608.

1528. —.]—Defts. in a printed monthly circular issued to their servants stated they had dismissed pltf. for gross neglect of duty:—*Held*: the occasion was privileged, in the absence of evidence of malice or abuse of authority, as it was clearly to the interest of defts. that their servants should know that gross misconduct would be followed by dismissal.—HUNT v. GREAT NORTHERN RY. CO., [1891] 2 Q. B. 189; 60 L. J. Q. B. 498; 55 J. P. 648; 7 T. L. R. 493, C. A.

Annotations:—Refd. Greenlands v. Wilmshurst & London Assocn. for Protection of Trade, [1913] 3 K. B. 507; Myroft v. Sleight (1921), 90 L. J. K. B. 883.

1529. Statements to parent or guardian.]—COX v. MATHEWS, No. 1488, *ante*.

1530. —.]—Letter written by mistress of servant girl to a person, *in loco parentis*:—*Held*: privileged.—ABERDEIN v. MACLEAY (1893), 9 T. L. R. 539, N. P.

1531. Statement to servant libelled.]—Deft., the wife of a tradesman, being informed that a female assistant in her husband's employment was dishonest, wrote at his request & sent a letter accusing her of theft, & strongly reproaching her. On an indictment for libel:—*Held*: the occasion was privileged, & therefore, in the absence of malice deft. was not liable; (2) the terms of a letter written under such circumstances ought not to be too nicely criticised.—R. v. PERRY (1883), 15 Cox, C. C. 169.

ii. *By Former Master concerning Servants.*

1532. Whether privileged.]—LOWRY v. AIKENHEAD (1768), cited in 3 Bos. & P. at p. 594; 127 E. R. 321.

Annotations:—Consd. Rogers v. Clifton (1803), 3 Bos. & P. 587. Refd. Coxhead v. Richards (1846), 2 C. B. 569.

1533. —.]—PATTISON v. JONES, No. 1507, *ante*.

1534. —.]—Where deft., the captain of a ship of which pltf. was chief mate, made a communication to the chief clerk of the J. coffee house, by whom pltf. & deft. had been introduced to one another, to the effect that pltf. was addicted to drinking, by reason of which pltf. lost an expected appointment:—*Held*: a privileged communication, in the absence of proof of malice; the rule being, that if a man give a character of a servant & utter what he verily believes to be true, though it should afterwards turn out not to be true, that would not be proof of malice. But if it be proved that he knew it to be untrue when he uttered it,

—Artist defamed.]—BROWN v. McCURDY (1888), 21 N. S. R. (9 R. & G.) 201.—CAN.

g. Statement by doctor—That maternity nurse was addicted to drink.]—Appl., a medical practitioner, who had special means of knowing resp.'s qualification as a maternity nurse, being asked as to her character by a friend, strongly advised him not to employ her, as she was addicted to drink. Subsequently he volunteered information of a similar nature to the same person. Applt. honestly believed in the truth of his statements, & was not actuated by ill-will to resp.:—*Held*: the communications were privileged.—REYNOLDS v. AINSLEY (1904), T. S. 868.—S. AF.

PART VI. SECT. 3, SUB-SECT. 3.—

A. (c) i.

1527 i. Statements to fellow servants.]—A. B. v. X. Y., C. D. v. X. Y., [1917] S. C. 15.—SCOT.

Statements to parent or

dian.]—GORST v. BARR (1887), 13 O. R. 644.—CAN.

h. Statements in presence of fellow servants.]—A master is not necessarily liable in damages because, in the presence of fellow servants or even of casual bystanders, he accuses his servant of theft. Such an accusation is *prima facie* privileged, & to destroy the qualified privilege there must be some evidence of malice, such as want of belief in the accusation, intemperate language, seeking the opportunity to make the accusation publicly, or the like.—GILDNER v. BUSSE (1902), 22 C. L. T. 137; 3 O. L. R. 561.—CAN.

k. Statement to police—Concerning alleged theft—Charge withdrawn.]—A. v. B. (1853), 16 Dunl. (Ct. of Sess.) 269; 26 Sc. Jur. 129.—SCOT.

PART VI. SECT. 3, SUB-SECT. 3.—
A. (c) ii.

1532 i. Whether privileged.]—RYAN v. (1882), 3 N. S. W. L. R.

309.—AUS.

1532 ii. —.]—S. dismissed pltf. for alleged dishonesty: & by his directions placards describing the offence & stating pltf.'s dismissal were posted up in the co.'s private offices & in circular books for the information & warning of the co.'s employees:—*Held*: the communication to the employees was privileged, as made by a person having a duty or interest to persons having a corresponding duty or interest.—TENCH v. GREAT WESTERN RY. CO. (1872), 33 U. C. R. 8.—CAN.

1532 iii. —.]—WATSON v. BURNET (1862), 24 Dunl. (Ct. of Sess.) 494; 34 Sc. Jur. 359.—SCOT.

1532 iv. —.]—FARQUHAR v. NEISH (1890), 17 R. (Ct. of Sess.) 716; 27 Sc. L. R. 549.—SCOT.

1532 v. —.]—WATSON v. GOWAN (1900), 15 E. D. C. 43.—S. AF.

i. That servant member of family of thieves.]—MILLER v. JOHNSTON (1874), 23 C. P. 580.—CAN.

Sect. 3.—Qualified privilege: Sub-sect. 3, A. (c) ii.,

that would be proof of malice, & would deprive him of any claim to privilege.—*TREMAINE v. PARKER* (1849), 12 L. T. O. S. 312, N. P.; *subsequent proceedings*, 12 L. T. O. S. 331.

1535. —.]—Case for slanderous words. Plea, not guilty. Pltf., a domestic servant, about to enter the service of B., referred B. for her character to deft., in whose service pltf. had been. Deft. being then unwell, her husband answered the application, & gave pltf. a good character: & B. took pltf. into service. Deft. recovered, & in a letter written to B. on other matters, said that she, deft., had lately been much imposed upon in her kitchen. B. in consequence made further inquiries of deft. as to pltf.'s character; & deft., in answer, spoke the words complained of, viz. that she suspected pltf. of dishonesty. The jury, in answer to the judge, found that deft. intended by her letter to induce inquiries on B.'s part as to pltf.: & they found a verdict for pltf., subject to leave to move for a nonsuit. On motion to enter a nonsuit:—*Held*: (1) deft. was bound to correct any error, as to pltf.'s character, into which she supposed B. to have been led by the answer to B.'s former application; & the words were spoken under such circumstances as *prima facie* to be privileged; (2) the facts that deft. alluded to pltf., & induced inquiries about her, were not evidence of malice.—*GARDNER v. SLADE* (1849), 13 Q. B. 796; 18 L. J. Q. B. 334; 13 L. T. O. S. 282; 13 J. P. 490; 13 Jur. 826; 116 E. R. 1467.

Annotations:—As to (1) *Reid*. *Henwood v. Harrison* (1872), L. R. 7 C. P. 606. As to (2) *Reid*. *Owens v. Roberts* (1856), 29 L. T. O. S. 39.

1536. —.]—A letter addressed to a person on whose recommendation the writer had taken pltf. into his service, to the effect that his conduct had not justified the character given of him, that he had left a balance unaccounted for, & that he ought not to be recommended for morality or honesty:—*Held*: a privileged communication.—*DIXON v. PARSONS* (1858), 1 F. & F. 24, N. P.

1537. —.]—Deft. received pltf. into his service as gardener, upon recommendation of A., who, as secretary to the Horticultural Society, was frequently applied to by members of that society who required gardeners. Deft. discharged pltf., & subsequently wrote to the secretary a letter containing (*inter alia*) the words following: "He ran towards me several times with an open knife, with eyes starting from their sockets, a perfect raving madman":—*Held*: whether the occasion created a privilege or not, the terms "raving madman," etc., went beyond what any privilege would have justified.—*FRYER v. KINNERSLEY* (1863), 15 C. B. N. S. 422; 3 New Rep. 125; 33 L. J. C. P. 96; 9 L. T. 415; 10 Jur. N. S. 441; 12 W. R. 155; 143 E. R. 849.

Annotations:—*Consd*. *Cowles v. Potts* (1865), 6 New Rep. 289. *Reid*. *Henwood v. Harrison* (1872), L. R. 7 C. P. 606; *Clark v. Molyneux* (1877), 3 Q. B. D. 237.

iii. To Master concerning his Servants.

1538. Whether privileged.]—*CLEAVER v. SARRAUDE* (circa 1800), cited in 1 Camp. at p. 268, N. P.

Annotations:—*Consd*. *Fairman v. Ives* (1822), 5 B. & Ald. 642; *Coxhead v. Richards* (1846), 15 L. J. C. P. 278; *Hebditch v. MacIlwaine* (1894), 63 L. J. Q. B. 587. *Reid*. *McDonnell v. MacIlwaine* (1894), 63 L. J. Q. B. 267; *Harrison v.*

1539. —.]—C., the mate of a ship, sends to B., a stranger, a letter charging A., the captain, with gross misconduct. B. shows this letter to D., the owner, who dismisses A.:—*Held*: (*TINDAL, C.J., ERLE, J.*) the showing of the letter by B. to D. was a privileged communication (*COLTMAN & CRESSWELL, JJ.*) not privileged.—*COXHEAD v. RICHARDS* (1846), 2 C. B. 569; 15 L. J. C. P. 278; 10 Jur. 984; 135 E. R. 1069.

Annotations:—*Consd*. *Bennett v. Deacon* (1846), 2 C. B. 828. *Expld*. *Davies v. Snead* (1870), L. R. 5 Q. B. 608. *Consd*. *Stuart v. Bell*, [1891] 2 Q. B. 341. *Reid*. *Blackham v. Pugh* (1846), 2 C. B. 611; *Revis v. Smith* (1856), 20 J. P. 453; *Owens v. Roberts* (1857), 29 L. T. O. S. 39; *Henderson v. Broomhead* (1859), 5 Jur. N. S. 1176; *Amann v. Damm* (1860), 29 L. J. C. P. 313; *Fryer v. Kinnorsley* (1863), 9 L. T. 415; *Clark v. Molyneux* (1877), 37 L. T. 694; *Robshaw v. Smith* (1878), 38 L. T. 423; *Waller v. Loch* (1881), 51 L. J. Q. B. 274.

1540. — Statement by person on whose premises servant engaged.]—*TOOGOOD v. SPYRING*, No. 1489, *ante*.

1541. — Statement by neighbour.]—(1) Deft. spoke to pltf.'s mistress words charging pltf. with irregularity in her conduct as a servant girl, in consequence of which pltf. lost her place. The only plea on the record was "not guilty":—*Held*: deft. might, under that plea, disprove malice in the various methods by which it is usually disproved; yet he was estopped from giving evidence of the truth of the facts as rebutting the malice, because he had not pleaded that the facts were true.

(2) Though in such case the absence of the proof of special damage, that pltf. thereby lost her place, cannot affect the verdict, yet the jury may consider it in assessing damages.

(3) If a neighbour make inquiry of another respecting his own servants, that other may state what he believes to be true; but the case is different when the statement is a voluntary act; yet, even in this case, the jury is to consider whether the words were dictated by a sense of the duty which one neighbour owes to another.—*RUMSEY v. WEBB* (1842), Car. & M. 104, N. P.; *subsequent proceedings*, 11 L. J. C. P. 129.

1542. — Statement vindicating defendant's own character.]—If B. a tradesman, be dismissed from serving A., one of his customers, A. stating as the reason of it that B. charged for goods never delivered, & B. after this write a letter to A. vindicating himself, & imputing the dishonesty to a servant of A., this is a privileged communication, if it be *bona fide* & without malice.—*COWARD v. WELLINGTON* (1836), 7 C. & P. 531, N. P.

Annotation:—*Expld*. *Blackham v. Pugh* (1846), 2 C. B. 611.

1543. —.]—*MASTERS v. BURGESS* (1886), 3 T. L. R. 96, N. P.

1544. — Confession by fellow servant.]—*JONES v. THOMAS*, No. 1479, *ante*.

1545. — Statement by host to guest—Repeating suspicions.]—Deft. told S., who was a guest in his house, that the police had informed him that S.'s valet was suspected of theft. S. thereupon dismissed his valet, who sued deft. for slander: *Held*: the occasion was privileged, deft. being under a moral & social, if not a legal, obligation to communicate to S. the information he had received from the police.—*STUART v. BELL*, [1891] 2 Q. B. 341; 60 L. J. Q. B. 577; 64 L. T. 633; 39 W. R. 612; 7 T. L. R. 502, C. A.

Annotations:—*Consd*. *Hebditch v. MacIlwaine*, [1894] 2 Q. B. 54. *Reid*. *Andrews v. Nott Bower*, [1895] 1 Q. B. 888; *Adam v. Ward*, [1917] A. C. 309; *Myroft v. Sleight*

Macintosh v. Dun, [1908] A. C. 390; *London Assocn. for Protection of Trade v. Greenlands*, [1916] 2 A. C. 15; *Pratt v. British Medical Assocn.*, [1919] 1 K. B. 244.

iv. *Complaints of Misconduct of Public Officials.*

1546. General rule.]—A letter written by a private individual to a public officer, complaining of the misconduct of a person under him, is not privileged from disclosure as an official communication. But if made *bonâ fide* & without malice, such communication is not actionable as libellous, though some of the charges may not be true.—*BLAKE v. PILFOLD* (1832), 1 Mood. & R. 198, N. P. *Annotations*:—*Reid*. *Coxhead v. Richards* (1846), 2 C. B. 569; *Henwood v. Harrison* (1872), L. R. 7 C. P. 606.

1547. Complaint as to postmaster—Addressed to Postmaster-General.]—A letter written to the Postmaster-General, or to the secretary to the General Post Office, complaining of misconduct in a postmaster, is not a libel, if it was written as a *bonâ fide* complaint to obtain redress for a grievance that the party really believed he had suffered; & particular expressions are not to be too strictly scrutinised, if the intention of deft. was good.—*WOODWARD v. LANDER* (1834), 6 C. & P. 548, N. P.

Annotations:—*Reid*. *Blackham v. Pugh* (1846), 2 C. B. 611; *Henwood v. Harrison* (1872), L. R. 7 C. P. 606.

1548. Charges against constable of district—Made to meeting of ratepayers.]—Charges made by a ratepayer against the constable of a district, to a meeting of ratepayers met to investigate the constable's disposal of the money of the inhabitants, are privileged, & may be made by letter, if the ratepayer be prevented from attending. The party alleging such letter to be libellous must prove the absence of the ratepayer to have been wilful.—*SPENCER v. AMERTON* (1835), 1 Mood. & R. 470, N. P.; *subsequent proceedings, sub nom.* *SPENCER v. HAMERTON* (1836), 4 Ad. & El. 413.

Annotations:—*Reid*. *Blackham v. Pugh* (1846), 2 C. B. 611; *Ramsey v. Foord* (1900), 64 J. P. 427.

1549. Complaints addressed to Home Secretary—Not being the competent authority—Concerning town clerk of a borough.]—*BLAGG v. STURT*, No. 1908, *post*.

1550. ——— Concerning a county magistrate.]—A communication made *bonâ fide* on any subject-matter in which the party making the communication has an interest, or in reference to which he has a duty, & relating to the duty or the interest, is privileged if made to a person having a corresponding interest or duty, although it contain matter which, without the privilege, would be slanderous & actionable. *Qu.*: if it be not also privileged if made to a person who has not, but by the maker of the communication is *bonâ fide* believed to have, the corresponding duty or interest.

(1) A declaration for libel set forth as the libellous matter complained of, certain parts of a memorial sent by deft., an elector & inhabitant of the borough of F., whereby pltf., who was a magistrate of the county, was charged with having committed, during an election, gross acts of violence, & the Secretary of State was prayed to cause an inquiry to be made into the conduct of pltf. during that election, & if the charges should be substantiated, to recommend to Her Majesty

remove pltf. from the Deft. pleaded not guilty, & a justification. At the close of pltf.'s case, the judge, in consequence of what had been said in *Blagg v. Sturt*, No. 1908, *ante*, refused to nonsuit, & deft. went into evidence to prove the justification & also that he had acted *bonâ fide*. The evidence failed to make out the whole justification, but the jury found that the memorial had been *bonâ fide*:—*Held*: the communication was privileged in respect of the interest & the duty of deft., & also in respect of a corresponding interest in the Secretary of State, inasmuch as the memorial was substantially a petition to the Queen to remove pltf., & the Secretary of State had a corresponding duty to cause to be made the inquiry prayed for, although the Crown usually removes magistrates by the advice & agency of the Lord Chancellor.

(2) At the taxation of costs the master allowed deft. the costs of all witnesses whose testimony was applied by him to show that he was not guilty on the ground of *bona fides*, although they were called to make out the plea of justification:—*Held*: the taxation was right, for that deft. was entitled to all the costs of the cause, except those exclusively applicable to the issue found against him.—*HARRISON v. BUSH* (1856), 5 E. & B. 344; 3 C. L. R. 1240; 25 L. J. Q. B. 25, 99; 25 L. T. O. S. 194; 26 L. T. O. S. 196; 20 J. P. 147; 1 Jur. N. S. 846; 2 Jur. N. S. 90; 3 W. R. 474; 4 W. R. 199; 119 E. R. 509.

Annotations:—*As to* (1) *Consd.* *Henwood v. Harrison* (1872), L. R. 7 C. P. 606; *Dickeson v. Hilliard* (1874), L. R. 9 Exch. 79; *Hebditch v. MacIlwaine*, [1894] 2 Q. B. 54. *Reid*. *Dickson v. Wilton* (1859), 1 F. & F. 419; *Campbell v. Spottiswoode* (1863), 3 B. & S. 769; *Fryer v. Kinnersley* (1863), 15 C. B. N. S. 422; *Whiteley v. Adams* (1863), 15 C. B. N. S. 392; *Lawless v. Anglo-Egyptian Cotton & Oil Co.* (1869), 17 W. R. 498; *Waller v. Loch* (1881), 7 Q. B. D. 619; *Allbutt v. General Council of Medical Education & Registration* (1889), 23 Q. B. D. 400; *London Assocn. for Protection of Trade v. Greenlands*, [1916] 2 A. C. 15; *Adam v. Ward*, [1917] A. C. 309. *As to* (2) *Consd.* *Brown v. Houston*, [1901] 2 K. B. 855. *Reid*. *Davis v. Clifton* (1856), 2 Jur. N. S. 490.

1551. Charges against overseer—Made at vestry meeting.]—(1) Pltf. being one of the overseers, & deft. assistant overseer of a township, a rate was made on a railway co., against which they appealed. Shortly before the hearing of the appeal a meeting of the overseers was called to consider the matter, when it was resolved to abandon the rate; & a vestry meeting was called to choose fresh overseers, & consider the propriety of removing deft. from his office. At that meeting pltf. imputed to deft. neglect of duty in collecting the rates, & having made a rate which the overseers were obliged to give up; to which deft. retorted by saying that pltf. had sold the ratepayers to the railway co., & had received a bribe from them for that purpose. After the meeting a person remarked to deft. that he ought not to have said what he did without some foundation for it; to which deft. replied that he believed there was reason for thinking that pltf. had had communications with the officers of the railway co. *Qu.*: An action having been brought for the words used by deft. at the meeting, whether the words were spoken under circumstances which rendered them a privileged communication:—*Held*: assuming they were, there was evidence of malice to be left to a jury.

(2) The question under discussion at the vestry

PART VI. SECT. 3, SUB-SECT. 3.—
A. (a) iv.

n. *Complaint as to post-office officials—By inspector.]*—*WATERBURY v. DEWE* (1876), 16 N. B. R. (3 Pug.)

670.—CAN.

—*DEWE v. WATERBURY* (1880), 6 S. C. R. 143.—CAN.

p. *Complaint as to sheriff.]*—A complaint addressed to a public body

or to the govt. respecting the conduct of an officer, in this case a sheriff, under their control, he is not necessarily privileged. That depends on the motives with which it was made.—

1897, *post*.

1553. Charges against medical officer of parish—By clerk of guardians—To relieving officer.]—A. was clerk to the board of guardians of a union of which B. was the medical officer, & C. the relieving officer. A pauper was to be removed to another district, & had previously to be examined by B. A., in pursuance of directions from the board of guardians, called twice on B. for the purpose of getting him to see this pauper, but could not get B. to do so. A. then went to C. & asked him to try & get B. to examine the pauper, telling C. at the same time that when he, A., saw B. on the preceding evening B. (in the words of the declaration) "was not sober;" whereupon C. served B. with a formal order to examine the pauper, & B. did so. In an action by B. against A. for slander:—*Held*: the communication between A. & C. was privileged, & B. must be nonsuited.

(2) It having been proved by the evidence that the actual words used were "as drunk as a sow," which words were relied on in proof of malice on the authority of *Fryer v. Kinnersley*, No. 1537, *ante*, the judge refused, under the circumstances of the case, to amend the declaration by inserting these words; & leave to move was refused to pltf.—*SUTTON v. PLUMRIDGE* (1867), 16 L. T. 741, N. P.

1554. — Contained in letter to chairman of parish council.]—The president of a charitable association, founded for the benefit of the sick poor of a parish, wrote a letter to the chairman of the parish council, calling his attention to the fact that the medical officer of the parish had not called in the services of the nurse supplied by the association in cases in which her services might have been of value, & specifying one case in particular of an old age pensioner. In an action of libel brought by the medical officer against the writer of the letter:—*Held*: the occasion was privileged.—*BAIRD v. WALLACE-JAMES* (1916), 85 L. J. P. C. 193, H. L.

1555. Charges against local contractors—By borough councillors—In letter to press.]—Pltfs. were contractors for the erection of a gaol in the borough of H. Defts. were members of the town council, & from their business competent judges of the work. They published in a local newspaper a letter in which they charged pltf. with serious omissions & deviations from his contract, for which libel this action was brought:—*Held*: although the charges in the libel would have been privileged if made by defts. to the town council in their characters as councillors, they were not privileged in the form of a letter in a public newspaper.—*SIMPSON v. DOWNS* (1867), 16 L. T. 391, N. P.

1556. Notice of removal of military officer—In

able time allowed him for that purpose, & that pltf. was compelled to subscribe to a military fund to provide for widows and orphans of officers, & that if he had continued in the service his widow would have been entitled to an allowance out of a fund called "Lord Clive's Fund." That after the Indian forces had been transferred to the Crown he, while in the performance of military duty, & in all respects physically & mentally competent to perform any duties which were or might be required of him, was, without any charge of misconduct, called upon to retire from the service, in pursuance of a general order made by the Governor-General of India with the sanction of deft., by which order unemployed officers ineligible for employment by reason of clear misconduct, or proved physical or mental inefficiency, etc., might be required to retire upon a pension; & upon his declining voluntarily to retire, he was compulsorily placed upon the pension list; & the fact of his removal to the pension list was notified in the usual way by a general order of the Commander-in-Chief published in the Gazette:—*Held*: the claim disclosed no cause of action, for the Crown acting by deft., had a general power of dismissing a military officer at its will & pleasure, & deft. could make no contract with a military officer in derogation of such power; & the customs regulations, etc., relied on by pltf. must be taken to be always subject to it, & incapable of superseding it, & further, the publication in the Gazette was an official act under the authority of the Crown for which deft. could not be responsible in an action for libel.—*GRANT v. SECRETARY OF STATE FOR INDIA* (1877), 2 C. P. D. 445; 46 L. J. Q. B. 681; 37 L. T. 188; 25 W. R. 848.

Annotation:—*Raid*. *Raphael SS. v. Brandy* (1911), 80 L. J. K. B. 1067.

1557. Charges against officer removable by Privy Council—To Privy Council.]—*PROCTOR v. WEBSTER*, No. 1343, *ante*.

1558. Charges against police superintendent—To member of watch committee.]—Pltf. was a superintendent of police in a borough. Deft., a ratepayer, made a verbal statement to a member of the watch committee of the borough respecting pltf. in his capacity of superintendent. The jury found that the statement was defamatory, but there was no malice on the part of deft.:—*Held*: the occasion was privileged.—*BANNISTER v. KELTY* (1895), 59 J. P. 793, N. P.

1559. Charges against overseer—By chairman of board of guardians.]—Deft., the chairman of a board of guardians, at a meeting of the board, uttered certain defamatory statements concerning the method in which the rates were collected by pltf. in his capacity of assistant overseer of a

CORBETT v. JACKSON (1844), 1 U. C. R. 128.—CAN.

q. —.]—*DESBARRES v. TREMAINE* (1883), 16 N. S. R. (4 R. & G.) 215.—CAN.

r. *Complaint as to postmaster—*

*Addressed to Member of Parliament.]—**GRAHAM v. CROZIER* (1879), 44 U. C. R. 378.—CAN.

t. *Complaint as to government clerk.]—*Where deft., a clerk in the Receiver-General's office, told his

principal that pltf., another clerk, had robbed him, the Receiver-General, there being no proof that any money had been stolen, or that the Receiver-General had ever suspected it:—*Held*: not privileged.—*PRENTICE v. HAMILTON* (1831), Dra. 410.—CAN.

1560. What statements are privileged—Charge against person reasonably suspected.]—An action for defamation cannot be maintained against a man whose property has been stolen, & who upon reasonable grounds of suspicion charges an innocent person with having stolen it.—*FOWLER v. HOMER* (1812), 3 Camp. 294, N. P.

Annotation:—Reid. Padmore v. Lawrence (1840), 4 J. P. 42.

1561. ———.]—*HOOPER v. TRUSCOTT*, No. 1870, *post*.

1562. ———.]—An action for slander not maintainable for information given with regard to a supposed robbery. Such information when made *bonâ fide* & without malice, is a privileged communication, though no robbery has been committed.—*NIXON v. SEWELL* (1838), 2 J. P. 151.

1563. ———.]—*PADMORE v. LAWRENCE*, No. 1493, *ante*.

1564. ———.]—*HOPWOOD v. THORN*, No. 344, *ante*.

1565. ———.]—H. & C. having made a charge against a medical practitioner affecting his moral character he proposed that certain persons should investigate it; these persons signed a resolution that it was groundless. H. & C. being dissatisfied it was proposed to them, by one of the last-mentioned persons, to reconstruct the same tribunal, & proceed again with the investigation. H. & C. in declining, wrote that they were anxious to convince the persons who had investigated the charge that they had not arrived at the truth; that no self-constituted tribunal was satisfactory; that they were desirous to afford the person charged an opportunity to expunge from his character the stain at present resting on it; that they had afforded him an opportunity to meet them in a ct. of law; & that if he withheld, they would not consider that he had cleared himself, etc.:—*Held*: the letter was a privileged communication; it did no more than refer to the charge which had been investigated & was not sufficient foundation for a criminal information.—*Re HILTON & CARTER* (1854), 2 W. R. 417.

1566. ———.]—Deft. being robbed of £50 in a crowd, gave a description of the offender, of whom he caught a glimpse, to a police constable, by whom pltf., upon the strength of that description, was apprehended on suspicion. Pltf. had a considerable sum of money on his person. Deft. met the constable while on his way to go before a magistrate with pltf. & deft. said, "That is the man," & he accompanied them to the magis-

tration having been brought:—*Held*: (1) deft. was not responsible for the remand, that being the act of the magistrate; (2) he was not liable for falsely saying to the constable that pltf. was the thief, as the occasion was privileged.—*SHUFFLEBOTTOM v. ALLDAY* (1857), 28 L. T. O. S. 292; 21 J. P. 263; 5 W. R. 315.

1567. ———.]—*AMANN v. DAMM*, No. 229, *ante*.

1568. ———.]—Saying to a policeman, "I give this man in charge for taking from me £45; take him into custody":—*Held*: not to amount to slander or to false imprisonment under the circumstances detailed in the case.—*M'CLEAN v. GREENING* (1867), 16 L. T. 433.

1569. ———.]—An employer accused his porter of theft, & subsequently searched his house with a policeman. An action was brought for slander & trespass, when deft. contended that he *bonâ fide* believed a robbery had been committed, that there was no express malice, & that the search was made with pltf.'s permission. The jury found that the words were uttered in the honest belief that a robbery had been committed by pltf. & that there had been no trespass:—*Held*: there was no evidence of express malice, & on the findings of the jury judgment entered for deft.—*HORNE v. JONES* (1884), 1 T. L. R. 19.

1570. ———.]—*COLLINS v. COOPER* (1902), 19 T. L. R. 118, C. A.

1571. ———. Repeated to third person—Third person disinterested.]—(1) A., suspecting B. of stealing meat from his shop, accused her of having done so, no one being by at the time. B. thereupon applied to a police magistrate for a summons against A. A. meeting a third person, who was in his shop at the time the supposed larceny was committed, told him that proceedings had been taken against him, & said to him: "You were in the shop: did not you see her take it?":—*Held*: a privileged communication.

(2) A. having accused B. of stealing meat, a friend of the latter, to whom she had mentioned the fact, called at A.'s shop, & asked him if he had accused B. of stealing; to which A. answered, "Yes; & I believe it to be true":—*Held*: not a privileged communication.

Proceedings had been taken or threatened against deft.; he had therefore an interest in making inquiry of a supposed eye witness in order to protect himself & also a public duty to substantiate the charge. But as to the words spoken to the other witnesses, I cannot see that there was any privilege. Deft. was not acting in pursuance of either interest or duty in repeating the charge

PART VI. SECT. 3, SUB-SECT. 3.—
A. (c) v.

1560 i. What statements are privileged—Charge against person reasonably suspected.]—*WILCOX v. STEWART* (1905), 38 N. S. R. 409.—CAN.

1560 ii. ———.]—Where deft. had lost a valuable fur collar & for the purpose of recovering it called in the services of a police detective, & during her conversation with him certain statements were necessarily made, & information in her possession & within

her knowledge was communicated to the detective:—*Held*: the statements so made were privileged.—*LUPEE v. HOGAN* (1920), 47 N. B. R. 492.—CAN.

1560 iii. ———.]—Where a person, in answer to a constable investigating a crime, charges another with the commission of that crime the communication is privileged, & in the absence of malice, is not actionable.—*BOWLES v. ARMSTRONG* (1913), 32 N. Z. L. R. 409.—N.Z.

1560 iv. ———.]—*BLACKETT v.*

LANG (1854), 16 Dunl. (Ct. of Sess.) 989; 26 Sc. Jur. 455.—SCOT.

1560 v. ———.]—Statements made by a person interested in the detection of a crime, & material thereto, are privileged provided they are made *bonâ fide* in investigation thereof.—*DAVIS v. JACOBS*, [1914] T. P. D. 220.—S. AF.

a. ———. Statement to person having no connection with matter—Parent of plaintiff.]—*BYERS v. McDONALD* (1911), 16 W. L. R. 370; 4 Sask. L. R. 58.—CAN.

Sect. 3.—Qualified privilege: Sub-sect. 3, A. (c) v., vi., vii., viii. & ix.]

to her (*per* CUR.).—**FORCE v. WARREN** (1864), 15 C. B. N. S. 806; 143 E. R. 1002.

1572. — Words spoken to officer about to execute search warrant.]—DANCASTER v. HEWSON, No. 995, *ante*.

1573. — Statement to person having no connection with matter—Wife of plaintiff.]—WENMAN v. ASH, No. 1086, *ante*.

1574. — —.]—Deft., having a *prima facie* ground of suspicion, which afterwards proved to be unfounded, that he was being robbed by one of his assistants & pltf., made certain inquiries from two persons having no connection with the matter. To each person deft. said that pltf. had robbed him & that he would get him imprisoned:—*Held*: the occasion was not privileged.—HARRISON v. FRASER** (1881), 29 W. R. 652.**

vi. Statements by Relatives on Matters of Family Interest.

1575. Whether privileged.]—A widow lady being about to marry pltf., deft., who had married her daughter, wrote her a letter, containing imputations on pltf.'s character, & desiring a diligent & extensive inquiry into pltf.'s character:—*Held*: this was a letter written on a justifiable occasion, & deft. was justified in writing the letter, provided the jury be satisfied that, in writing it, deft. acted *bona fide*, although the imputations contained in the letter were false, or based upon the most erroneous information; & if deft. used expressions, however harsh, or untrue, yet *bona fide*, & believing them to be true, he was justified in so doing.

Communications of this kind should be viewed liberally by juries, & unless they see clearly that there was a malicious intention of defaming pltf., they ought to find for deft.—**TODD v. HAWKINS** (1837), 8 C. & P. 88; 2 Mood. & R. 20, N. P.

Annotations:—*Reid*. Coxhead v. Richards (1846), 2 C. B. 569; Henwood v. Harrison (1872), L. R. 7 C. P. 606.

1576. —.]—ADAMS v. COLERIDGE (1884), 1 T. L. R. 84.

Annotation:—*Consd.* Hesketth v. Brindle (1888), 4 T. L. R. 199.

vii. Statements by Solicitors, etc.

1577. By solicitor's clerk—Confidential communication—To witness—Communication unauthorised.]—BOWEN v. COOPER (1843), 1 L. T. O. S. 76.

1578. By solicitor—In vindication of client's character—Against charges of prosecution.]—A letter published by an attorney honestly, in vindication of the character of a client against charges published & circulated against the client by the prosecutor, is privileged.

On an indictment for an alleged libel, it appeared that the libel was contained in a letter published by deft., an attorney, in answer to charges against a client, which had been published by the prosecutor, & it described the charges as false & wicked:—*Held*: if the letter was published honestly, to vindicate the client's character, & was such as the circumstances might reasonably warrant, the publication was privileged or protected.—**R. v. VELEY** (1867), 4 F. & F. 1117; 16 L. T. 122.

1579. — To client—Prior to being retained—Reasonable anticipation of retainer.]—If a solr. reasonably believes that his services may be required by a possible client who does afterwards retain him, all communications passing between the solr. & the client, leading up to the retainer & relevant to it, & having that, & nothing else, in view are privileged.—BROWNE v. DUNN** (1893), 6 R. 67, H. L.**

Annotations:—*Consd.* Morgan v. Wallis (1917), 33 T. L. R. 495. *Reid*. Pratt v. British Medical Assocn., [1919] 1 K. B. 244; British Ry. Traffic & Electric Co. v. C. R. C. Co. & L. C. C., [1922] 2 K. B. 260; Yorkshire Insee. v. Craine, [1922] 2 A. C. 541.

1580. — Acting in ordinary course of duty to client.]—A solr., on behalf of his client, gave written notice to an auctioneer not to part with the proceeds of sale of certain goods intrusted to him for sale on the ground that the owner of the goods had committed an act of bkpcy. upon which an order in bkpcy. might be made against him. In an action by the owner of the goods against the solr. for libel:—*Held*: the occasion was privileged, since the solr. was acting in the ordinary course of his duty to his client, & the occasion would have been privileged had the client himself written the letter.—BAKER v. CARRICK**, [1894] 1 Q. B. 838; 63 L. J. Q. B. 399; 70 L. T. 366; 58 J. P. 669; 42 W. R. 338; 38 Sol. Jo. 286; 9 R. 283, C. A.**

Annotations:—*Apld.* Boxsius v. Goblet, [1894] 1 Q. B. 842; *Smith v. Streatfield*, [1913] 3 K. B. 764. *Reid*. Edmondson v. Birch (1907), 76 L. J. K. B. 346.

1581. — Statements inserted in bill of costs—For necessary information of recipient.]—MORGAN v. WALLIS**, No. 1084, *ante*.**

viii. Statements by and to Trade Protection Societies.

1582. Whether publication privileged—Statement by society—Trade circulars.]—A circular letter sent by the secretary to the members of a society for the protection of trade against sharpers & swindlers, furnishing information respecting certain bill transactions, is not a privileged communication. *Semble*: if such letter state particular facts, it will not be a libel, though some of the persons receiving it, believed that it was sent to intimate that the parties mentioned in it were

PART VI. SECT. 3, SUB-SECT. 3.—A. (c) vi.

1575 i. Whether privileged.]—A niece wrote to her aunt, with whom she was on terms of great intimacy, & with whom she was in the habit of staying, a letter making, on the authority of a correspondent, statements derogatory to the character of a gentleman well known to niece & aunt, who was a frequent visitor at the aunt's house:—*Held*: such a moral & social duty existed as made the communication a privileged one.—FENTON v. MACDONALD** (1901), 21 C. L. T. 228; 1 O. L. R. 422.—**CAN.****

1575 ii. —.]—In libel for an anonymous letter written by deft. to his brother, of & concerning pltf., the brother's wife, charging her with

adultery:—*Held*: the communication was not privileged.—HERTLEIN v. HERTLEIN** (1913), 22 W. L. R. 959; 9 D. L. R. 72; 3 W. W. R. 752.—**CAN.****

1575 iii. —.]—ATKINSON v. CONGREVE** (1857), 30 L. T. O. S. 12.—**IR.****

1575 iv. —.]—TRONIP v. McDONALD**, [1920] App. D. 1.—**S. AF.****

PART VI. SECT. 3, SUB-SECT. 3.—A. (c) vii.

1580 i. By solicitor—Acting in ordinary course of duty to client.]—HANNA v. DEBLAQUIERE** (1854), 11 U. C. R. 310.—**CAN.****

1580 ii. —.]—Statements of legal practitioners made in the course of their professional duty are absolutely privileged even though the statements

are maliciously defamatory & irrelevant.—MAHARAJ KUMAR JAGAT MOHEN NATH SAI DEE v. KALIPADA GHOSH** (1922), 1 L. R. 1 Pat. 371.—**IND.****

b. By solicitor's clerk—Acting on solicitor's instructions—During search for papers.]—DRYSDALE v. ROSEBERRY (EARL)**, [1909] S. C. 1121; 46 Sc. L. R. 795; 2 S. L. T. 2.—**SCOT.****

PART VI. SECT. 3, SUB-SECT. 3.—A. (c) viii.

1582 i. Whether publication privileged—Statement by society—Trade circulars.]—LEMAY v. CHAMBERLAIN** (1886), 10 O. R. 638.—**CAN.****

1582 ii. —.]—The secretary of a trade assocn., prepared a

common sharpers & swindlers. *Aliter*, if it contain a general statement, such as, that the party mentioned in it is considered an improper person to be proposed to be balloted for as a member of the society. At all events, in the former case, it is a question for the jury, whether the society really & *bonâ fide* intended to give the particular information which the letter contains.—GETTING *v. FOSS* (1827), 3 C. & P. 160.

Annotation:—*Reid. Greenlands v. Wilmshurst & London Asscn. for Protection of Trade*, [1913] 3 K. B. 507.

1583. ———.—]—Inquiries involving imputations on the solvency of persons contained in a paper issued only to its members by a voluntary society for the protection of trade are not published on a privileged occasion.—ELKINGTON *v. LONDON ASSOCN. FOR PROTECTION OF TRADE* (1911), 28 T. L. R. 117.

Annotation:—*Distd. Greenlands v. Wilmshurst & London Asscn. for Protection of Trade*, [1913] 3 K. B. 507.

1584. ———.—]—**Extract from public registers.**—The register of protests for non-acceptance & non-payment of bills of exchange & promissory notes, established by the Scotch Acts, 1681 & 1696, & Bills of Exchange Act, 1772 (c. 72), & 23 Geo. 3, c. 18, is a public document, to which every body has a right of access, & the publication of which in a printed paper does not constitute a libellous publication.

This registration [has] the effect of a decree or judgment of the Ct. of Session (LORD COTTENHAM, C.).—FLEMING *v. NEWTON* (1848), 1 H. L. Cas. 363; 9 E. R. 797, H. L.

Annotations:—*Consd. Prudential Assce. v. Knott* (1875), 10 Ch. App. 142. *Distd. Williams v. Smith* (1888), 22 Q. B. D. 134. *Folld. Searles v. Scarlett*, [1892] 2 Q. B. 56. *Expld. Reis v. Perry* (1895), 64 L. J. Q. B. 566. *Reid. M'Nally v. Oldham* (1863), 8 L. T. 604; *Mulkern v. Ward* (1872), L. R. 13 Eq. 619. *Mentd. Geils v. Geils* (1851), 3 H. L. Cas. 280; *Coleman v. West Hartlepool Harbour & Ry.* (1860), 2 L. T. 766; *Dixon v. Holden* (1869), L. R. 7 Eq. 488.

1585. ———.—]—WILLIAMS *v. SMITH*, No. 1051, *ante*.

1586. ———.—]—The publication of a mere copy of what is contained in a register of judgments, kept in pursuance of an Act of Parliament, & which by law the public are entitled to inspect, is privileged.

An extract from the register of county ct. judgments was published in a trade protection society's journal, stating that judgments had been obtained in the county ct. against the persons named, among whom was *pltf.* A note was appended to the effect that the statement was taken from the register of county ct. judgments, but that no distinction was made in the register between actions for debt or damages or properly disputed cases, neither was it known which of the judgments remained unpaid, but it was probable that a large proportion of them had been settled or paid. *Pltf.* brought

an action for libel alleging by way of innuendo that the statement meant that a judgment had been obtained against him in the county ct., which remained unsatisfied, & that he was insolvent & a person to whom credit ought not to be given:—*Held*: having regard to the note appended, the statement complained of was incapable of the meaning alleged by the innuendo, & such statement being merely an extract from the register of county ct. judgments, a document which by law was open to public inspection, the publication was privileged & in the absence of evidence of malice the action could not be maintained.—SEARLES *v. SCARLETT*, [1892] 2 Q. B. 56; 61 L. J. Q. B. 573; 66 L. T. 837; 56 J. P. 789; 40 W. R. 696; 8 T. L. R. 562, C. A.

Annotations:—*Expld. Reis v. Perry* (1895), 64 L. J. Q. B. 566. *Folld. Jones v. Financial Times* (1909), 25 T. L. R. 677.

1587. ———.—]—The publication of a copy of an entry as to the appointment of a receiver of a co. contained in the register kept by the registrar of joint-stock cos., pursuant to the Companies Acts, & which by law the public are entitled to inspect, is privileged.—JONES (JOHN) & SONS, LTD. *v. FINANCIAL TIMES, LTD.* (1909), 25 T. L. R. 677; 53 Sol. Jo. 614, C. A.

1588. ———.—]—**Erroneous extract officially supplied.**—In an action for libel brought by a trader for the publication by *defts.* in a trade gazette of what purported to be an extract of a deed of inspectorship, registered by him under Deeds of Arrangement Act, 1887 (c. 57), which extract, though officially supplied to *defts.*, was in fact inaccurate, *defts.* pleaded that the publication was privileged:—*Held*: the plea could not be sustained, inasmuch as an individual publishing on his own account such extracts of documents open to public inspection must take the risk of the statements contained in such extracts being inaccurate, even though officially supplied.—REIS *v. PERRY* (1895), 64 L. J. Q. B. 566; 43 W. R. 648; 11 T. L. R. 373; 39 Sol. Jo. 470; 15 R. 427; 59 J. P. Jo. 308.

Annotation:—*Consd. Mangena v. Wright*, [1909] 2 K. B. 958.

1589. ———.—]—**Statement to society—According to rules of society.**—WHITE *v. BATEY & CO., LTD.* (1892), 8 T. L. R. 698.

ix. Communications by and to Public Bodies.

1590. **Communication to committee of body—By member of committee—Respecting member of body.**—If words are spoken to a committee of persons, to whom the management of a volunteer corps is entrusted, respecting a member, as matter of fair representation respecting his principles, they are not actionable.—BARBAUD *v. HOOKHAM* (1804), 5 Esp. 109, N. P.

statement for circulation among the members of the *asscn.*, containing an allegation that *pltf.* was unworthy of credit:—*Held*: the publication to the members of the *asscn.* was privileged, in the absence of malice, on the ground of interest.—HARPER *v. HAMILTON RETAIL GROCERS' ASSOCN.* (1900), 32 O. R. 295.—CAN.

1582 iii. ———.—]—LION BREWERY CO., LTD. *v. BRADSTREET CO.* (1903), 9 B. C. R. 435.—CAN.

1582 iv. ———.—]—BARR *v. MUSSELBURGH MERCHANTS' ASSOCN.*, [1912] S. C. 174; 49 Sc. L. R. 102; 2 S. L. T. 402.—SCOT.

1584 i. ———.—]—**Extract from public registers.**—The publication without malice by a mercantile agency to its subscribers, of a true extract from a register kept by virtue of an Act of a

Provincial Legislature, which was open to inspection by the public, for the purpose of giving to the subscribers information which the agency *bonâ fide* believed to be true, is privileged.—SMITH *v. DUN* (1911), 21 Man. L. R. 583.—CAN.

c. ———.—]—**On application—Negligence.**—A mercantile agency is not liable in damages for false information as to a trader given in good faith to a subscriber making inquiries, the information having been obtained by the agency from a person apparently well qualified to give it, & there being nothing to make them in any way doubt its correctness.—ROBINSON *v. DUN* (1896), 28 O. R. 21; *reversd.* (1897), 24 A. R. 287.—CAN.

d. ———.—]—**Insertion in register of association.**—KEITH *v. LAUDER* (1905),

8 F. (Ct. of Sess.) 356; 43 Sc. L. R. 230; 13 S. L. T. 650.—SCOT.

PART VI. SECT. 3, SUB-SECT. 3.—A. (c) ix.

e. **Communication to council meeting—By alderman.**—WARD *v. MCBRIDE* (1911), 20 O. W. R. 93; 3 O. W. N. 99; 24 O. L. R. 555.—CAN.

f. **Statement to school board—By member—Respecting teacher's residence.**—CLARK *v. DUNCAN* (1923), 53 O. L. R. 287.—CAN.

g. **Communication to church council—Respecting immoral conduct of members.**—*Deft.* made a communication to members of a church council, of which he was a member, that *pltf.* had had immoral relations with *pltf.*'s wife:—*Held*: the communication was not privileged.—LALOE JANOE *v.*

Sect. 3.—Qualified privilege: Sub-sect. 3, A. (c) ix.,

1591. — By subscriber to body—Regarding secretary of body.]—A letter by deft., a subscriber to a charity, to the committee, impugning the moral conduct of the secretary, in reference especially to a person whom deft. had recommended as a matron; & a second letter to the committee in answer to an answer from them proposing an inquiry; & certain oral statements made before the committee during the inquiry:—*Held*: privileged, if made in the honest & reasonable belief that the charges were true, even although it appeared that they were made on hearsay.—*MAITLAND v. BRAMWELL* (1861), 2 F. & F. 623, N. P.

Annotation:—Reid. Campbell v. Spottiswoode (1863), 3 B. & S. 769.

1592. — Regarding applicant for licence.]—At a meeting of the London County Council held for the purpose of hearing applications for music & dancing licences pursuant to the powers transferred to it by Local Government Act, 1888 (c. 41), which the justices had formerly exercised under Disorderly Houses Act, 1752 (c. 36), deft. made statements defamatory of pltf., who in an action for slander afterwards recovered a verdict & damages against him. Upon a motion by deft. for judgment or a new trial:—*Held*: (1) though the County Council was bound to act judicially in the sense of fairly & impartially, the meeting was not a ct. so as to entitle deft. to absolute immunity for what he had uttered at such meeting; (2) the occasion being privileged, there was evidence of express malice to justify the verdict of the jury; there being evidence that deft. had allowed his mind to get into a state of such unreasoning prejudice that he spoke, reckless whether his statements were true or false, & without acting simply from consideration of his duty in the matter; & (3) deft. was not entitled to notice of action, "words spoken" not being "a thing done" by him in the execution of his office.—*ROYAL AQUARIUM & SUMMER & WINTER GARDEN SOCIETY v. PARKINSON*, [1892] 1 Q. B. 431; 61 L. J. Q. B. 409; 66 L. T. 513; 56 J. P. 404; 40 W. R. 450; 8 T. L. R. 352, C. A.

Annotations:—As to (1) Connell. Burr v. Smith (1909), 78 L. J. K. B. 889; *Attwood v. Chapman*, [1914] 3 K. B. 275; *Everett v. Griffiths*, [1920] 3 K. B. 163. *Reid. R. v. L. C. C., Re Empire Theatre* (1894), 71 L. T. 638; *Hodson v. Pare*, [1899] 1 Q. B. 455; *Barratt v. Kearns*, [1905] 1 K. B. 504; *R. v. Russell, Ex p. Morris* (1905), 93 L. T. 407; *Tenby Corp. v. Mason*, [1908] 1 Ch. 457; *R. v. L. G. Board, Ex p. Arlidge* (1913), 78 J. P. 25; *R. v. L. C. C., Ex p. London & Provincial Electric Theatres*, [1915] 2 K. B. 466; *Copartnership Farms v. Harvey-Smith*, [1918] 2 K. B. 405; *Slack v. Barr* (1918), 82 J. P. 91; *R. v. Bath Compensation Authority*, [1925] 1 K. B. 685. *As to (2) Connell. Weld-Blundell v. Stephens*, [1919] 1 K. B. 520. *Reid. Roff v. British & French Chemical Manufacturing Co. & Gibson*, [1918] 2 K. B. 677; *Pratt v. British Medical Assocn.*, [1919] 1 K. B. 244.

1593. — By official.]—*COOKE v. WILDES*, No. 1896, *post*.

1594. — Regarding fellow official.]—H., clerk of guardians, wrote a letter to the board setting forth an omission of duty by K., one of the clerks in the office, & that K.'s manner was offensive & insubordinate. The board, after inquiry & hearing statements & explanations of H. & K. as to this charge, directed H. to give K. a month's notice to leave, & he was discharged. The board

at the same time gave a certificate to K. as sober & steady, & as to their parting with him with regret. K. having sued H. for libel & slander:—*Held*: occasion was privileged, & if H. was acting in the course of his duty & without malice, he was not liable.—*KEIGHT v. HILL* (1879), 43 J. P. 176, N. P.

1595. — — — — —.]—*MARTIN v. ALLEN* (1901), 65 J. P. 809, N. P.

1596. Communication to general members of body—Justices in special sessions.]—Under Parish Constables Act, 1842 (c. 109), the vestry, on precept from the justices, are to make out & return a certain number of persons within the parish, qualified & liable to serve as constables; the list is to be affixed on the church door, & notice given when & where objections will be heard by the justices, who are empowered, at a special sessions, to strike out of the list the names of persons not qualified or liable to serve. At a vestry held in pursuance of that Act, pltf.'s name was inserted in the list of persons qualified & liable to serve, & he attended a session for the purpose of being sworn in, when deft., a parishioner, objected to him, & made a statement to the justices, in the presence of other persons, imputing perjury to pltf. In an action for slander the jury found that deft. made the statement *bonâ fide*, believing it to be true:—*Held*: the statement was properly made before the justices, & was a privileged communication.—*KERSHAW v. BAILEY* (1848), 1 Exch. 743; 17 L. J. Ex. 129; 12 J. P. 663; 154 E. R. 316.

1597. Statement by public body—Publication of minutes—Intimating removal of member from register.]—By Medical Act, 1858 (c. 90), the General Council of Medical Education & Registration were established, one of their duties being to keep a register of medical practitioners. By sect. 29 "if any registered medical practitioner shall after due inquiry be judged by the general council to have been guilty of infamous conduct in any professional respect, the general council may, if they see fit, direct the registrar to erase the name of such medical practitioner from the register":—*Held*: (1) if the council, acting *bonâ fide* & after due inquiry, had adjudged a medical practitioner to have been guilty of infamous conduct in a professional respect, the ct. has no jurisdiction to review their decision; (2) the publication of the minutes of the council, containing a report of their proceedings comprising a statement that the name of a specified medical practitioner has been removed from the register on the ground that, in the opinion of the council, he has been guilty of infamous conduct in a professional respect, is, if the report be accurate, & published *bonâ fide* & without malice, privileged, & the medical practitioner cannot maintain an action of libel against the council in respect of the publication.—*ALLBUTT v. GENERAL COUNCIL OF MEDICAL EDUCATION & REGISTRATION* (1889), 23 Q. B. D. 400; 58 L. J. Q. B. 606; 61 L. T. 585; 54 J. P. 36; 37 W. R. 771; 5 T. L. R. 651, C. A.

Annotations:—As to (1) Reid. Partridge v. General Council of Medical Education & Registration (1892), 57 J. P. 4; *Mangena v. Wright*, [1909] 2 K. B. 958; *Pratt v. British Medical Assocn.*, [1919] 1 K. B. 244. *As to (2) Connell. Macdougall v. Knight* (1890), 25 Q. B. D. 1. *Reid. Mangena v. Wright*, [1909] 2 K. B. 958.

BROUKHORST, [1918] T. P. D. 165.—S. AF.

h. Communication to Licensing Board.]—A member of a Licensing Board has no privilege such as may attach to a judicial capacity of protection for any statements made by him at a meeting of the Board.—*DELIA*

v. NEETHLING (1874), Buch. 129.—S. AF.

k. Communication to chamber of commerce—By fellow member.]—A communication made *bonâ fide* & without malice & upon sufficient grounds, at a meeting of a chamber of commerce, by one member concerning another

member, on a subject fairly within the scope of the objects of the chamber, would be privileged.—*KRÖGER & Co. v. BETTINGTON* (1882), 2 E. D. C. 361.—S. AF.

l. — — — — —.]—*FOORD v. GOOD* (1876), Buch. 37.—S. AF.

x. Communications by and to Corporations, Companies, etc.

1598. Communication to committee—By member—Director to board meeting—Regarding auditor.]—Pltf., the secretary of a co. called the Brewers' Insurance co., being charged with misconduct, was called upon to attend a board of directors for the purpose of explanation, but declined to do so, whereupon the directors, after hearing the nature of the charges, passed a resolution declaring him to have been guilty of gross misconduct & dismissing him from their service. Deft., who was a director of that co., & also of another co. called the London Necropolis co., communicated the fact of pltf.'s dismissal from the service of the former co. "for gross misconduct," at a board meeting of the latter co., & proposed a resolution to dismiss him from his employment as their auditor, & in answer to an inquiry from the chairman, said that the misconduct consisted in "obtaining money from the solrs. of the co. under false pretences, & paying a debt of his own with it"; & upon pltf.'s appearing on a subsequent day with his attorney before the board, to meet the charges against him, deft. refused to go into them. In an action of slander:—*Held*: the communication was privileged, & deft.'s refusal to go into the charges in the presence of pltf. & his attorney, was no evidence of malice that could properly be submitted to the jury; for that, such refusal being consistent with *bona fides*, *bona fides* was to be presumed until the contrary was proved.—*HARRIS v. THOMPSON* (1853), 13 C. B. 333; 20 L. T. O. S. 99; 138 E. R. 1228.
Annotation:—*Apld.* Laughton v. Sodor & Man (Bp.) (1872), L. R. 4 P. C. 495.

1599. — By official—Regarding applicant for charitable relief.]—*WALLER v. LOCH*, No. 1445, *ante*.

1600. Communication to general members—By directors—Circular letter.]—*LAWLESS v. ANGLO-EGYPTIAN COTTON CO.*, No. 1481, *ante*.

1601. — At general meeting.]—A person who had been manager of a local branch of a co-operative society sued the chairman of the society for slander. At a large meeting the conduct of pltf., of whom complaints had been made, was brought forward, & deft., the chairman, in answer to questions, made certain statements as to pltf. to the effect that "he was a thorn in the side" of three former head managers when he had acted as branch manager, & that he was often late to business, adding, "I have met him myself coming down smelling strongly of drink." It was put to the meeting that pltf. should be dismissed, & out of 130 persons present about 90 voted for his dismissal, & only 40 against it, & he was accordingly dismissed. He then brought an action against the chairman for slander in respect of the statements so made, & at the trial in the county ct. the judge held that the occasion was privileged & directed a nonsuit, there being, in his opinion, no evidence of malice:—*Held*: the county ct. judge was right in directing a nonsuit.—*STOTT v. EVANS* (1887), 3 T. L. R. 693, D. C.

1602. — By fellow member—At general meeting.]—(1) Words spoken by one member of a charitable association to another, respecting the conduct of a medical man employed by the association, are not a privileged communication.

(2) *Seem*: if they had been spoken at a meeting of the association, held for the consideration of the medical man's conduct, it would be otherwise.—*MARTIN v. STRONG* (1836), 5 Ad. & El. 535; 2 Har. & W. 336; 1 Nev. & P. K. B. 29; 6 L. J. K. B. 48; 11 E. R. 1268.

Annotations:—*As to* (1) *Consd.* Kine v. Sewell (1838), 3 J.—VOL. X

M. & W. 297. *As to* (2) *Refd.* Kine v. Sewell (1838), 3 *M. & W.* 297; *Padmore v. Lawrence* (1840), 4 J. P. 42. *Generally, Mntd.* Hearne v. Stowell (1841), 12 Ad. & El. 719.

1603. — — — — —.]—*MYROFT v. SLEIGHT*, No. 346, *ante*.

1604. — — — — — Circular letter.]—*HILL v. HART-DAVIES*, No. 2251, *post*.

1605. Statement by one member to another—Regarding employee.]—*MARTIN v. STRONG*, No. 1602, *ante*.

xi. Statements by Public Officials.

1606. Whether privileged.]—Where the justices for a borough, to facilitate business, at the general annual licensing meeting ordered the head constable to issue to persons having business at the meeting copies of his report stating grounds of objection to renewal of licenses:—*Held*: the publication was upon a privileged occasion, & in the absence of express malice an action for libel would not lie against the head constable for defamatory statements in the grounds of objection.—*ANDREWS v. NOTT BOWER*, [1895] 1 Q. B. 888; 64 L. J. Q. B. 536; 72 L. T. 530; 59 J. P. 420; 43 W. R. 582; 11 T. L. R. 350; 14 R. 404, C. A.

1607. — — — — —.]—*MANGENA v. WRIGHT*, No. 1722, *post*.

1608. — — — — —.]—(1) Upon a plea that a libel was published on a privileged occasion it is for the judge to determine whether the occasion is privileged & whether the privilege has been exceeded.

(2) It is for the judge, & the judge alone, to determine as a matter of law whether the occasion is privileged, unless the circumstances attending it are in dispute, in which case the facts necessary to raise the question of law should be found by the jury (*LORD FINLAY, C.*).

(3) Where a libel contains defamatory matter not referable to the duty or interest which gives rise to the privileged occasion, such matter is outside the occasion & is not protected; & such excess of privilege in part of a defamatory publication may also be evidence of malice as to the whole of it. Excessive language in regard to a matter within the privileged occasion is material only as evidence of malice. *Seem*: in determining whether such language is evidence of malice, it will not be subjected to strict scrutiny.

(4) A public official, who acting under the direction of his principals, signs & publishes a libel, takes the benefit of the privilege of his principals & is liable for their malice. *Seem*: evidence of malice on his part is irrelevant.

Pltf., who was formerly an officer in a cavalry regiment & was subsequently elected a member of Parliament, in a speech in the House of Commons, falsely charged the General commanding the brigade of which his late regiment formed part with sending confidential reports to Headquarters on officers under his command, containing wilful & deliberate misstatements. The General having referred the matter to the Army Council, deft., as secretary to the Council & by their direction, wrote a letter to the General, vindicating him against the charge made by pltf., & containing defamatory statements about pltf., & sent it to the Press for publication. The letter was widely published in the British & Colonial Press. In an action for libel by pltf. against deft., deft. pleaded that the letter was published on a privileged occasion:—*Held*: (5) the occasion was privileged & there was no evidence of malice on the part of either the Council or deft.; (6) having regard to the circumstances under which pltf.'s charge was made, the publication of the libel was not unreasonably wide; (7) in the special circumstances of the

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... xiii. & xiv.]

case the defamatory statements were strictly relevant to the vindication of the General, & the whole of the letter was protected.—*ADAM v. WARD*, [1917] A. C. 309; 86 L. J. K. B. 849; 117 L. T. 34; 33 T. L. R. 277, H. L.; *affg.* (1915), 31 T. L. R. 299, C. A.

Annotations:—As to (1) Reid. Tournier v. National Provincial & Union Bank of England, [1924] 1 K. B. 461. *As to (3) Reid. Gerhold v. Baker* (1918), 35 T. L. R. 102. *As to (4) Reid. London Assoon. for Protection of Trade v. Greenlands* (1915), 85 L. J. K. B. 698.

xii. Statements at Elections.

1609. Whether privileged—Letter to newspaper by elector.]—Where a candidate for the representation of a borough, circulated an address to the electors, asking for their suffrages, & claiming to be a fit & proper person to represent them in Parliament; & an elector of that borough published in a newspaper two letters addressed to the candidate: the first in answer to the circular, & the second in consequence of the treatment he had received from the candidate on the day of nomination at the hustings, & both letters contained imputations on the private character of the candidate. In an action for libel, brought by the candidate:—*Held*: the circumstances under which the letters were published did not render them privileged communications.—*DUNCOMBE v. DANIELL* (1837), 8 C. & P. 222; 1 Will. Woll. & H. 101; 2 Jur. 32.

Annotations:—Reid. Pankhurst v. Hamilton (1887), 3 T. L. R. 500. *Mentd. Kirkman v. Jervis* (1839), 7 Dowl. 678; *Speck v. Phillips* (1839), 7 Dowl. 470; *Haller v. Worman* (1861), 3 L. T. 741.

1610. — Communication by one agent to another—Alleging bribery.]—F. & B. were candidates at a Parliamentary election. The defts. were agents of B., & on the day of the election, whilst the poll was proceeding, one of them wrote to the agent of F., stating that bribery on F.'s behalf was going on. B. was returned & on the next day pltf.'s name was mentioned by the deft. to F.'s agent as that of a briber. A discussion upon the imputation ensued, which resulted in defts. transmitting to F.'s agent on the day following a document signed by both of them "certifying" that pltf. had been personally guilty of bribery. In an action of defamation brought upon this document:—*Held*: the occasion was not privileged. *Qu.*: whether it would have been privileged if a petition against the return of B. had been presented or contemplated, the twenty-one days during which such a petition might have been presented not having elapsed.—*DICKESON v. HILLIARD* (1874), L. R. 9 Exch. 79; 43 L. J. Ex. 37; 30 L. T. 196; 22 W. R. 372.

1611. — Provided no malice proved.]—*WISDOM v. BROWN* (1885), 1 T. L. R. 412, N. P.

xiii. Statements by and to Ministers of Religion.

1612. Letter to member of congregation—Concerning proposed minister.]—*BLACKBURN v. BLACKBURN*, No. 1869, *post*.

1613. Letter to bishop of diocese—Regarding be-

haviour of incumbent.]—A letter written to a bishop, informing him of a report current in a parish, in his diocese, that the incumbent of a district in that parish had collared the schoolmaster, & that a fight ensued between them, is a privileged communication if such letter was written to the bishop honestly, to call his attention to a rumour in the parish which was bringing scandal on the church, & not from any malicious motive; & it is not material that the writer of the letter did not live in the district to the incumbent of which the letter refers.—*JAMES v. BOSTON* (1845), 2 Car. & Kir. 4, N. P.

1614. Circular letter by vicar—Concerning former parish schoolmaster.]—Pltf. was master of a "national school" in the parish of C., of which deft. was rector & also one of the managers of the school. Deft. requested pltf. to teach a Sunday school in connection with the national school, which he declined, on account of the increased labour, & was in consequence dismissed. Pltf. being about to set up a school on his own account in the same parish, deft. wrote, & distributed in that & the adjoining parish a pastoral letter, in which he denounced pltf.'s conduct as unchristian-like, & warned his parishioners against affording any countenance to the projected school, either by subscriptions or by sending their children to it. The judge at the trial having ruled that this letter was a privileged communication, & that, there being no evidence of express malice, deft. was entitled to a verdict:—*Held*: (1) the communication was not privileged, & there was evidence for the jury of express malice; (2) in determining the question of malice the jury might look at the libel itself.—*GILPIN v. FOWLER* (1854), 9 Exch. 615; 23 L. J. Ex. 152; 23 L. T. O. S. 22; 18 Jur. 292; 2 W. R. 272; 156 E. R. 263, Ex. Ch. *Annotations:—As to (2) Consd. Cooke v. Wildes* (1855), 5 E. & B. 328. *Reid. Clark v. Molyneux* (1877), 3 Q. B. D. 237.

1615. Letter concerning member of church congregation.]—(1) A communication made *bona fide* upon any subject-matter in which the party communicating has an interest, or in reference to which he has, or honestly believes he has, a duty, is privileged, if made to a person having a corresponding interest or duty, although it contain criminatory matter which, without this privilege, would be slanderous & actionable.

A., a well esteemed member of a congregation in London notorious for its extreme high church notions, being on a visit to a Mrs. H., also a member of the same congregation, who was residing for a time at S., in Berkshire, was by her introduced to B., the rector of the parish, a gentleman of similar religious tendencies. The latter introduced A. to one of his parishioners, a farmer named F., with whom A. soon became on terms of intimacy, staying on several occasions at F.'s farm with different members of his family. After the lapse of some months, F., conceiving that he had ground of complaint against A. with regard to some private transactions which he communicated to B., brought an action against A.

PART VI. SECT. 3, SUB-SECT. 3.—
A. (c) xii.

m. Whether privileged—Allegation of bribery—Unaccepted challenge to answer charge.]—*GAUTHIER v. JEAN-NOTTE* (1898), 28 S. C. R. 590.—*CAN.*

n. — Question at meeting.]—A question put at a public meeting to a candidate for election to Parliament is not actionable as slanderous, however damaging it may be to the character

of the candidate, if put by an elector with *bona fides*, & honestly with the intention of gaining information, or to satisfy himself as to the truth of an existing rumour; but such a question may be actionable if put maliciously with the object of circulating a slander.—*CRICK v. BUTLER* (1891), 12 N. S. W. L. R. 75; 7 N. S. W. W. N. 141.—*AUS.*

o. —.]—*BRADNEY v. VIRTUE* (1909), 28 N. Z. L. R. 828.—*N.Z.*

PART VI. SECT. 3, SUB-SECT. 3.—
A. (c) xiii.

p. Candidate for ordination as elder—Statement by ordaining minister—On third person's authority.]—In an action of damages for slander, pursuer, a candidate for eldership, averred that defender, the parish minister, had written a letter to him in which he informed him that a third party had made a serious charge against him, &

PART VI.—DEFENCES.

for board & lodging & the price of a horse which he alleged had been bought of him by A. A. resisted the claim as to the board & lodging on the ground that he & his family had resided at F.'s farm as guests & not as lodgers, & the claim as to the horse on the ground that he had only taken it upon trial. In this state of things, one C., one of the curates of the London congregation, wrote to B. asking him to consent to act with him as arbitrator in the dispute between F. & A. B. declined; whereupon C. again wrote to him, urging it upon him as a sacred duty to aid in averting what he called a scandal from a member of his (C.'s) congregation. In reply to this letter, B. wrote to C. giving him his reasons for declining to act as arbitrator, imputing to A. very gross misconduct, & adding, "I think it my duty to unmask him to you." This letter having been handed by C. to A., & the latter having commenced an action for a libel against B., B. came to London, & called on Mrs. H., to whom he detailed some of the charges against A. That lady intimated her conviction that B. was mistaken in his opinion of A., but said she would see him on the subject & communicate with B. the result, adding that she was quite sure A. would tell her the truth. Mrs. H. afterwards wrote to B., with A.'s knowledge, telling him that A. denied all the charges alleged against him, & reiterating her confidence in A.'s integrity. B. thereupon wrote in answer to Mrs. H. substantially repeating the charges, saying, as to one of them, that there was not a shadow of doubt but that the complaint was correct, & that if A. denied it in the witness box he would be indicted for perjury. This letter was also handed to A. who, knowing it was coming, called on Mrs. H. for it, & a second action was the result. The two actions having been consolidated, the jury at the trial found that the charges contained in the letters were unfounded, but that B. was not actuated by malice:—*Held*: both letters were privileged, on the ground that they were written by deft. in what he believed to be the honest discharge of a social & moral duty, & on a subject-matter in which the writer had an interest in making the communications, & the persons respectively receiving them had an interest in the receipt of them.

(2) Judges who have from time to time to deal with questions as to whether the occasion justified the speaking or the writing of the defamatory matter, have all felt great difficulty in defining what kind of social or moral duty, or what amount of interest, will afford a justification; but all are clear that it is a question for the judge to decide

(ERLE, C.J.).—*WHITELEY v. ADAMS* (1863), 15 C. B. N. S. 392; 3 New Rep. 126; 33 L. J. O. P. 89; 9 L. T. 483; 10 Jur. N. S. 470; 12 W. R. 153; 143 E. R. 838.

Annotations:—As to (1) *Apld.* *Laughton v. Sodor & Man (Bp.)* (1872), L. R. 4 P. C. 495. *Consd.* *Henwood v. Harrison* (1872), L. R. 7 C. P. 606; *Clark v. Molyneux* (1877), 3 Q. B. D. 237. *Apld.* *Stuart v. Bell*, [1891] 2 Q. B. 341. *Refd.* *Cowles v. Potts* (1865), 6 New Rep. 289; *Hebditch v. MacIlwaine*, [1894] 2 Q. B. 54; *Macintosh v. Dun*, [1908] A. C. 390; *London Assocn. for Protection of Trade v. Greenlands*, [1916] 2 A. C. 15; *Adam v. Ward*, [1917] A. C. 309. As to (2) *Refd.* *Allbutt v. General Council of Medical Education & Registration* (1889), 23 Q. B. D. 400; *Stuart v. Bell*, [1891] 2 Q. B. 341; *London Assocn. for Protection of Trade v. Greenlands*, [1916] 2 A. C. 15; *Adam v. Ward*, [1917] A. C. 309.

1616. Statement to vicar of parish—Concerning own & solicitor's conduct—In relation to trust property.]—*DAVIES v. SNEAD*, No. 1455, *ante*.

1617. Bishop's charge to clergy—Containing defence of own conduct.]—*LAUGHTON v. SODOR & MAN (Bp.)*, No. 1451, *ante*.

1618. Communication from clergyman to curate—Referring to ecclesiastical matters.]—*CLARK v. MOLYNEUX*, No. 1922, *post*.

xiv. Other Cases.

1619. Words used by way of counsel.]—Words are not actionable if they are used by way of good counsel.—*VANSPIKE v. CLEYSON* (1597), Cro. Eliz. 541; 78 E. R. 788.

Annotation:—*Consd.* *Bromage v. Prosser* (1825), 6 Dow. & Ry. K. B. 296.

1620. Statement in "confidence & friendship & by way of warning."—*HERVER v. DOWSON* (1765), Bull. N. P. 8, N. P.

Annotations:—*Distd.* *Rogers v. Clifton* (1803), 3 Bos. & P. 587. *Dbtd.* *Coxhead v. Richards* (1846), 2 C. B. 569. *Refd.* *Bromage v. Prosser* (1825), 3 L. J. O. S. K. B. 203.

1621. Statement as to plaintiff's commercial honesty.]—(1) Though a letter, written confidentially by the correspondents of a foreign mercantile house, contain very strong expressions concerning third persons engaged in mercantile transactions, imputing to such persons "notoriety for everything but fair dealing, & a strict adherence to their engagements"; yet, *semble*: those expressions will not, *per se*, take away the privilege which attaches to such a communication, & make the letter a libel. (2) The transmission of the letter by deft. to his correspondent held a sufficient publication by deft.—*WARD v. SMITH* (1830), 6 Bing. 749; 4 C. & P. 302; 4 Moo. & P. 595; 8 L. J. O. S. C. P. 294; 130 E. R. 1469.

1622. Letter regarding candidate for post with company—From one shareholder to another.]—A. was engaged to superintend the works of a

that defender could not ordain pursuer as elder with such a charge against his character:—*Held*: the occasion was privileged.—*MURRAY v. WYLIE*, [1916] S. C. 356.—*SCOT*.

PART VI. SECT. 3, SUB-SECT. 3.— A. (c) xiv.

q. Statement as to plaintiff's unfitness as solicitor.]—*TOBIN v. GANNON* (1901), 34 N. S. R. 9.—*CAN*.

r. Communication to plaintiff's solicitor.]—Communication of defamatory matter to the solr. of the party alleged to be defamed is privileged if done without malice & to give information of interest to such party in matters in which the solr. is employed.—*DE SCHELKING v. CROMIE (B. C.)*, [1919] 3 W. W. R. 539.—*CAN*.

t. Statement as to teacher's character—By inhabitants of school section.]—*MCINTYRE v. MOBEAN* (1856), 13 U. C. R. 534.—*CAN*.

a. Statement as to conduct of

lighthouse keeper.]—A letter to a newspaper commenting on the conduct of a lighthouse keeper on the occasion of the wreck of a vessel, & making statements tending to show that he had acted in an inhuman manner, & had not taken the proper means to save the lives of the crew, is not a privileged communication.—*BROWN v. ELDER* (1888), 27 N. B. R. 465.—*CAN*.

b. Statement as to medical practitioner—Relating to prospective appointment—Unfitness as examiner of lunatic in gaol.]—*SHAVER v. LINTON* (1862), 28 U. C. R. 177.—*CAN*.

c. Applicant for membership of farmers' association—Statement as to character.]—When a person is applying for membership in an organisation of a character such as that of the United Farmers of Alberta it is the duty of a member who knows of the application to communicate to his fellow members anything that he knows & that he honestly believes to be to the detri-

ment of the character of the applicant.—*HALMRAST v. CHISHOLM (Alta.)*, [1924] 1 W. W. R. 140.—*CAN*.

d. Statement to one partner—Other formerly associate of burglars—Informant a detective.]—Deft. a government detective, knowing that one M. was in partnership with pltf., informed him that pltf. was connected with a gang of burglars which deft. had been the means of breaking up, & put him on his guard:—*Held*: the communication was privileged.—*SMITH v. ARMSTRONG* (1866), 26 U. C. R. 57.—*CAN*.

e. Statement to prospective husband—As to intended wife's character.]—*ROSS v. BUCKE* (1891), 21 O. R. 692.—*CAN*.

f. Imputing treachery to trade union member—In journal of union.]—*BEAULIEU v. COCHRANE* (1898), 29 O. R. 151, 598.—*CAN*.

g. Complaint by doctor—Relating to dispensing by chemist.]—A doctor in making a complaint to a chemist that

Sect. 3.—Qualified privilege: Sub-sect. 3, C., D. & E.; sub-sect. 4, A. & B. (a) & (b).]

verdict must be for deft.—HOARE v. TODD (1850), 16 L. T. O. S. 86.

.]—Pltf.'s attorney having at his desire written to deft. demanding payment of an alleged debt, the latter sent a letter to the attorney containing gross imputations upon pltf.'s character, wholly unconnected with the demand made upon him:—*Held*: not a privileged communication, although the jury found that the letter was written *bond fide*, & negatived malice in fact.—HUNTLEY v. WARD (1859), 8 C. B. N. S. 514; 33 L. T. O. S. 137; 6 Jur. N. S. 18; 141 E. R. 557.

Annotations:—*Distd.* Stevens v. Kitchener (1887), 4 T. L. R. 159. *Refd.* McQuire v. Western Morning News Co., [1903] 2 K. B. 100.

1645. ———.]—Where an underwriter, in discussing with an agent of the assured a claim on his part as for a total loss, made a statement purporting to be founded on a letter of the assured which he professed to have seen, implying a design to make such a claim dishonestly, no such letter having been written:—*Held*: the occasion was privileged, but whether the communication was so, would depend on the motive with which it was made & whether there was a mere mistake or a statement wilfully false.—HANCOCK v. CASE (1862), 2 F. & F. 711.

tradesman received a letter in the name of deft. containing an order for goods. The goods were sent & returned by deft., on the ground that he had not ordered them. At his request the tradesman sent him the letter containing the order, when he wrote to the tradesman stating that in his opinion, & he firmly believed, the letter was written by pltf.:—*Held*: the statement, having been made *bond fide*, was a privileged communication.—CROFT v. STEVENS (1862), 7 H. & N. 570; 31 L. J. Ex. 143; 5 L. T. 683; 20 J. P. 200; 10 W. R. 272; 158 E. R. 598.

Annotation:—*Refd.* Stuart v. Bell, [1891] 2 Q. B. 341.

1647. ———.]—A policy holder having, in the course of a dispute with an insurance co., published a pamphlet accusing the directors of fraud, & they having published a pamphlet in answer, declaring these charges to be false & calumnious, & also asserting that, in a suit he had instituted, he had sworn, in support of those charges, in opposition to his own handwriting; & evidence being given that there was ground for these statements, & the pamphlet of the co. having been only handed by the manager to a party applying for a policy, in answer to an inquiry by him as to the case:—*Held*: if the publication was fair, *bond fide*, & without malice, & not for the purpose of injuring the policy holder, but of vindicating

the co., then it was privileged; & if his charges were false, the publication, even if not privileged, was justified, because, if false, they were calumnious.—KOENIG v. RITCHIE (1862), 3 F. &

1648. ———.]—Declaration that pltf., a certificated master mariner, having been employed as master of certain vessels, his services were retained by the proprietor of ship U.; that he was getting ready to take command thereof when he found that deft. insurance society had intimated to the proprietor that if pltf. were to take command of her the society would refuse to continue to insure her; that he then took certain steps in order to induce the society to reconsider their resolution or to give him an opportunity of refuting the reasons they might have for it, but in vain; that by reason of this proceeding on the part of the society he had lost his employment, & that this arbitrary & vexatious conduct on the part of the society caused him considerable damage in depriving him of his employment, & consequently of the means of providing for & maintaining his family, praying that the conduct of the society might be declared illegal, arbitrary, & vexatious, & that they might pay damages £500. Plea in effect that defts. acted upon information which they believed to be true that pltf. was addicted to intemperance, that they communicated their refusal to insure, but not their information, to the shipowner, that they did so in good faith, & without any malice towards pltf., without any desire to injure him, & in the honest belief that the information they had received was sufficient to justify the course which they took:—*Held*: (1) such defence, if proved, was a sufficient answer to the *prima facie* cause of action disclosed by the declaration. The representation made by the defts. was clearly one made in the conduct of their own affairs & in matters in which their own interest was concerned; (2) such defence was established by proof that defts. had received such information, & had reason to believe it to be true, without conclusively establishing habits of intemperance against pltf. as upon a plea of justification.—HAMON v. FALLE (1879), 4 App. Cas. 247; 48 L. J. P. C. 45, P. C.

Annotations:—*As to* (1) *Appld.* Hunt v. G. N. Ry. (1890), 55 J. P. 234. *Refd.* Stuart v. Bell, [1891] 2 Q. B. 341.

1649. ———.]—STEVENS v. KITCHENER (1887), 4 T. L. R. 159.

1650. ———.]—NEVILL v. FINE ART & GENERAL INSURANCE Co., No. 1010, *ante*.

D. Statements in Answer to Question by Party Defamed.

1651. Whether privileged.]—WARR v. JOLLY, No. 1497, *ante*.

PART VI. SECT. 3, SUB-SECT. 3.—C.

1649 i. Whether privileged.]—It is a good defence to an action for libel that deft. published the words complained of *bond fide* & without malice in reasonable & necessary defence of his property against injurious statements by pltf. concerning that property.—NORTON v. HOARE (1913), 17 C. L. R. 310.—AUS.

1649 ii. ———.]—HOLLIDAY v. ONTARIO FARMERS MUTUAL INSURANCE Co. (1876), 38 U. C. R. 76.—CAN.

1649 iii. ———.]—STEWART v. SCULTHROP (1894), 25 O. R. 544.—CAN.

1649 iv. ———.]—R. v. SLATER (1890), 1 L. R. 15 Bom. 351.—IND.

1649 v. ———.]—In an action to recover damages for libel, if it is proved that what deft. wrote was written *bond fide* in answer to the attack made on

him by pltf. & for the sole purpose of defending himself from such an attack, then the occasion is privileged.—AMRITA NATH MITTER v. ABHOY CHARAN GHOSE (1904), 1 L. R. 32 Calc. 318; 8 C. W. N. 731.—IND.

1649 vi. ———.]—Where a party publishes in a newspaper statements reflecting on the conduct or character of another, the aggrieved party is entitled to have recourse to the public press for his defence & vindication; & if, in so doing, he reflects on the conduct or character of his assailant, it is for the jury to say whether he did so honestly in self-defence, or was actuated by malice towards the party who originally assailed him.—O'DONOGHUE v. HUSSEY (1871), 1 L. R. 5 C. L. 124.—IR.

1649 vii. ———.]—Dwyer v. Edmonde (1878), 2 L. R. 1r. 243.—IR.

1649 viii. ———.]—*Held*: the words complained of, having been spoken in *bond fide* self-defence & with reference to a matter in which deft. had an interest, were privileged.—TOWELL v. FALLON (1913), 47 I. L. T. 176.—IR.

1649 ix. ———.]—BUCHAN v. NORTH BRITISH Ry. Co. (1894), 21 R. (Ct. of Sess.) 379; 31 Sc. L. R. 273; 1 S. L. T. 450.—SCOT.

1649 x. ———.]—CAMPBELL v. COCHRANE (1905), 8 F. (Ct. of Sess.) 205; 43 Sc. L. R. 221; 13 S. L. T. 691.—SCOT.

1649 xi. ———.]—NATHANSON v. DOHERTY, [1914] T. P. D. 453.—S. AF.

PART VI. SECT. 3, SUB-SECT. 3.—D.

1651 i. Whether privileged.]—MISSON v. McOWAN, [1906] V. L. R. 280.—AUS.

1652. —.]—(1) Where a person courts the alleged slander by a question, the occasion is privileged.

(2) Where evidence has been given showing an utterly untrue statement to have been made, that is of itself sufficient *prima facie* evidence of express malice.—**PALMER v. HUMMERSTON** (1883), *Cab. & El.* 36.

1653. — Inquiry caused by former statement of defendant.]—**GRIFFITHS v. LEWIS**, No. 1499, *ante*.

E. Privileged Reports.

See Sub-sect. 4, *post*.

SUB-SECT. 4.—PRIVILEGED REPORTS.

A. In General.

1654. Limit of privilege—Reports made to editors of newspapers.]—**DAVIS v. SHEPSTONE**, No. 1746, *post*.

B. Judicial Proceedings.

(a) In General.

1655. General rule—Report privileged.]—An action cannot be maintained for publishing a true account of the proceedings of a ct. of justice, however injurious such publication may be to the character of an individual. *Qu.*: whether the matter of justification ought not to be pleaded.—**CURRY v. WALTER** (1796), 1 *Bos. & P.* 525; 1 *Esp.* 456; 126 *E. R.* 1046.

Annotations:—**Expld.** **Knobell v. Fuller** (1797), *Peake, Add. Cas.* 139; **Stiles v. Nokes** (1806), 7 *East*, 493. **Distd.** **R. v. Fisher** (1811), 2 *Camp.* 563. **Consd.** **R. v. Creevey** (1813), 1 *M. & S.* 273; **R. v. Carlile** (1819), 3 *B. & Ald.* 167; **Duncan v. Thwaites** (1824), 3 *B. & C.* 556; **Stockdale v. Hansard** (1839), 9 *Ad. & El.* 1. **Apld.** **Lewis v. Levy** (1858), *E. B. & E.* 537. **Folld.** **Usill v. Hales** (1878), 3 *C. P. D.* 319. **Refd.** **Carr v. Jones** (1806), 3 *Smith, K. B.* 491; **Stockley v. Clement** (1827), 12 *Moore, C. P.* 376; **Smith v. Thomas** (1835), 2 *Scott*, 546; **Kimber v. Press Assocn.**, [1893] 1 *Q. B.* 65; **R. v. Evening News, Ex. p. Hobbs**, [1925] 2 *K. B.* 158.

1656. —.]—**KIMBER v. PRESS ASSOCN.**, No. 1666, *post*.

1657. Ground of privilege.]—**MACDOUGALL v. KNIGHT**, No. 1698, *post*.

1658. —.]—Pltf. was summoned for a breach of 56 & 57 *Vict. c.* 56, s. 1 (1), & convicted. In a report of the proceedings in the police ct. defts. stated in their newspaper that pltf. was prosecuted for "having issued a certain invoice as to the quality of manure sold by him to S., on Jan. 26, which he knew to be false." The summons did not contain the words "which he knew to be false," but these words appeared in the abstract of the charge in the charge sheet, which was shown to defts.' reporter, & which was a copy identical with the charge sheet subsequently signed by the chairman of the magistrates:—**Held**: the entry in the charge sheet was not a minute or memorandum of the order for conviction within Summary Jurisdiction Act, 1848 (*c.* 43), s. 14.

The privilege given to reports of proceedings in cts. is based upon this, that, as every one cannot be in ct., it is for the public benefit that they should

be informed of what takes place substantially as if they were present.—**FURNISS v. CAMBRIDGE DAILY NEWS, LTD.** (1907), 23 *T. L. R.* 705, *C. A.*

(b) What are Judicial Proceedings.

1659. General rule.]—**USILL v. HALES**, No. 1665, *post*.

1660. Preliminary investigation before magistrate.]—The publication in a newspaper of the depositions taken before a justice of the peace on a criminal charge, before the party is tried, is libellous, & a misdemeanour; neither can the printer on an information against him for a libel, give them in evidence, to show that they were truly published.—**R. v. LEE** (1804), 5 *Esp.* 123, *N. P.*

Annotations:—**Refd.** **Duncan v. Thwaites** (1824), 3 *B. & C.* 556; **Delegal v. Highley** (1837), 3 *Bing. N. C.* 950; **R. v. Parke**, [1903] 2 *K. B.* 432.

1661. —.]—In a newspaper a report was given of a case heard before a justice of the peace at the Bow Street office. The statement charged a person with a criminal offence, & consequently was a libel:—**Held**: if it was a fair & true report of what occurred at the office, yet it was unlawful in the editors of the newspaper to publish it.—**DUNCAN v. THWAITES** (1824), 3 *B. & C.* 556; 5 *Dow. & Ry. K. B.* 447; 3 *L. J. O. S. K. B.* 3; 107 *E. R.* 840.

Annotations:—**Distd.** **Lewis v. Levy** (1858), *E. B. & E.* 537. **Refd.** **Pinero v. Goodlake** (1867), 15 *L. T.* 676; **Usill v. Hales** (1878), 3 *C. P. D.* 319.

1662. — Where application *ex parte*.]—It is libellous to publish the preliminary examinations taken *ex parte* before a magistrate previous to committing a man for trial or holding him to bail for an offence with which he is charged; the tendency of such a publication being to prejudice the minds of jurymen against the accused, & to deprive him of a fair trial.—**R. v. FISHER** (1811), 2 *Camp.* 563, *N. P.*

Annotations:—**Expld.** **R. v. Tibbits**, [1902] 1 *K. B.* 77. **Refd.** **Delegal v. Highley** (1837), 5 *Scott*, 154; **R. v. Parke**, [1903] 2 *K. B.* 432.

1663. —.]—*Qu.*: whether the publication of a fair & correct account of proceedings, *ex parte* upon a charge before a magistrate is or is not a privileged publication.—**DELEGAL v. HIGHLEY** (1837), 3 *Bing. N. C.* 950; 3 *Hodg.* 158; 5 *Scott*, 154; 6 *L. J. C. P.* 337; 132 *E. R.* 677.

Annotations:—**Mentd.** **James v. Phelps** (1840), 11 *Ad. & El.* 483; **Turner v. Ambler** (1847), 11 *Jur.* 346.

1664. —.]—In an action for libel there is no distinction between a mere *ex parte* investigation before a magistrate & the regular proceedings in a ct. of law: & therefore deft. in such action cannot set up in answer to it any privilege, on the ground that the libel complained of was a report of a mere preliminary investigation before a magistrate, such distinction being abolished.—**PINERO v. GOODLAKE** (1867), 15 *L. T.* 676, *N. P.*

1665. — Refusal of summons.]—The rule that the publication of a fair & correct report of proceedings taking place in a public ct. of justice is privileged extends to proceedings taking place publicly before a magistrate, though such proceedings consist of an *ex p.* application for a criminal

ii. —.]—**GOOSEN v. SCHEEPERS**, [1914] *E. D. L.* 249.—*S. AF.*

VI. SECT. 3, SUB-SECT. 4.—*B. (a).*

1655 i. General rule—Report privileged.]—A *bona fide* & accurate report of proceedings in a ct. of justice is privileged.—**HUTCHISON v. ROBINSON** 21 *N. S. W. L. R.* 130; 16 *V. W. N.* 254.—*AUS.*

1655 ii. —.]—The publication of a public record, *e.g.* a judgment, of a ct. of justice, is not, *per se*, an actionable libel.—**COSGRAVE v. TRADE AUXILIARY CO.** (1874), 1 *R. 8 C. L.* 349.—*IR.*

1655 iii. —.]—**FULTON v. STUBBS, LTD.** (1903), 5 *F. (Ct. of Sess.)* 814; 40 *Sc. L. R.* 620; 11 *S. L. T.* 77.—*SCOT.*

PART VI. SECT. 3, SUB-SECT. 4.—*B. (b).*

a. Examination of bankrupt before official assignee.]—The examination of a bkpt. before the official assignee in bkpcy. is a judicial proceeding, & the publication of the evidence given by the bkpt. stands on the same footing as the examination of a witness in a ct. of justice.—**PETERSON v. PELLING** (1887), 5 *N. Z. L. R.* 354 (*S. C.*).—*N.Z.*

Sect. 3.—Qualified privilege: Sub-sect. 4, B. (e) i., ii. & iii.]

of the judge or jury should, if necessary, be brought to the bar of public opinion, like all other matters of public concern (COCKBURN, C.J.).—WOODGATE v. RIDOUT (1865), 4 F. & F. 202.

1682. —.]—RISK ALLAH BEY v. WHITEHURST, No. 1734, *post*.

1683. —.]—MILISSICH v. LLOYDS, No. 1717, *post*.

1684. —.]—DODSON v. OWEN, No. 1695, *post*.

1685. —.]—MACDOUGALL v. KNIGHT, No. 1699, *post*.

1686. —.]—RUMNEY v. WALTER (1892), 8 T. L. R. 256.

1687. **Statements untruly reported as proved facts.]**—A report of proceedings in a police ct., which states as proved facts matters opened by the solr. for the prosecution, but contradicted by all the evidence produced, is not privileged as being a fair report of a trial. It is a misdirection in an action for libel on such report, to direct the jury that if they believe the libellous words reported to have been used in the course of the trial they must find for deft. It should be left to them to find if the report is substantially true & fair.—ASHMORE v. BORTHWICK (1885), 49 J. P. 792; 2 T. L. R. 113, D. C.; *affd.*, 2 T. L. R. 209, C. A.

1688. **Untrue statement as to effect of judgment.]**—HAYWARD & CO. v. HAYWARD & SONS, No. 125, *ante*.

ii. Accuracy.

1689. **Verbatim report unnecessary.]**—FLINT v. PIKE, No. 1369, *ante*.

1690. —.]—It is a good defence to an action for a libel, that it consists of a fair & impartial, though not verbatim, report of a trial in a ct. of justice; & such defence is admissible under not guilty, which puts in issue as well the lawfulness of the occasion of the publication, as the tendency of the alleged libel.—HOARE v. SILVERLOCK (1850), 9 C. B. 20; 19 L. J. C. P. 215; 137 E. R. 798.

*Annotations:—***Refd.** Lucan v. Smith (1856), 1 H. & N. 481; Lewis v. Levy (1858), E. B. & E. 537.

1691. —.]—(1) A fair account of proceedings in a ct. of justice is not a libel, even although it may reflect upon the character of a person implicated in them. It is not necessary for this purpose that the report should be a report of all that took place, provided it be a fair & not a garbled account of the proceedings, & the *onus* of proof of this is on deft.

(2) It is a question for the jury whether the report was or was not a fair one, & if satisfied that it was a fair one, deft. is entitled to a verdict.

(3) It is not a justification that the alleged libel was copied from another newspaper, but such a fact will be received in mitigation of damages, as will also an offer by deft. to contradiction of such part of the alleged libel as pltf. will point out to him as untrue.—WEAVER v. SMITH (1851), 16 L. T. O. S. 512.

1692. —.]—ANDREWS v. CHAPMAN, No. 1707, *post*.

1693. —.]—(1) A newspaper has a right to publish either a verbatim or an abridged & condensed report of what passes in a ct. of justice,

even reflections there cast upon parties by counsel or otherwise. But it must be done fairly & honourably so as to convey a just impression of what had passed there.

(2) Whether it is such a fair report is not a question of law for the judge, but a question for the opinion of the jury.—TURNER v. SULLIVAN (1862), 6 L. T. 130.

1694. —.]—MILISSICH v. LLOYDS, No. 1717, *post*.

1695. —.]—Where a condensed report of legal proceedings is inserted in a newspaper it must fairly state the effect of the evidence given & statements made on behalf of the respective parties to the proceedings.—DODSON v. OWEN (1885), 2 T. L. R. 111, D. C.

1696. **Part only of proceedings reported—Opening by counsel—Unaccompanied by evidence.]**

(1) A statement in a newspaper of the circumstances of a cause tried in a ct. of justice, given as from the mouth of counsel, instead of being accompanied or corrected by the evidence, is not such a report of the proceedings of a ct. of justice, as a newspaper is privileged to publish.

(2) In mitigation of damages, deft. was allowed under the general issue to show that he copied this statement from another newspaper, but was not allowed to show that it had appeared concurrently in several other newspapers.—SAUNDERS v. MILLS (1829), 6 Bing. 213; 3 Moo. & P. 520; 8 L. J. O. S. C. P. 24; 130 E. R. 1262.

*Annotations:—***As to** (1) **Consd.** Roberts v. Brown (1834), 10 Bing. 519; Kimber v. Press Assocn., [1893] 1 Q. B. 65. **Refd.** Delegal v. Highley (1837), 3 Bing. N. C. 950. **As to** (2) **Consd.** Pearson v. Lemaitre (1843), 5 Man. & G. 700.

1697. — **Report of each day's proceedings.]**—LEWIS v. LEVY, No. 1667, *ante*.

1698. — **Report of judgment alone.]**—If the report of a judge's judgment or summing-up to a jury did not in fact give reasonable opportunities to the reader to form his own judgment as to what conclusion should be drawn from the evidence given, the publication of such partial, & in that respect inaccurate, representations of the evidence might be the subject of an action for libel to which the supposed privilege in what was said by a judge would be no answer. There is no presumption one way or the other as to whether a judge's judgment does or does not give such a complete & substantially accurate account of the matters upon which he is adjudicating as to bring it within the privilege. If it be so, it must be proved to be so by evidence, & certainly not inferred as a presumption of law.—MACDOUGALL v. KNIGHT (1889), 14 App. Cas. 194; 58 L. J. Q. B. 537; 60 L. T. 762; 53 J. P. 691; 38 W. R. 44; 5 T. L. R. 390, H. L.

*Annotations:—***Mentd.** Smith v. Baker, [1891] A. C. 325; Dakhyi v. Labouchere, [1908] 2 K. B. 325, n.; Banbury v. Bank of Montreal, [1918] A. C. 626; Wilson v. United Counties Bank, [1920] A. C. 102.

1699. — —.]—Deft. published, in the form of a pamphlet, a report of the judgment delivered in a former action which pltf. had brought against him. The pamphlet contained no report of the evidence given at the trial, & there were passages in the judgment reflecting on pltf.'s conduct. Pltf. brought an action for libel in respect of such publication, & the jury found that the pamphlet was a fair, accurate, & honest report of the judgment, & was published without malice, & returned

PART VI. SECT. 3, SUB-SECT. 4.—
B. (e) ii.

proceedings re-
by evidence.]—Unaccom-
libellous speech of counsel given with-

out the evidence by which it was supported & without any object towards the prosecution of the cause, is not a report of the proceedings of a ct. of justice within the meaning of the privilege.—KANE v. MULVANY (1866),

I. R. 2 C. L. 402.—**IR.**

f. — Name omitted by counsel
—Supplied by newspaper.]—GEARY v. ALGER, [1925] 4 D. L. R. 1005.—**CAN.**

g. —.]—M'LINTOCK v. STUBBS,

a verdict for deft. Pltf. thereupon brought another action for libel in respect of the same publication; but he relied on other defamatory statements in the pamphlet than those set out in the statement of claim in the former action for libel. On an application to dismiss this action as frivolous & vexatious:—*Held*: (1) the questions for the jury in the second action for libel being identical with those decided in the first, a plea of *res judicata* must succeed, & the action ought to be stayed as frivolous & vexatious; (2) even if pltf. could rely in one action on one part of the pamphlet, & in another action on another part, such a course was an abuse of the process of the ct., & the second action should be stayed.

The rule of law is, that the publication, without malice, of an accurate report of what has been said or done in a judicial proceeding in a ct. of justice, is a privileged publication, although what is said or done would, but for the privilege, be libellous against an individual, & actionable at his suit, & this is true although what is published purports to be & is a report, not of the whole judicial proceeding, but only of a separate part of it, if the report of that part is an accurate report thereof & published without malice.

The ground of the privilege is that the publication of what took place is merely a means of putting those who were not present in ct. in the position of those who were (LORD ESHER, M.R.).—*MACDOUGALL v. KNIGHT* (1890), 25 Q. B. D. 1; 59 L. J. Q. B. 517; 63 L. T. 43; 54 J. P. 788; 38 W. R. 553; 6 T. L. R. 276, C. A.

Annotations:—As to (1) *Refd.* Ord. v. Ord, [1923] 2 K. B. 432. As to (2) *Refd.* Stephenson v. Garnett, [1898] 1 Q. B. 677.

1700. — *Imputations reported—Denial on oath not reported.*—*RUMNEY v. WALTER* (1892), 8 T. L. R. 256.

iii. Introduction of Comment.

1701. General rule.]—*DELEGALL v. HIGHLEY*, No. 1926, *post*.

1702. —.]—(1) Where justification & fair comment are pleaded as defences in an action for libel, the latter only arises when the former has failed. A fair & *bond fide* comment on a matter of public interest suffices to protect that which would otherwise be defamatory.

(2) Comment which tends to prejudice may still be fair; it may convey an imputation of bad motive so far as the facts truly stated justify such an imputation. It is for the jury to say whether the facts justify the imputation or not.

In an action for libel based upon two articles in newspapers published by defts., which stated certain alleged facts with reference to what occurred in a certain polling station, & also contained comments which, pltf. alleged, charged him with not having acted honestly in the discharge of his statutory duties as deputy returning officer for the London County Council election, & as having been influenced by political bias, defts. pleaded justification & fair comment. The judge did not leave any separate questions to the jury, but directed them that it was for them to decide whether the articles constituted a libel, & if so, whether the statements as to what happened in

the polling station were true, & in so far as they consisted of comment, whether that comment was *bond fide* & fair comment, or whether it was comment which tended, as alleged, to charge pltf. with improper conduct. The jury returned a general verdict for pltf., with £800 damages:—*Held*: the judge had not properly directed the jury upon the issue of fair comment, inasmuch as he had failed to direct them that the comment would not be libellous if it was the honest expression of the well-founded opinion of the writer, based upon the true facts, & there must consequently be a new trial on the ground of misdirection.

Comment in order to be justifiable as fair comment must appear as comment & must not be so mixed up with the facts that the reader cannot distinguish between what is report & what is comment. The justice of this rule is obvious. If the facts are stated separately & the comment appears as an inference drawn from those facts, any injustice that it might do will be to some extent negated by the reader seeing the grounds upon which the unfavourable inference is based. But if fact & comment be intermingled so that it is not reasonably clear what portion purports to be inference, he will naturally suppose that the injurious statements are based on adequate grounds known to the writer though not necessarily set out by him. . . . In order to give room for the plea of fair comment the facts must be truly stated. If the facts upon which the comment purports to be made do not exist the foundation of the plea fails. . . . To allege a criminal intention or a disreputable motive as actuating an individual is to make an allegation of fact which must be supported by adequate evidence (*FLETCHER MOULTON, L.J.*).—*HUNT v. STAR NEWSPAPER CO., LTD.*, [1908] 2 K. B. 309; 77 L. J. K. B. 732; 98 L. T. 629; 24 T. L. R. 452; 52 Sol. Jo. 376, C. A.

Annotations:—As to (1) *Refd.* Walker v. Hodgson, [1909] 1 K. B. 239. As to (2) *Conad.* Walker v. Hodgson, [1909] 1 K. B. 239; *Homing Pigeon Publishing Co. v. Racing Pigeon Publishing Co.* (1913), 29 T. L. R. 389.

1703. Inclusion of reporter's own comments.]—*STILES v. NOKES*, No. 1255, *ante*.

1704. — *Addition of headline.*]—Declaration for a libel concerning pltf. in his profession as an attorney. The libel began, "shameful conduct of an attorney," & then proceeded to give an account of proceedings in a ct. of law, which contained matter injurious to the pltf.'s professional character. Deft. pleaded that the supposed libel contained a true account of the proceedings in the ct. of law:—*Held*: after verdict for the deft., the plea was bad, inasmuch as the words "shameful conduct of an attorney" formed no part of the proceedings in the ct. of law, & pltf. was therefore entitled to judgment. *Qu.*: whether it be lawful to publish proceedings of a ct. of law containing matter defamatory of a person neither a party to the suit nor present at the time of the inquiry.—*LEWIS v. CLEMENT* (1820), 3 B. & Ald. 702; 106 E. R. 817; *on appeal*, *sub nom.* *CLEMENT v. LEWIS* (1822), 3 Brod. & Bing. 297, Ex. Ch.

Annotations:—*Appl.* Delegal v. Highley (1837), 3 Bing. N. C. 950. *Refd.* Cook v. Wildes (1855), 24 L. J. Q. B.

LTD. (1902), 5 F. (Ct. of Sess.) 1; 40 Sc. L. R. 10; 10 S. L. T. 267.—SCOT.

h. — *Ultimate result of proceedings omitted.*]—*POPE v. OUTRAM & CO., LTD.*, [1909] S. C. 230; 46 Sc. L. R. 61; 16 S. L. T. 457.—SCOT.

k. Proof.]—*DICKINSON v. WORLD PRINTING & PUBLISHING CO.* (1912), 17 B. C. R. 401.—CAN.

PART VI. SECT. 3, SUB-SECT. 4.—B. (e) iii.

1703 i. Inclusion of reporter's own comments.]—*SMALL v. MACKENZIE* (1830), Dra. 253.—CAN.

1703 ii. —.]—*A.-G. v. DAVIDSON*, [1925] N. Z. L. R. 849.—N.Z.

1703 iii. —.]—A newspaper editor

is not privileged if he comments upon judicial proceedings.—*DREW v. MACKENZIE & CO.* (1862), 24 Dunl. (Ct. of Sess.) 649; 34 Sc. Jur. 320.—SCOT.

1704 i. — *Addition of headline.*]—*LEON v. "EDINBURGH EVENING NEWS," LTD.*, [1909] S. C. 1014; 4 Sc. L. R. 705; [1909] 2 S. L. T. 65.—SCOT.

Sect. 3.—Qualified privilege: Sub-sect. 4, B. (c) iii., iv. & v., C. & D.; sub-sect. 5.

1.]

367; Ryalls v. Leader (1866), 4 H. & C. 555. *Mentd.* Corner v. Shew (1838), 4 M. & W. 163; Gwynne v. Burnell (1840), 6 Bing. N. C. 453; Gregory v. Brunswick & Vallance (1843), 13 L. J. C. P. 34; Warwick v. Cox (1844), 13 L. J. Ex. 314; Wilmshurst v. Bowker (1844), 7 Man. & G. 882; Campbell v. R. (1847), 11 Q. B. 814.

1705. ———.]—BISHOP v. LATIMER, No. 151, *ante*.

1706. ———.]—ROBERTS v. BROWN, No. 1221, *ante*.

1707. ———.]—(1) By the law of England a fair account of what takes place in a ct. of justice may be published, but the reporter ought not to mix up with it comments of his own.

(2) If the report contains only a fair account of what takes place in a ct. of justice, the person who publishes it has only to prove that fact under the general issue, & he is entitled to entire immunity.

(3) It is not essential that every word of the evidence, of the speeches, & of what was said by the judge, should be inserted, if the report is substantially a fair & correct report of what took place in a ct. of justice.—ANDREWS v. CHAPMAN (1853), 3 Car. & Kir. 286; 21 L. T. O. S. 108, N. P.

Annotation:—As to (1) Rejd. Hunt v. Star Newspaper Co., [1908] 2 K. B. 309.

1708. ———.]—LEWIS v. LEVY, No. 1667, *ante*.

1709. ———.]—RISK ALLAH BEY v. WHITEHURST, No. 1734, *post*.

1710. Inclusion of remark addressed by clerk to magistrate.]—DELEGALL v. HIGHLEY, No. 1926, *post*.

1711. Inclusion of observation made by litigant not in witness box.]—*Qu.*: whether a report which contains an observation made by a litigant, though not in the witness box, but made in ct. in the course of the legal proceedings, thereby loses the protection which it would otherwise have as a fair & accurate report of judicial proceedings.

The report is a report in a daily newspaper, & it is not to be judged by the same standard of accuracy which would be adopted if we were criticising a law report of a professional law reporter. It must be regarded from the standpoint of persons whose function it is to give the public a fair account of what has taken place in a ct. of justice (COLLINS, M.R.).—HOPE v. LENG (W. C.) & Co. (SHEFFIELD TELEGRAPH), LTD. (1907), 23 T. L. R. 243, C. A.

Fair comment.]—See Sect. 4, *post*.

iv. Onus of Proof.

1712. Defendant must prove fairness & accuracy.]

—ANDREWS v. CHAPMAN, No. 1707, *ante*.

1713. ———.]—MILISSICH v. LLOYDS, No. 1717, *post*.

1714. ———.]—KIMBER v. PRESS ASSOCN., No. 1666, *ante*.

v. Question for Jury.

1715. General rule.]—WEAVER v. SMITH, No. 1691, *ante*.

1716. ———.]—TURNER v. SULLIVAN, No. 1693, *ante*.

1717. ———.]—(1) A fair report of a trial, whether published in a newspaper or a pamphlet,

is privileged; but it lies on him who sets up the privilege to show that he comes within it. It is sufficient if such a report is a fair abstract of the trial; but where there is any evidence on which a jury could reasonably find that the report was not absolutely fair, the question of fairness must be left to them.

(2) There is no difference as to the publication of such reports, between the privilege of a private individual & of the public press.

If what is published is a fair report of a trial in a ct. of justice, then the publication is privileged. . . . It is said that this case could not be within the privilege, for though a fair report it was not published in a newspaper, but by private individuals. To this I cannot agree; the privilege is the same as a matter of law for the one as for the other. In both cases a fair report of the trial is all that is necessary, unless there be malice in fact when the privilege is lost even if the report be published in a newspaper. . . . Now if the libel had been shown to be a verbatim copy of a shorthand note taken at the trial, the pltf. would, although the *onus* of proof is really on defts., have proved absolutely defts.' privilege. . . . If the report differs from the shorthand note, though it differs it may differ so little that no reasonable jury could say that the difference affected pltf. If the ct. could say that, I think the judge would still be bound to direct the jury that the privilege was proved (BRETT, L.J.).—MILISSICH v. LLOYDS (1877), 46 L. J. Q. B. 404; 36 L. T. 423; 13 Cox, C. C. 575; *sub nom.* MELISSICH v. LLOYD'S, 25 W. R. 353, C. A.

Annotations:—As to (1) Rejd. Clark v. Molyneux (1877), 37 L. T. 694; MacDougall v. Knight (1890), 6 T. L. R. 276; Royal Mail Steam Packet Co. v. George & Branday, [1900] A. C. 480. Generally, Mentd. Daun v. Simmins (1879), 48 L. J. Q. B. 343; Skeate v. Slaters, [1914] 2 K. B. 429.

1718. ———.]—GRIMWADE v. DICKS (1886), 2 T. L. R. 627.

C. Proceedings in Parliament and Parliamentary Reports.

See Sect. 2, sub-sect. 2, B. (c), *ante*.

1719. General rule.]—WASON v. WALTER, No. 1754, *post*.

1720. What are Parliamentary papers—Extracts from report of Royal Commission.]—HOUGHTON v. PLIMSOLL (1874), *Times*, April 2.

Annotations:—Apld. Mangena v. Lloyd (1908), 98 L. T. 640; Mangena v. Wright, [1909] 2 K. B. 958.

1721. ——— Extracts from "Blue Book."—Where a newspaper *bond fide* & without malice publishes an extract from or abstract of a Parliamentary paper, such paper being a "Blue Book" presented to both Houses of Parliament by command of His Majesty & ordered by the House of Commons to lie on the table, such newspaper is protected by Parliamentary Papers Act, 1840 (c. 9), s. 3, from an action for libel brought in respect of the matters contained in such extract or abstract.—MANGENA v. LLOYD (EDWARD), LTD. (1908), 98 L. T. 640; 24 T. L. R. 610; *on appeal*, 99 L. T. 824, C. A.

Annotations:—Folld. Mangena v. Wright, [1909] 2 K. B. 958. Rejd. Isaacs v. Cook, [1925] 2 K. B. 391.

1722. ———.]—(1) A person who *bond fide* & without malice prints & publishes an extract from or an abstract of a Parliamentary paper,

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1715i. General rule.]—It is a question for the jury whether the report of judicial proceedings is a fair & accurate

report.—HUTCHISON v. ROBINSON (1900), 21 N. S. W. L. R. 130; 16 N. S. W. W. N. 254.—AUS.

PART VI. SECT. 3, SUB-SECT. 4.—C. 1719i. General rule.]—Publication of

a fair & an accurate report of proceedings in Parliament is privileged even though the words are defamatory.—"THE ENGLISHMAN," LTD. v. LAJPAT RAI (1910), 11 L. R. 37 Cal. 760.—IND.

though in doing so he does not act by or under the authority of either House of Parliament, is protected by Parliamentary Papers Act, 1840 (c. 9), s. 3, in an action for libel in respect of such publication.

(2) Where an allegation is made against a person in a privileged document, as, for instance, in a Parliamentary paper, a comment upon that allegation by a person who is not the person making the allegation may be fair comment, even though the allegation be untrue.

(3) A communication by a public servant of a matter within his own province concerning the conduct of a person who is for the time taking a public part, the matter being one of public interest as to which the public are entitled to information, may be a privileged communication on the part of that public servant, & if sent by him to a newspaper & published therein, it may also be the subject of privilege in the proprietor of the newspaper, as that is the ordinary channel by means of which the communication can be made public.

It may be considered as a communication by a person having a common interest to others having the like interest (PHILLIMORE, J.).

(4) R. S. C., Ord. 36, r. 37, has not altered the common law as laid down in *Scott v. Sampson*, No. 2045, *post*, with reference to the admissibility of evidence of the pltf.'s bad character in mitigation of damages in an action of libel.

It [evidence] will also be relevant if & so far as it proves in reduction of damages that pltf.'s general character as a public man is bad. But it will not be relevant if & so far as it tends to prove other specific charges than those which are in issue in these pleadings (PHILLIMORE, J.).—*MANGENA v. WRIGHT*, [1909] 2 K. B. 958; 78 L. J. K. B. 879; 100 L. T. 960; 25 T. L. R. 534; 53 Sol. Jo. 485.

Annotation:—As to (3) *Dbtd. Adam v. Ward* (1915), 31 T. L. R. 299. I doubt whether . . . those facts without more will create a privileged occasion (BUCKLEY, L.J.).

D. Proceedings of Public Meetings.

See, now, Law of Libel Amendment Act, 1888 (c. 64), s. 4.

1723. What is a public meeting—Sermon delivered in chapel.]—*CHALONER v. LANSDOWN & SONS* (1894), 10 T. L. R. 290.

1724. Publication for "public benefit"—Question for jury.]—In an action against the proprietor of a newspaper for reporting a speech in which blasphemy was imputed to pltf., the judge had not left the question to the jury as to whether the publication of the matter complained of was for the public benefit:—*Held*: there had not been a "proper & complete direction," & there must be a new trial.—*PANKHURST v. SOWLER* (1886), 3 T. L. R. 193, D. C.

Annotations:—*Consd. Venables v. Fitt* (1888), 5 T. L. R. 83. *Apld. Rickards v. Bartram* (1908), 25 T. L. R. 181; *Sharman v. Merritt & Hatcher* (1916), 32 T. L. R. 360.

1725. ———.]—*VENABLES v. FITT* (1888), 5 T. L. R. 83.

1726. ———.]—*RICKARDS v. BARTRAM* (1908), 25 T. L. R. 181.

Annotation:—*Refd. Vacher v. London Soc. of Compositors*, [1912] 3 K. B. 547.

1727. Matter of "public concern"—Matters unconnected with object of meeting.]—If a news-

paper chooses to publish defamatory matter about anybody, though actually uttered at a public meeting but which has nothing to do with the objects of the meeting, then it cannot shield itself behind Law of Libel Amendment Act, 1888 (c. 64) (*HUDDLESTON, B.*).—*KELLY v. O'MALLEY* (1889), 6 T. L. R. 62.

1728. ——— Statement by chairman of company reflecting on character of employee.]—*PONSFORD v. FINANCIAL TIMES, LTD. & HART* (1900), 16 T. L. R. 248.

1729. ——— Report made to public meeting of corporation—Reflecting on conduct of employee.]—Pltf. had been in the employment of a borough corp'n. as superintendent of a public cemetery, & a committee of the corp'n. reported to the corp'n. that they were not satisfied with the way in which he had carried out his duties & that notice should be given to him to terminate his appointment. This report appeared on the agenda paper of a meeting of the corp'n., which was open to the public, & it was adopted by the corp'n. without being read. Defts. published a report of the meeting, & this report contained the statements in the agenda paper concerning pltf. In an action for libel:—*Held*: defts. were protected by Law of Libel Amendment Act, 1888 (c. 64), s. 4.—*SHARMAN v. MERRITT & HATCHER, LTD.* (1916), 32 T. L. R. 360.

SUB-SECT. 5.—AVOIDANCE OF BY EXPRESS MALICE.

See Part VII., Sect. 2, sub-sect. 2, *post*.

SECT. 4.—FAIR COMMENT.

SUB-SECT. 1.—NATURE OF DEFENCE.

1730. General rule.]—*R. v. HUNT*, No. 1798, *post*.

1731. ———.]—*TURNBULL v. BIRD*, No. 1755, *post*.

1732. ———.]—In an action for a libel in a newspaper, imputing to pltf., the proprietor & editor of Zadkiel's Almanack, that not only was he connected with that foolish publication, but that he "gulled" the public by means of a magic ball of crystal, by which he pretended to tell what was going on in the other world, & that he took money for those profane acts, & made a good thing of it: pleas, not guilty, & a justification that the libels were true in substance & fact:—*Held*: (1) within the scope of fair discussion a public writer is not liable unless he writes unreasonably, recklessly, & maliciously; (2) this immunity does not extend beyond the discussion of the published writings on public or undoubted acts of pltf., & does not extend to the gratuitous assertion of matters of fact for which there is no foundation; (3) the privilege had extended to a denunciation of the Almanack & the use of the ball as an imposture, but if the libel meant that pltf. had made money by a conscious & fraudulent imposture by use of the magic ball, that was beyond the right of fair discussion & required a justification; (4) the justification required proof that pltf. took money for the use of the crystal

PART VI. SECT. 3, SUB-SECT. 4.—D.

1. Matter of "public concern."—*AITON v. M'CULLOCH* (1823), 3 Murr. 291.—*SCOT*.

m. Fairness—Necessity for.]—*PIERCE v. ELLIS* (1856), 6 I. C. L. R. 55.—*IR*.

n. Accuracy—Necessity for.]—The publication in a newspaper of a report of proceedings at a public meeting containing defamatory statements, is not privileged if such statements be untrue even although the publication be made *bona fide* & with-

out malice, with the intention of giving information to the public with respect to a matter which it interests the public to know.—*CAMERON v. OTAGO DAILY TIMES* (1883), 1 N. Z. L. R. C. A. 1.—*N.Z.*

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ball, & used it knowing that it was an imposture. MORRISON v. BELCHER (1863), 3 F. & F. 614, N. P.

1733. —.]—HUNTER v. SHARPE, No. 954, ante.

1734. —.]—Pltf. was tried in Brussels for murder & acquitted. A correspondent of an English journal wrote letters which were inserted in such journal, containing incorrect statements of the evidence, independent comments of the writer upon the character & bearing of the prisoner, & expressions impugning the verdict of acquittal, & implying that the prisoner should have been found guilty of murder & was certainly guilty of forgery & fraud. A leading article was also published adopting the same tone:—*Held*: (1) if in the opinion of the jury, looking at the letters individually & not collectively, they did not contain fair, honest, & faithful representations of what passed at the trial, they were not privileged; (2) if a public writer in the press writes that which turns out to be not founded upon the inference he draws, & is unable to justify the conclusion he has arrived at, yet if he has acted in good faith in the discharge of his duty, bringing to it the amount of care, reason, & judgment which a man who takes upon himself to discuss public questions is bound to bring, so that the jury is of opinion that he has acted reasonably & properly, he will be privileged although he may turn out to be in error; (3) if by some oversight or want of firmness on the part of the judge or jury a great criminal escapes, & by a miscarriage of justice, a scandal is brought on its administration, & the criminal is let loose on society when he ought to be suffering punishment, a public writer is privileged in remonstrating with that tribunal if he does so fairly & with reasonable exercise of judgment; & (4) if counsel cross-examines pltf. with a view to show that he has been guilty of that of which he had been acquitted, the libel is thereby aggravated, & the damages must follow the aggravation.—RISK ALLAH BEY v. WHITEHURST (1868), 18 L. T. 615.

1735. —.]—The fair & honest discussion of or comments upon a matter of public interest is in point of law privileged, & is not the subject of an action, unless pltf. can establish malice.

Pltf., a naval architect, in 1867 submitted to the Admiralty proposals for the conversion of the old wooden line-of-battle ships of the navy into ironclad turret-ships. His proposals were considered by the Admiralty, & rejected. In Sept. 1870, the iron-clad turret-ship, Captain, whilst on a cruise, capsized & sunk with all hands. This disaster caused great excitement & anxiety in the public mind; & with a view to explain the circumstances under which the Captain had been sent to sea, as well as the general course pursued by the Board with reference to the placing the navy in a proper condition to meet the exigencies of modern naval warfare, a minute was prepared by the First Lord of the Admiralty for presentation to Parliament during the approaching session. This minute referred to & criticised the plans of conversion proposed by pltf.; & in a note was inserted a letter upon the subject addressed to the Board in Sept. 1869, by R., then controller of the navy, which letter contained this passage: "These plans would have no weight whatever

from the known antecedents of their author, but they derived weight from the approval of W., the late chief constructor of the navy," & concluded by recommending their rejection. The minute was by order of the Lords of the Admiralty printed by deft., the Queen's printer; & copies of it were publicly sold by him before the meeting of Parliament. At the trial of an action for this alleged libel; the judge, assuming the letter to be *prima facie* libellous, & it being conceded that the publication was without malice, nonsuited pltf., on the ground that it was a fair criticism upon a matter of public & national importance, & therefore privileged:—*Held*: the nonsuit was right.

It is not competent for the jury to find that, upon a privileged occasion, relevant remarks made *bond fide* without malice are libellous. . . . It would be abolishing the law of privileged discussion, & deserting the duty of the ct. to decide upon this as upon any other question of law, if we were to hand over the decision of privilege or no privilege to the jury. A jury, according to their individual views of religion or policy, might hold the church, the army, the navy, Parliament itself, to be of no national or general importance, or the liberty of the press to be of less consequence than the feelings of a thin-skinned disputant. In actions of libel, as in other cases where questions of fact, when they arise, are to be decided by the jury, it is for the ct. first to determine whether there is any evidence upon which a rational verdict for the affirmant can be founded (WILLES, J.).—HENWOOD v. HARRISON (1872), L. R. 7 C. P. 606; 41 L. J. C. P. 206; 26 L. T. 938; 20 W. R. 1000.

Annotations:—*Distd.* Purcell v. Sowler (1876), 1 C. P. D. 781. *Consd.* Merivale v. Carson (1887), 20 Q. B. D. 275; Allbutt v. General Council of Medical Education & Registration (1889), 23 Q. B. D. 400. *Apprvd.* McQuire v. Western Morning News Co., [1903] 2 K. B. 100. *Consd.* Thomas v. Bradbury, Agnew, [1906] 2 K. B. 627; Walker v. Hodgson, [1909] 1 K. B. 239. *Apprvd.* Adam v. Ward, [1917] A. C. 309; Sutherland v. Stopes, [1925] A. C. 47.

1736. —.]—Nobody can take advantage of the privilege of the occasion to exercise private malice, nor will the privilege shield him if he makes charges against another recklessly or inconsiderately. One of the cases in which privilege can be claimed is the present one, as it is that of a public writer, writing for the public on matters of public interest, but the privilege will not avail deft. if the matter complained of by pltf. has been anything more than a comment at once fair & *bond fide* (LORD COLERIDGE, C.J.).—WILLIAMS v. BERESFORD-HOPE (1886), 3 T. L. R. 20.

1737. —.]—HUNT v. STAR NEWSPAPER CO., LTD., No. 1702, ante.

SUB-SECT. 2.—FAIR COMMENT AND JUSTIFICATION COMPARED.

1738. *General rule.*—WALKER (PETER) & SON, LTD. v. HODGSON, No. 1742, *post*.

1739. —.]—(1) The plea in an action for libel that in so far as the words complained of consist of allegations of fact they are true in substance & in fact & in so far as they consist of expressions of opinion they are fair comments

PART VI. SECT. 4, SUB-SECT. 2.
17381. *General rule.*—There are vital differences between a defence of justification & one of fair comment.

Under the former a deft. must justify every injurious fact & imputation in whatever shape expressed. Under the latter he must justify the facts, but

he need not justify the comment; it is sufficient if he satisfies the ct. that it is "fair."—STEENKAMP v. LAURENCE, [1918] C. P. D. 79.—S. AF.

made in good faith & without malice on a matter of public interest is not a plea partly of justification & partly of fair comment, but is a plea of fair comment only.

There has been a good deal of misconception as to the nature of this plea. It has been sometimes treated as containing two separate defences rolled into one, but it in fact raises only one defence, that being the defence of fair comment on matters of public interest. The averment that the facts were truly stated is merely to lay the necessary basis for the defence on the ground of fair comment. This averment is quite different from a plea of justification of a libel on the ground of truth, under which deft. has to prove not only that the facts are truly stated but also that any comments upon them are correct (LORD FINLAY).

(2) Then was there any evidence or other material upon which a reasonable jury could find that, assuming (as it must be assumed) that the charges were true in substance & in fact, these expressions of opinion or any of them constituted unfair comment? This is plainly a question for the ct., which has to determine whether the document is capable in law of being a libel (VISCOUNT CAVE, C.).—SUTHERLAND *v.* STOPES, [1925] A. C. 47; 94 L. J. K. B. 166; 132 L. T. 550; 41 T. L. R. 106; 69 Sol. Jo. 138, H. L.; *reversg.* S. C. *sub nom.* STOPES *v.* SUTHERLAND (1923), 39 T. L. R. 677, C. A.

1740. Fair comment does not arise if justification proved.]—DAKHYL *v.* LABOUCHERE, No. 1823, *post.*

1741. —.]—HUNT *v.* STAR NEWSPAPER CO., LTD., No. 1702, *ante.*

1742. —.]—(1) Deft. in an action for slander, alleged to have been uttered in a speech made by him as chairman at a licensing meeting, pleaded a defence of fair comment in the following terms: "In so far as the words complained of consist of statements of fact the same are in their natural & ordinary signification true in substance & in fact. In so far as they consist of comment the same are fair & *bond fide* comment upon matters of public interest." There was no plea of justification. Upon an application by deft. for leave to administer interrogatories to pltfs. directed to proving the truth of the statements of fact in his speech & in the particulars delivered by him of the materials upon which his defence of fair comment was based:—*Held*: deft. was entitled, notwithstanding the absence of a plea of justification, to administer interrogatories with the object of obtaining admissions of the truth of the material statements of fact in the speech & particulars alleged to be defamatory.

(2) This form of pleading, which I always think very indefinite & embarrassing, has been adopted & sanctioned ever since the decision in *Penrhyn v. Licensed Victuallers' Mirror*, No. 1844, *post.*, & must now be accepted as proper pleading. No

difficulty, however, arises in the present case, because there was an order for particulars obtained by pltfs. in which it was stated that deft. admitted that the defence was one of fair comment, & not of justification. . . . No one can doubt that the matter commented on by deft. is a matter of public interest; but the *onus* of proving that his words are a comment, & that they are a comment on a matter of public interest, lies upon deft. (VAUGHAN WILLIAMS, L.J.).

(3) Where deft. in an action for libel pleads by way of defence, first, justification, & secondly, fair comment, he will fail upon his plea of justification unless he justifies every injurious imputation which the jury may think is to be found in the alleged libel. Assuming that he fails in that defence, then fair comment is a weapon which comes into action when justification has failed.

(4) Upon the plea of fair comment the substratum must, I think upon the authorities, be laid by showing that, notwithstanding, that the words are defamatory, yet the facts upon which the comment is based were truly stated, & that the comment was honest & was not without foundation. Fair comment does not negative defamation, but establishes a defence to any right of action founded on defamation. To succeed upon the plea of justification deft. must prove not only that the facts were truly stated, but also that the innuendo is true. He must justify every injurious imputation. Upon fair comment, however, if it be established that the facts stated are true, the defence of fair comment will succeed even if the imputation or innuendo be not justified as true, but be fair & *bond fide* comment upon a matter of public interest (BUCKLEY, L.J.).—WALKER (PETER) & SON, LTD. *v.* HODGSON, [1909] 1 K. B. 239; 78 L. J. K. B. 193; 99 L. T. 902; 53 Sol. Jo. 81, C. A.

Annotations:—As to (2) *Consd.* Sutherland *v.* Stopes, [1925] A. C. 47. *Refd.* Aga Khan *v.* Times Publishing Co., [1924] 1 K. B. 675.

SUB-SECT. 3.—POSITION OF NEWSPAPERS.

1743. No special privilege.]—CAMPBELL *v.* SPOTTISWOODE, No. 1802, *post.*

1744. —.]—To whatever lengths the subject in general may go, so also may the journalist, but, apart from statute law, his privilege is no other & no higher. The responsibilities which attach to his power in the dissemination of printed matter may, & in the case of a conscientious journalist do, make him more careful; but the range of his assertions, his criticisms, or his comments, is as wide as & no wider than that of any other subject. No privilege attaches to his position (LORD SHAW).—ARNOLD *v.* KING-EMPEROR, [1914] A. C. 644; L. R. 41 Ind. App. 149; 83 L. J. P. C. 299; 111 L. T. 324; 30 T. L. R. 462; 24 Cox, C. C. 297, P. C.

PART VI. SECT. 4, SUB-SECT. 3.

1743 i. No special privilege.]—DONKIN *v.* TELEGRAPH NEWSPAPER CO., LTD. (1873), 3 Q. S. C. R. 180.—AUS.

1743 ii. —.]—The proprietors of a newspaper have no special privileges beyond those which every member of the community possesses in commenting upon public men & public matters.—ANDERSON *v.* FAIRFAX (1883), 4 N. S. W. L. R. 183.—AUS.

1743 iii. —.]—SUNDAY TIMES PUBLISHING CO., LTD. *v.* HOLMAN (1925), 27 W. A. L. R. 10.—AUS.

1743 iv. —.]—R. *v.* THOMPSON (1874), 24 C. P. 252.—CAN.

1743 v. —.]—BROWN *v.* ELDER (1888), 27 N. B. R. 465.—CAN.

1743 vi. —.]—PATTERSON *v.* EDMONTON BULLETIN CO. (1908), 1 Alta. L. R. 477; 8 W. L. R. 672.—CAN.

1743 vii. —.]—CASWELL *v.* LAW (1911), 19 W. L. R. 48; 4 Sask. L. R. 366.—CAN.

1743 viii. —.]—SINCLAIR *v.* HORNBY (1886), 5 N. Z. L. R. 113 (S. C.).—N.Z.

1743 ix. —.]—DAVIS *v.* MILLER & FAIRLY (1855), 17 Dunl. (Ct. of Sess.) 1050; 27 Sc. Jur. 542.—SCOT.

1743 x. —.]—BRIMS *v.* REID & SONS (1885), 12 R. (Ct. of Sess.) 1016; 22 Sc. L. R. 670.—SCOT.

1743 xi. —.]—M'KERCHAR *v.* CAMERON (1892), 19 R. (Ct. of Sess.) 883; 29 Sc. L. R. 320.—SCOT.

1743 xii. —.]—MORRISON *v.* RITCHIE & Co. (1902), 4 F. (Ct. of Sess.) 645; 39 Sc. L. R. 432; 9 S. L. T. 476.—SCOT.

Sect. 4.—Fair comment: Sub-sect. 4, A. & B. (a) & (b) i. & ii.]

SUB-SECT. 4.—ESSENTIALS OF DEFENCE.

A. Comment must be Expression of Opinion.

1745. Not allegation of fact.]—MORRISON v. BELCHER, No. 1732, ante.

1746. —.]—In an action to recover damages for libel it appeared that applts. had in their newspaper falsely charged resp., a public officer, with specific acts of misconduct in the execution of the duties of his office; had vouched the truth of those charges, & on the assumption of their truth, commented on his proceedings in highly offensive & injurious language:—*Held*: they were liable.

The privilege which covers fair & accurate reports of proceedings in Parliament & in cts. of justice does not extend to fair & accurate reports of statements made to the editors of newspapers.

There is no doubt that the public acts of a public man may lawfully be made the subject of fair comment or criticism, not only by the press, but by all members of the public. But the distinction cannot be too clearly borne in mind between comment or criticism & allegations of fact, such as that disgraceful acts have been committed, or discreditable language used. It is one thing to comment upon or criticise, even with severity, the acknowledged or proved acts of a public man, & quite another to assert that he has been guilty of particular acts of misconduct (LORD HERSCHELL, C.).—DAVIS v. SHEPSTONE (1886), 11 App. Cas. 187; 55 L. J. P. C. 51; 55 L. T. 1; 50 J. P. 709; 34 W. R. 722; 2 T. L. R. 380, P. C.

Annotations:—*Reid*. Pankhurst v. Sowler (1886), 3 T. L. R. 193; Joynt v. Cycle Trade Publishing Co. (1904), 91 L. T. 155.

1747. —.]—THOMAS v. BRADBURY, AGNEW & CO., LTD., No. 1955, post.

1748. —.]—HUNT v. STAR NEWSPAPER CO., LTD., No. 1702, ante.

B. Comment must be on Matter of Public Interest.

(a) In General.

1749. Must be of interest to whole community.]—PURCELL v. SOWLER, No. 1764, post.

1750. Whether matter of public interest—Question for judge.]—SOUTH HETTON COAL CO. v. NORTH-EASTERN NEWS ASSOCN., No. 1795, post.

1751. Onus of proof that matter of public interest—On defendant.]—BRENON v. RIDGWAY, No. 7, ante.

1752. —.]—WALKER (PETER) & SON, LTD. v. HODGSON, No. 1742, ante.

(b) What are Matters of Public Interest.

i. Matters of State.

1753. Petition to Parliament.]—Pltf., a surgeon, petitioned Parliament against quacks. Deft., a

journalist, commented severely on the contents of the petition, & charged the pltf. with ignorance of his profession, pointing out ignorance of chemistry, which, he said, appeared on the face of the petition. Pltf. then sued deft. for libelling him in his profession of a surgeon; the judge directed the jury, that if they considered deft.'s attack a fair comment on pltf.'s petition, if the charge of ignorance was collected from a petition alone, & was not the spontaneous effusion of malice in deft., the writing in question was no libel; he also directed them to consider whether deft. had imputed to pltf. ignorance in his profession of a surgeon or ignorance of chemistry, for if they thought the latter, the declaration was not adapted to pltf.'s case. The jury having found a verdict for deft., the ct. granted a new trial, costs to abide the event. *Qu.*: whether a petition to Parliament on matters of general importance is such a publication as renders the petitioner an object of fair criticism & comment.—DUNNE v. ANDERSON (1825), 3 Bing. 88; 10 Moore, C. P. 407; 3 L. J. O. S. C. P. 157; 130 E. R. 447; *subsequent proceedings*, Ry. & M. 287, N. P.

Annotations:—*Reid*. Thompson v. Shackell (1828), Mood. & M. 187; Henwood v. Harrison (1872), L. R. 7 C. P. 606.

1754. — & consequent debate.]—A faithful report in a public newspaper of a debate in either House of Parliament, containing matter disparaging to the character of an individual which had been spoken in the course of the debate, is not actionable at the suit of the person whose character has been called in question. But the publication is privileged on the same principle as an accurate report of proceedings in a ct. of justice is privileged, viz., that the advantage of publicity to the community at large outweighs any private injury resulting from the publication.

Pltf. presented a petition to the House of Lords, charging a high judicial officer with having, thirty years before, made a statement false to his own knowledge, in order to deceive a committee of the House of Commons, & praying inquiry & the removal of the officer if the charge was found true; a debate ensued on the presentation of the petition, & the charge was utterly refuted:—*Held*: this was a subject of great public concern on which a writer in a public newspaper had full right to comment, & the occasion was therefore so far privileged that the comments would not be actionable so long as a jury should think them honest & made in a fair spirit, & such as were justified by the circumstances, as disclosed in an accurate report of the debate.

The jury were told that they must be satisfied that the article was an honest & fair comment on the facts, in other words, that, in the first place, they must be satisfied that the comments had been made with an honest belief in their justice, but that this was not enough, inasmuch as such

PART VI. SECT. 4, SUB-SECT. 4.—A.

1745 i. Not allegation of fact.]—GRAHAM v. MCKIMM (1890), 19 O. R. 475.—CAN.

1745 ii. —.]—AUGUSTINE AUTOMATIC ROTARY ENGINE CO. OF CANADA, LTD. v. SATURDAY NIGHT, LTD. (1917), 38 O. L. R. 609; 34 D. L. R. 439.—CAN.

1745 iii. —.]—Where facts had not been fully, carefully & accurately stated, & as it was difficult to separate statements of fact from comment thereon, defts. could not rely upon the plea of fair comment on a matter of public interest.—AFRICAN LIFE ASSUR-

ANCE SOCIETY, LTD. v. PHELAN (1908), 25 S. C. 743.—S. AF.

1745 iv. —.]—HULTZER & DAS v. VAN GORKOM (1909), T. S. 232.—S. AF.

1745 v. —.]—CRAWFORD v. ALBU, [1917] App. D. 102.—S. AF.

PART VI. SECT. 4, SUB-SECT. 4.—B. (a).

a. General rule.]—A fair comment on matter of public interest is not libel.—"THE ENGLISHMAN," LTD. v. LAJPAT RAI (1910), I. L. R. 37 Cal. 760.—IND.

b. —.]—IRWIN v. REID (1920)

I. L. R. 48 Cal. 304.—IND.

1750 i. Whether matter of public interest—Question for judge.]—LANG v. FAIRFAX (1865), 4 N. S. W. S. C. R. (L.) 268.—AUS.

1750 ii. —.]—MCDONALD v. SYDNEY POST PUBLISHING CO., LTD. (1906), 39 N. S. R. 81.—CAN.

1750 iii. —.]—RICE SHEPPARD v. BULLETIN CO., LTD., [1917] 3 W. W. R. 279.—CAN.

1751 i. Onus of proof that matter of public interest—On defendant.]—ALTAF HOSSEIN v. TASUD-DOOK HOSSEIN (1867), 2 Agra, 87.—IND.

belief might originate in the blindness of party zeal, or in personal or political aversion, that a person taking upon himself publicly to criticise & to condemn the conduct or motives of another, must bring to the task, not only an honest sense of justice, but also a reasonable degree of judgment & moderation, so that the result may be what a jury shall deem, under the circumstances of the case, a fair & legitimate criticism on the conduct & motives of the party who is the object of censure (COCKBURN, C.J.).—WASON v. WALTER (1868), L. R. 4 Q. B. 73; 8 B. & S. 671; 38 L. J. Q. B. 34; 19 L. T. 409; 33 J. P. 149; 17 W. R. 169.

Annotations :—**Expld.** *Henwood v. Harrison* (1872), L. R. 7 C. P. 606. **Consd.** *Davis v. Duncan* (1874), L. R. 9 C. P. 396. **Refd.** *Re Belfast Election Petition* (1868), 17 W. R. 333; *Purcell v. Sowler* (1877), 2 C. P. D. 215; *Macdougall v. Knight* (1886), 17 Q. B. D. 636; *Allbutt v. General Council of Medical Education & Registration* (1889), 23 Q. B. D. 400; *Hunt v. Star Newspaper Co.*, [1908] 2 K. B. 309. **Mentd.** *Millissich v. Lloyds* (1877), 46 L. J. Q. B. 404; *Usill v. Hales*, *Usill v. Brearley*, *Usill v. Clarke* (1878), 3 C. P. D. 319; *Hennessy v. Wright* (1888), 4 T. L. R. 548; *McQuire v. Western Morning News Co.*, [1903] 2 K. B. 100.

1755. Public appointments.]—Pltf., a Roman Catholic, having been appointed Calendarer of Foreign State Papers, deft., Secretary of the Protestant Alliance, in the course of a newspaper controversy, on the subject of the propriety of the appointment, published letters, in which, with certain misstatements of facts not shown to have been wilful, he argued that the papers might not be fairly epitomised by pltf., & also threw out that such papers might not be in safe custody while in the hands of persons of pltf.'s views, & that such persons might possibly through religious prejudices be induced to mutilate, alter, or abstract them :—**Held** : assuming this to be aimed at pltf., if deft. really believed it, the publications were privileged, provided there was no wilful misstatement, but it was for the jury whether he really could have believed it.

Defamatory matter is presumed to be malicious, unless it is published in the performance of any duty, legal or moral, or in the exercise of any right (ERLE, C.J.).

A man may publish defamatory matter of another, holding any public employment, if it is a matter on which the public have any interest, within limits. . . . Every person has a right to comment on the acts of a public man, which concern him as a subject of the realm, if he do not make his comments the vehicle of malice or slander. . . . The word "malice" in law means any corrupt motive, any wrong motive, or any departure from duty. . . . If deft., in the comments that he made, was guilty of any wilful misrepresentation of fact, either by the exaggeration of what actually existed, or by the partial suppression of what actually existed, so as to give it another colour; or if he made his comments with any misstatement of fact which he must have known to be a misstatement if he exercised ordinary care, then he loses his privilege, & the occasion does not justify the publication (ERLE, L.J.).—TURNBULL v. BIRD (1861), 2 F. & F. 508, N. P.

Annotations :—**Refd.** *Campbell v. Spottiswoode* (1863), 3 B. & S. 769; *Hogan v. Sutton* (1867), 16 W. R. 127. **Mentd.** *Merivale v. Carson* (1887), 58 L. T. 331; *Pratt v. British Medical Assocn.*, [1919] 1 K. B. 244; *British Ry. Traffic & Electric Co. v. C. R. C. Co. & L. C. C.*, [1922] 2 K. B. 260.

1756. —.]—Pltf., a barrister, who, after be-

coming an M.P., was made Q.C., & also a recorder, having been partly acquitted & partly censured by the benchers of his Inn after an inquiry into his conduct, private as well as professional; & having afterwards, on a public platform, alluded to their sentence as one of acquittal; upon which they published their sentence, & he published a protest & a letter, in which he impugned their proceedings, & their decision as unjust. Deft., in a legal review, published an article fairly setting forth these documents, with comments, & also a narrative of pltf.'s career, mixed up with some general reflections on his character, & particular observations, suggesting that he had obtained his appointments by Parliamentary influence or services. In an action for libel for the publication of this article :—**Held** : (1) the matter of those appointments was a legitimate subject of public comment; (2) even the private conduct of pltf. might, as tending to show whether he was a man of honour & integrity, be also legitimate subject of such comment; (3) as pltf. had in a public speech alluded to all these matters, they were all legitimate subjects for such comments as were fair, & not, in substance, going beyond the matters which were the subject of comment.

(4) It was not disputed that the public conduct of a public man might be discussed with the fullest freedom. It might be made the subject of hostile criticism & of hostile animadversions provided the language of the writer was kept within the limits of an honest intention to discharge a public duty & was not a means of promulgating slanderous & malicious accusations (COCKBURN, C.J.).—SEYMOUR v. BUTTERWORTH (1862), 3 F. & F. 372.

Annotations :—**As to** (3) **Refd.** *Hogan v. Sutton* (1867), 16 W. R. 127. **As to** (4) **Refd.** *Bryce v. Rusden* (1886), 2 T. L. R. 435.

1757. Evidence before Parliamentary Committee.]—HEDLEY v. BARLOW, No. 899, *ante*.

1758. Evidence before Royal Commission.]—

(1) A motion on behalf of pltf's, trustees of a permanent benefit building society, being also a bank for deposit, for an injunction to restrain the publication & sale by defts. of a book containing alleged libellous paragraphs in reference to the annual balance sheets & solvency of the society was refused.

He really seems to have selected pltf.'s society, partly because of its size, partly from his access to its balance sheets, & partly & principally on account of his extreme dissent on scientific grounds from the manager's evidence before the Comrs. on Friendly Societies. That evidence was *publici juris*, & deft. had a perfect right to criticise it (WICKENS, V.-C.).

(2) I ought not to interfere in a case like this, while uncertain whether what is stated is false or true, & reasonably certain that there was no malice (WICKENS, V.-C.).—MULKERN v. WARD (1872), L. R. 13 Eq. 619; 41 L. J. Ch. 464; 26 L. T. 831.

Annotations :—**As to** (1) **Refd.** *Prudential Assce. v. Knott* (1875), 10 Ch. App. 142; *Bonnard v. Perryman*, [1891] 2 Ch. 269. **As to** (2) **Refd.** *Liverpool Household Stores Assocn. v. Smith* (1887), 37 Ch. D. 170.

1759. Report to government department.]—HENWOOD v. HARRISON, No. 1735, *ante*.

ii. *Public Conduct of those taking Part in Public Affairs.*

1760. General rule.]—PARMITER v. COUPLAND, No. 1019, *ante*.

PART VI. SECT. 4, SUB-SECT. 4.—
B. (b) ii.

1760i. General rule.]—The public acts
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& conduct of an individual in a public office are a fair subject of comment as to his fitness.—BROADBENT v. SMALL

(1876), 2 V. L. R. L. 121.—AUS.

1760 ii. —.]—LANGTON v. SYME (1877), 3 V. L. R. L. 30.—AUS.

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Sect. 4.—Fair comment: Sub-sect. 4, B. (b) ii., iii., iv., v. & vi.]

1761. —.]—SEYMOUR v. BUTTERWORTH, No. 1756, ante.

1762. —.]—Whoever fills a public position renders himself open to public discussion & if any part of his public acts is wrong he must accept the attack as a necessary though unpleasant circumstance attaching to his position (BRAMWELL, B.).—KELLY v. SHERLOCK (1865), as reported in L. R. 1 Q. B. 686; 30 J. P. 805; N. P.; subsequent proceedings (1866), 7 B. & S. 480.

Annotations:—Expld. Bryce v. Rusden (1886), 2 T. L. R. 435. **Mentd.** Falvey v. Stanford (1874), L. R. 10 Q. B. 54; Cooke v. Brogden (1885), 1 T. L. R. 497.

1763. —.]—DAVIS v. SHEPSTONE, No. 1746, ante.

1764. —.]—To justify the publication in a newspaper of defamatory comments, apart from reports of what passes in cts. of justice, it must be shown either that the person of whom the defamatory matter is written was a person whose position & character are of general interest to the whole country, or that the subject-matter dealt with is one of general interest to the whole community. It is not enough to show that the individual fills a public character of a limited kind & in a limited district, or that the subject-matter dealt with is of interest only to a small portion of the public, or to the public in a limited district.

Defts., the proprietors of a newspaper, published a report of the proceedings at a meeting of the board of guardians of a provincial union, containing false & defamatory matter reflecting upon the medical officer of the union workhouse:—**Held:** not privileged by the occasion, though the report was admitted to be *bonâ fide* & a correct account of what passed at the meeting.—PURCELL v. SOWLER (1877), 2 C. P. D. 215; 46 L. J. Q. B. 308; 36 L. T. 416; 41 J. P. 789; 25 W. R. 362, C. A.

Annotations:—Consd. Davis v. Shepstone (1886), 11 App. Cas. 187; Allbutt v. Medical General Council (1889), 23 Q. B. D. 400. **Expld.** Pittard v. Oliver, [1891] 1 Q. B. 474. **Consd.** Adam v. Ward (1915), 31 T. L. R. 299. **Refd.** Pankhurst v. Sowler (1886), 3 T. L. R. 193; Kelly v. O'Malley (1889), 6 T. L. R. 62; Royal Aquarium & Summer & Winter Garden Soc. v. Parkinson, [1892] 1 Q. B. 431; Walker v. Hodgson, [1909] 1 K. B. 239. **Mentd.** Tenby Corpn. v. Mason (1908), 6 L. G. R. 233.

1765. Minister of State.]—CAMPBELL v. SPOTTISWOODE, No. 1802, post.

1766. Waywarden.]—(1) No criticism on a person holding a public office like that of waywarden can be a libel unless malice is proved.

(2) Qu.: whether the neglect of the editor of a newspaper to inquire into the truth of allegations sent to him for publication is evidence of malice.—HARLE v. CATHERALL (1866), 14 L. T. 801, N. P.

1767. Political agitator.]—ODGER v. MORTIMER, No. 1836, post.

1768. Supporters of political candidate.]—The conduct of persons at a public meeting held for the purpose of promoting the election of a candidate for a seat in Parliament, may be made the subject of fair & *bonâ fide* discussion by a writer in a public newspaper, & unfavourable

comments made upon such conduct in the course of such discussion are privileged.—DAVIS v. DUNCAN (1874), L. R. 9 C. P. 396; 43 L. J. C. P. 185; 30 L. T. 464; 38 J. P. 728; 22 W. R. 575.

Annotation:—Distd. Purcell v. Sowler (1876), 1 C. P. D. 781.

1769. Architect of local school board.]—Pltf. was appointed architect to a local school board under an agreement by which he undertook all alterations & additions to existing buildings & was paid a percentage on the costs. In the case of new buildings he was entitled to tender along with other architects, in which case he might or he might not be intrusted with the conduct of the job. At a meeting of the school board the chairman stated that a scheme for extending an existing school had been approved, that resp. had submitted an estimate, that the cost now appeared to be about double, & that the termination of the agreement with him should be considered. Defts., who were the proprietors of a newspaper circulated in that district, in commenting on the proceedings at the meeting, published an article which stated that "the board has at present the curious arrangement with its architect by which he undertakes all work of the nature of alterations & additions to existing structures, while new buildings are submitted to open competition. But for a considerable time past the 'enlargements' have been much bigger jobs than the erection of new structures. . . . The rule as interpreted is an absurdity, & it puts a premium upon a certain kind of advice." In an action for libel pltf. averred that the above statements in the article meant & were intended to mean that he had been unfaithful to the trust reposed in him, & had in his position acted corruptly for his personal benefit:—**Held:** as the article did not cast any imputation on pltf. in either his private or professional capacity, it had not exceeded the latitude of fair comment allowed newspaper articles criticising public officials, & the action must be dismissed.—LENG (JOHN) & CO., LTD. v. LANGLANDS (1916), 114 L. T. 665; 32 T. L. R. 255, H. L.

iii. Legal Matters.

1770. Conduct of magistrate.]—(1) As the administration of justice is a matter of public interest, the hearing of a case upon a charge of felony before a magistrate, or a fair report of it in a newspaper, is a proper subject for public comment & discussion. A public writer, therefore, is privileged in discussing the conduct of the magistrates, in dismissing the charge without fully hearing the evidence, & even in commenting upon the evidence given, in support of the view that the charge ought not to have been dismissed.

(2) But if he goes beyond these limits, & not only argues upon the effect of the evidence given, but attempts to show, from statements of matters of fact not in evidence, that the charge was well founded, & that the accused was guilty, he loses this privilege, & is liable to action.—HIBBINS v. LEE (1864), 4 F. & F. 243; 11 L. T. 541, N. P.

1760 iii. —.]—TUCKER v. HUTCHINSON (1901), 3 S. A. L. R. 49.—AUS.

1760 iv. —.]—MACDONALD v. ROBINSON (1885), 12 A. R. 270.—CAN.

1760 v. —.]—The right to comment upon the public acts of public men is a right of every citizen & is not the particular privilege of the press.—KANE v. MULVANY (1866), 1 R. 2 C. L. 402.—IR.

1760 vi. —.]—M'LAUGHLAN v. ORR, POLLOCK & Co. (1894), 22 H. (Ct. of Sess.) 38; 32 Sc. L. R. 36; 2 S. L. T. 275.—SCOT.

q. Solicitor to municipal corporation.]—The discussion of the conduct of a solr. of a municipal corpn. in that capacity is a matter of public interest, & a newspaper is entitled to criticise or make fair comment thereon.—DOUGLAS v. STEPHENSON (1898), 29

O. R. 616.—CAN.

r. Candidate for municipal office.]—BRUHUS v. BUTTER, [1920] C. P. D. 593.—S. AF.

PART VI. SECT. 4, SUB-SECT. 4.—B. (b) iii.

1770 i. Conduct of magistrate.]—PHILPOTT v. WHITTAL, [1907] E. D. C. 193.—S. AF.

1771. —.]—*Ex p.* GREENWELL (1870), 34 J. P. Jo. 406.

1772. *Solicitor's charges.*]—BLAIR & GIRLING v. COX (No. 1) (1892), 37 Sol. Jo. 130, C. A.

Reports of judicial proceedings.]—See Sect. 3, sub-sect. 4, B., *ante*.

iv. Ecclesiastical Matters.

1773. *Sermon preached in parish church.*]—

(1) In an action for libel, to which deft. pleaded only not guilty:—*Held*: the jury were properly directed that a clergyman gives no occasion for public comment by establishing or carrying into effect any arrangements for the purposes of charity.

Where a clothing society, with the vicar at the head of it, was formed & carried on, in a parish containing five thousand persons, on the principle of the exclusion of dissenters:—*Held*: not to be the subject of public comment, on a plea of not guilty.

(2) *Qu.*: as to a sermon preached by a clergyman to his congregation & not published,

(3) On the trial of an action for a libel in a newspaper, a witness stated that he was president of a literary institution having eighty members; that about the date of the paper proved one was brought, he could not say by whom, to the reading room of the institution, & left there gratuitously; that, a fortnight after, it was taken away without his authority, & never returned; that he had searched for it, but could not find it, & believed it to be lost or destroyed; that the title of it was the same as that proved, & as far as he could judge from a glance at it, it contained the libel in question, & he believed it was a copy of that paper. He was not cross-examined:—*Held*: though sent by a person unknown, it was evidence against deft., not to show malice, but to affect the damages, by showing the extent of circulation.—GATHERCOLE v. MIALL (1846), 15 M. & W. 319; 15 L. J. Ex. 179; 7 L. T. O. S. 89; 10 J. P. 582; 10 Jur. 337; 153 E. R. 872.

1774. *Affairs of private charitable society organised by parish priest.*]—GATHERCOLE v. MIALL, No. 1773, *ante*.

1775. *Conduct of parish church.*]—A churchwarden having written to pltf., the incumbent, accusing him of having desecrated the church, by allowing books to be sold in it during service, & by turning the vestry room into a cooking apartment, the correspondence was published without pltf.'s permission in deft.'s newspaper, with comments on pltf.'s conduct:—*Held*: this was a matter of public interest, which might be made the subject of public discussion; & the publication was, therefore, not libellous, unless the language used was stronger than, in the opinion of the jury, the occasion justified.—KELLY v. TINLING (1865), L. R. 1 Q. B. 699; 35 L. J. Q. B. 231; 13 L. T. 255; 30 J. P. 791; 12 Jur. N. S. 940; 14 W. R. 51.

Annotations:—*Consd.* Davis v. Duncan (1874), L. R. 9 C. P. 396; Purcell v. Sowler (1876), 1 C. P. D. 781. *Refd.* Kelly v. Sherlock (1866), L. R. 1 Q. B. 686.

1776. *Translation of Papal bull.*]—The translation of a Papal bull & its publication in a newspaper simply for the information of readers is not a contravention of 13 Eliz., c. 2. The words of the Statute "publish or . . . put in ure" mean publishing so as to make the bull operative in this country.—MATHEW v. TIMES PUBLISHING CO., LTD. (1913), 29 T. L. R. 471.

v. Literary, Artistic and Dramatic Criticism.

1777. *Public entertainments.*]—The editor of a public newspaper may fairly comment on any

place of public entertainment; nor shall such a paragraph be deemed a libel.—DIBDIN v. SWAN (1793), 1 Esp. 27, N. P.

Annotation:—*Refd.* Henwood v. Harrison (1872), L. R. 7 C. P. 606.

1778. —.]—MCQUIRE v. WESTERN MORNING NEWS CO., No. 1826, *post*.

1779. *Literary work.*]—CARR v. HOOD (1808), 1 Camp. 355, n.

Annotations:—*Distd.* Green v. Chapman (1837), 4 Bing. N. C. 92. *Consd.* McQuire v. Western Morning News Co., [1903] 2 K. B. 100. *Refd.* Finnerty v. Tipper (1809), 2 Camp. 72; Dunne v. Anderson (1825), 3 Bing. 88; Thompson v. Shackell (1828), Mood. & M. 187; Fraser v. Berkeley (1836), 7 C. & P. 621; Coxhead v. Richards (1846), 2 C. B. 569.

1780. — *Contents of newspaper.*]—STUART v. LOVELL, No. 1962, *post*.

1781. —.]—(1) Whatever is fairly written of a work, & can be reasonably said of it, or of its author, as connected with it, is not actionable, unless it appear that the party, under the pretext of criticising the work, takes an opportunity of attacking the character of its author.

(2) In cases of libel, a subsequent publication, brought out even after issue joined, may be evidence to show the motives of the party.—MACLEOD v. WAKLEY (1828), 3 C. & P. 311, N. P.

Annotations:—*As to* (1) *Consd.* Merivale v. Carson (1887), 20 Q. B. D. 275. *Distd.* Joynt v. Cycle Trade Publishing Co., [1904] 2 K. B. 292. *As to* (2) *Refd.* Webb v. Smith (1838), 7 L. J. C. P. 191.

1782. —.]—If a critic, in criticising a work, goes out of his way to attack the private character of the author, this is a libel.—FRASER v. BERKELEY (1836), 7 C. & P. 621; 2 Mood. & R. 3, N. P.

Annotations:—*Mentd.* Thomas v. Powell (1837), 7 C. & P. 807; Pearson v. Lemaitre (1843), 5 Man. & G. 700.

1783. —.]—The publication of a critique upon a literary work, couched in terms of condemnation, however strong, & even though imputing profanity or indecency, will be excused, unless it appears that it is so unfair & reckless in its character that it may be presumed to have been published, not honestly, but maliciously. *Semble*: as this cannot appear without reference to the work itself, it is part of pltf.'s case, in the absence of any other evidence of malice, to put it in evidence.—STRAUSS v. FRANCIS (1867), 4 F. & F. 1107; 15 L. T. 674, N. P.

1784. —.]—MERIVALE v. CARSON, No. 1837, *post*.

1785. *Works of art—Architecture.*]—A fair criticism on the works of a professional artist, in the course of his professional employment, is not actionable, however mistaken it may be: if it is unfair & intemperate, & written for the purpose of injuring the party criticised, it is actionable.—SOANE v. KNIGHT (1827), Mood. & M. 74, N. P.

1786. — *Painting.*]—It is not libellous fairly & honestly to criticise a painting publicly exhibited, however strong the terms of censure used may be.—THOMPSON v. SHACKELL (1828), Mood. & M. 187, N. P.

1787. — *Spurious antiques.*]—EASTWOOD v. HOLMES, No. 72, *ante*.

vi. Matters inviting Public Attention.

1788. *Pamphlet.*]—Pltf. having, in the course of a public controversy with a third party, published as the opinion of deft., upon that party expressions more severe than deft. had employed, & deft. having, in commenting thereupon in his newspaper, charged pltf. with a "malice which overcame his sense of truth & honesty," etc., the jury were told that the occasion was privileged, & the publication unless malicious; & that if the

Sect. 4.—Fair comment: Sub-sect. 4, B. (b) vi. & vii., & C. (a)

strong expressions used were under the circumstances natural, although rash, they might find for deft.

This is an action which is not maintainable without malice, which means, in law, any wrong motive. Nothing is more important than to draw the line duly between fair discussion for the promotion of the truth, & publications for the aspersion of personal character. . . . Where pltf. & deft. have both had recourse to the press, & the libel has been published in the course of a discussion in which both parties have been before the public, & in which pltf. first had recourse to the press, & made the matter public, it is, in such a case, important to see if malice is made out against the party sued, or if he has published only what he believed to be required for the interests of truth. . . . If you are of opinion that deft. wrote what he did for the purpose of maintaining the truth, sincerely having that object in view, without any corrupt motive, & that the language he used, even although it may be exaggerated, was prompted by the desire to maintain the truth, & that the exaggerated language was provoked by similar language on the other side, & which might well have accounted for the use of strong expressions, then you are at liberty to find deft. not guilty (ERLE, C.J.).—HIBBS v. WILKINSON (1859), 1 F. & F. 608, N. P.

*Annotations:—*Refd. Paris v. Levy (1860), 3 L. T. 323; Merivale v. Carson (1887), 4 T. L. R. 125.

1789. —.]—KOENIG v. RITCHIE, No. 1647, ante.

1790. *Advertisement or handbill.*—A tradesman's advertisement or handbill is open to fair criticism & remark, like a book or a work of art.—PARIS v. LEVY (1860), 9 C. B. N. S. 342; 30 L. J. C. P. 11; 3 L. T. 323; 7 Jur. N. S. 289; 9 W. R. 71; 142 E. R. 135.

*Annotation:—*Consd. Campbell v. Spottiswoode (1863), 3 B. & S. 769.

1791. —.]—CAMPBELL v. SPOTTISWOODE, No. 1802, post.

1792. —.]—HUNTER v. SHARPE, No. 954, ante.

vii. Other Matters.

1793. *Management of college.*—In an action for libel, consisting of a publication in a newspaper of a report of an inspector of charities under Charitable Trusts Act, 1853 (c. 137), containing a letter, written some years before, reflecting on pltf. in his management of a college:—*Held*: as the matter was one of public interest, deft. was not liable, provided he published it fairly, from an honest desire to afford the public information, & comments on it were only material as evidence of malice.—COX v. FEENEY (1863), 4 F. & F. 13, N. P.

*Annotations:—*Refd. R. v. Gray (1865), 10 Cox, C. C. 184; Allbutt v. General Council of Medical Education & Registration (1889), 23 Q. B. D. 400; Adam v. Ward (1915), 31 T. L. R. 299.

PART VI. SECT. 4, SUB-SECT. 4.— B. (b) vii.

t. *Management of newspaper.*—A co. incorporated for the purpose of publishing a newspaper can maintain an action of libel in respect of a charge of corruption in the conduct of their paper, without alleging special damage.—JOURNAL PRINTING CO. v. MACLEAN (1894), 25 O. R. 509; *affd.* (1895), 23 A. R. 324.—CAN.

a. *Collection for charity.*—WILES

v. VICTORIA TIMES PRINTING & PUBLISHING CO., LTD. (1904), 11 B. C. R. 143.—CAN.

PART VI. SECT. 4, SUB-SECT. 4.— C. (a).

1797 i. *Necessity for fairness.*—FALCKE v. HERALD & WEEKLY TIMES, LTD., [1925] V. L. R. 56; 46 A. L. T. 142.—AUS.

1797 ii. —.]—Comment on a matter of public interest must be fair.—SANDWITH v. COWPER & GARRIOCH (1911),

1794. *Circulation of newspapers.*—LATIMER v. WESTERN MORNING NEWS CO., No. 1037, ante.

1795. *Housing accommodation of employees.*—(1) An action of libel will lie at the suit of an incorporated trading co. in respect of a libel calculated to injure its reputation in the way of its business, without proof of special damage.

(2) The sanitary condition of a large number of cottages let by the proprietors of a colliery to their workmen is a matter of public interest, fair comment on which is not libellous.

(3) The ct. decides whether the matter commented on is one of public interest (LOPES, L.J.).—SOUTH HETTON COAL CO. v. NORTH-EASTERN NEWS ASSOCN., [1894] 1 Q. B. 133; 63 L. J. Q. B. 293; 69 L. T. 844; 58 J. P. 196; 42 W. R. 322; 10 T. L. R. 110; 9 R. 240, C. A.

*Annotations:—*As to (1) Refd. Willmott v. London Road Car Co., [1910] 2 Ch. 525. As to (2) Refd. Homing Pigeon Publishing Co. v. Racing Pigeon Publishing Co. (1913), 29 T. L. R. 389. As to (3) Refd. Adam v. Ward (1915), 31 T. L. R. 299. Generally, Refd. Empire Typesetting Machine Co. of New York v. Linotype Co. (1898), 79 L. T. 8. Mentd. Pratt v. British Medical Asscn., [1919] 1 K. B. 244.

1796. *Conduct of licensed houses.*—WALKER (PETER) & SON, LTD. v. HODGSON, No. 1742, ante.

C. Comment must be Fair.

(a) In General.

1797. *Necessity for fairness.*—R. v. WHITE (1808), 1 Camp. 359, n., N. P.

1798. —.]—(1) It is competent for all the subjects of his Majesty freely but temperately to discuss not only in conversation between friend & friend, but through the medium of the press, every question connected with public policy: but in proportion to the importance & delicacy of the subject, in proportion to the peril which may attend an inflamed discussion of a subject: a guard is to be imposed upon the person . . . in order that he may take care he does no material injury to private feeling or the public peace & happiness. He must be cautious not to make this privilege a cloak to cover a malicious intention (LORD ELLENBOROUGH).

(2) Deft. may be found guilty upon a count in an information which charges him with having "composed, printed, & published" a libel, if he is proved to have published without having composed it.

He need not prove all [the counts]. Proof of composing is not necessary. The distinction runs through all indictments. Where you charge that the party did or caused the thing to be done if you prove either, it is enough (LORD ELLENBOROUGH).—R. v. HUNT (1811), 31 State Tr. 367, 380, 408; 2 Camp. 583.

*Annotation:—*Generally, Refd. Darby v. Ouseley (1856), 1 H. & N. 1.

1799. —.]—A Wesleyan minister was charged before the magistrates with being the father of a bastard child, & the summons was dismissed for want of corroboration. Deft., the proprietor of the "Wesleyan Times" then inserted articles in his paper commenting upon the fact that it was

17 W. L. R. 1; 4 Sask. L. R. 12.—CAN.

1797 iii. —.]—UPINGTON v. SOLOMON (SAUL) & CO., UPINGTON v. DORMER (1879), Buch. 240.—S. AF.

1797 iv. —.]—AFRICAN LIFE ASSURANCE SOCIETY, LTD. v. SOUTH AFRICAN MUTUAL LIFE ASSURANCE SOCIETY (1909), 26 S. C. 102.—S. AF.

1797 v. —.]—HULTZER & DAS v. VAN GORKOM (1909), T. S. 232.—S. AF.

1797 vi. —.]—CRAWFORD v. ALBU, [1917] App. D. 102.—S. AF.

1805 xiv. —.] — ROOS v. STENT
(1909), T. S. 998. — S. AF.

Sect. 4.—Fair comment: Sub-sect. 4, C. (b) & (c), & D.; sub-sect. 5, A. & B.]

1806. —.]—DIGBY *v.* FINANCIAL NEWS, LTD., No. 1845, *post*.

1807. —.]—HUNT *v.* STAR NEWSPAPER CO., LTD., No. 1702, *ante*.

1808. —.]—WALKER (PETER) & SON, LTD. *v.* HODGSON, No. 1742, *ante*.

1809. *Facts must not be adduced by defendant.*—HIBBINS *v.* LEE, No. 1770, *ante*.

1810. —.]—WALKER *v.* BROGDEN, No. 1267, *ante*.

1811. *Untrue facts contained in privileged document—Protection of comment.*—MANGENA *v.* WRIGHT, No. 1722, *ante*.

(c) *Personal Attacks.*

1812. *Exceed limits of fair comment.*—It is not within the limits of privileged criticism to print of an exhibitor of flowers, in observations touching the exhibition, "the name of G. is to be rendered famous in all sorts of dirty work; the tricks by which he, & a few like him, used to secure prizes, seem to have been broken in upon by some judges, more honest than usual. If G. be the same man who wrote an impudent letter to the Metropolitan Society, he is too worthless to notice, if he be not the same man, it is a pity two such beggarly souls could not be crammed into the same carcase."—GREEN *v.* CHAPMAN (1837), 4 Bing. N. C. 92; 5 Scott, 340; 132 E. R. 724.

1813. —.]—PARMITER *v.* COUPLAND, No. 1019, *ante*.

1814. —.]—WILSON *v.* REED, No. 5, *ante*.

1815. —.]—CAMPBELL *v.* SPOTTISWOODE, No. 1802, *ante*.

1816. —.]—HEDLEY *v.* BARLOW, No. 899, *ante*.

1817. —.]—In an action by a musical critic for a libel, imputing to him that he used his influence as a critic to extort the gratuitous services of eminent artists at his concerts, it appearing that he did obtain their services gratuitously, they of course knowing that he was a critic:—*Held*: although deft. might have been excused in commenting upon the system in severe terms, as likely to bias the criticism, & have an unfair influence, yet the imputation in the libel went far beyond the limits of fair discussion, & a justification of it, not proved, was an aggravation.

To impute to a public writer, who writes public criticisms upon the performances of others, that he is induced to give or to withhold praise, or to pronounce censure, from interested motives, is to make a charge of the greatest turpitude, for it is a charge of the basest & most dishonourable conduct. Those who undertake to enlighten public opinion & public taste in matters of literature or art undertake a most important trust. It is not only that the public look to them upon matters in which the public must be necessarily

less informed or enlightened for assistance in the formation of their judgment & their taste; but it is also this, that those who are struggling in the race of public competition for public favour, as the means of their livelihood or success in life, have a right to expect that their performances shall be scanned by fair & impartial critics; for it would make all the difference to the artist whether he is praised or censured in journals of extensive circulation. . . . If the libel had been limited to observations upon the character of the system & its probable consequences, no one could have complained of the spirit of the tone of the article. . . . But unfortunately in this instance the writer has gone much further. He has not satisfied himself with pointing out the bad consequences of the system which pltf. has adopted, but he has imputed to him that he does, in fact, mete out his criticism, favourable or unfavourable, according as the services were rendered to him or not; & that by this means through the influence of his criticisms upon those artists who dread them if they do not submit to his demands, he was enabled to levy "black mail" upon them, & thus was a kind of "highwayman upon the press." Such being the scope of the article it assumes as I have said a serious character. . . . When such a charge as this is made, of corrupt & dishonest conduct, & it is not warranted either by the law or by the facts, a jury ought to give such damages as may clear pltf.'s character from such a serious aspersion upon it, for which it does not appear that there is any foundation (Cockburn, C.J.).—RYAN *v.* WOOD (1866), 4 F. & F. 735.

1818. —.]—*Ex p.* HOSKYN (1869), 33 J. P. Jo. 68.

1819. —.]—R. *v.* SHIMMENS (1870), 34 J. P. Jo. 308.

1820. —.]—R. *v.* MASTERS (1889), 6 T. L. R. 44, D. C.

1821. —.]—BLAIR & GIRLING *v.* COX (No. 1) (1892), 37 Sol. Jo. 130, C. A.

1822. —.]—JOYNT *v.* CYCLE TRADE PUBLISHING CO., No. 1805, *ante*.

1823. — *Unless warranted by facts truly stated.*—(1) In an action for libel it is for the jury to affix the true meaning of the words complained of, & to say whether or not they fit pltf. Deft. is also entitled to have the jury's decision, on a plea of fair comment, whether or not the words exceed the limits of fair comment. It is the right of deft. to have the question distinctly left to the jury whether the meaning attached to the impugned words by pltf. is the meaning which they would carry to the ordinary reader.

(2) A personal attack in any given case may form part of fair comment if it be warranted by facts truly stated, & be a reasonable inference from such facts. Whether such attack can reasonably be inferred from comments on truly stated facts is matter of law for the determination of the

1809 i. *Facts must not be adduced by defendant.*—A man may not invent his facts & then comment upon them, & succeed upon the ground that, the facts being assumed to be true, the comment is fair.—CROW'S NEST PASS COAL CO. *v.* BELL (1902), 22 C. L. T. 107; 1 O. W. R. 660; 1 O. W. R.

MAGAZINE, LTD., OF AUSTRALASIA (1921), 21 S. R. N. S. W. 189; 38 N. S. W. W. N. 26.—AUS.

1812 iii. —.]—FARMER *v.* HAMILTON TRIBUNE PRINTING & PUBLISHING CO. (1883), 3 O. R. 538.—CAN.

1812 iv. —.]—IMPERATRIX *v.* KARDE (1880), 1 L. R. 4 Bom. 298.—IND.

1812 v. —.]—Comments on the conduct of a public officer in the discharge of his official duties are permissible, provided they be fair; but statements as to his conduct as a private citizen in the ordinary relations of life, if libellous, are actionable.—EYES *v.*

HENDERSON (circa 1873), 1 N. Z. Jur. 34.—N.Z.

1812 vi. —.]—Discussion of the public conduct of a Member of Parliament is not libellous, unless it is a personal attack on the individual.—HAMILTON *v.* STEVENSON (1822), 3 Murr. 81.—SCOT.

1812 vii. —.]—GUDGEON *v.* OUTRAM & Co. (1888), 16 R. (Ct. of Sess.) 183; 26 Sc. L. R. 130.—SCOT.

1812 viii. —.]—FARRAR *v.* HAY (1907), T. S. 194.—S. AF.

1812 ix. —.]—WYNDHAM *v.* WAL-LACH'S P. & P. Co., LTD. (1907), T. S. 385.—S. AF.

PART VI. SECT. 4, SUB-SECT. 4.—C. (c).

1812 i. *Exceed limits of fair comment.*—BROWN *v.* MCKINLEY (1886), 12 V. L. R. 240.—AUS.

1812 ii. —.]—NEWBURY *v.* TRIAD

judge; whether the inference in the particular case ought to be drawn is for the jury to decide.

The pith of the libel is that deft. wrote to pltf. as a "quack of the rankest species" in connection with his service on the staff of the Drouet Institute. Deft. denounced the Drouet Institute, on what he claimed to be public grounds, as an organised system for dishonestly obtaining money from persons suffering from deafness in hope of a cure. Deft. pleaded that his accusation against pltf. was true, & also that it was protected as a fair comment upon a matter of public interest. The jury found a verdict for pltf. for £1,000. I rest my opinion that the verdict cannot stand upon two grounds. In the first place, deft. was entitled to have the jury's decision, on his plea of justification, whether the words used were true in the plain meaning which the jury might attach to them. In the second place, deft. was, in my opinion, entitled to have the jury's decision, as to the plea of fair comment, whether or not, in all the circumstances proved, the libel went beyond a fair comment on pltf. & on the system of medical enterprise with which he associated himself, as a matter of public interest treated by deft. honestly & without malice. The plea of fair comment does not arise if the plea of justification is made good, nor can it arise unless there is an imputation on a pltf. It is precisely where the criticism would otherwise be actionable as a libel that the defence of fair comment comes in (LORD LOREBURN, C.).—*DAKHYL v. LABOUCHERE* (1907), [1908] 2 K. B. 325, n.; 77 L. J. K. B. 728; 96 L. T. 399; 23 T. L. R. 364, H. L.

Annotations:—As to (1) *Refd. Aga Khan v. Times Publishing Co.*, [1924] 1 K. B. 675. As to (2) *Appld. Hunt v. Star Newspaper Co.*, [1908] 2 K. B. 309. *Consd. Walker v. Hodgson*, [1909] 1 K. B. 239; *Sutherland v. Stopes*, [1925] A. C. 47. *Refd. Homing Pigeon Publishing Co. v. Racing Pigeon Publishing Co.* (1913), 29 T. L. R. 389.

1824. ———.]—*HUNT v. STAR NEWSPAPER CO., LTD.*, No. 1702, *ante*.

Functions of Judge & Jury.—See Sub-sect. 5, *post*.

D. Effect of Malice.

See Part VII., Sect. 2, sub-sect. 3, *post*.

SUB-SECT. 5.—FUNCTIONS OF JUDGE AND JURY.

A. The Judge.

1825. **Whether comment capable of being interpreted as unfair.**—*HENWOOD v. HARRISON*, No. 1735, *ante*.

1826. ———.]—(1) In order to bring a criticism upon a public dramatic performance within the protection given by the law to "fair comment" in such matters, the view expressed must be honest, & must be such as can fairly be called criticism.

(2) It is for pltf. who rests his claim upon a document which on his own statement purports to be a criticism on a matter of public interest to show that it is a libel; *i.e.* that it travels beyond the limit of fair criticism; & it is for the judge at the trial to say whether it is reasonably capable of being so interpreted. If it is not, there is no

question for the jury, & the judge may enter judgment for deft.

(3) Unless there is in the criticism some element which may support an inference of unfairness in some other sense, such as an attack on the personal character of pltf. or an imputation that pltf. has written something which he has not in fact written, it is the duty of the judge to withdraw the case from the jury & to hold that there is no libel.—*MCQUIRE v. WESTERN MORNING NEWS CO.*, [1903] 2 K. B. 100; 72 L. J. K. B. 612; 88 L. T. 757; 51 W. R. 689; 19 T. L. R. 471, C. A.

Annotations:—As to (1) *Consd. Joynt v. Cycle Trade Publishing Co.*, [1904] 2 K. B. 292; *Homing Pigeon Publishing Co. v. Racing Pigeon Publishing Co.* (1913), 29 T. L. R. 389. *Refd. Plymouth Mutual Co-op. & Industrial Soc. v. Traders' Publishing Assocn.*, [1906] 1 K. B. 403. As to (2) *Apprvd. Sutherland v. Stopes*, [1925] A. C. 47. *Refd. Thomas v. Bradbury, Agnew*, [1906] 2 K. B. 627; *Walker v. Hodgson*, [1909] 1 K. B. 239.

1827. ———.]—In an action for libel in which deft. pleads fair comment, the judge, before leaving the question of fair comment to the jury, must be satisfied that the defamatory inference can reasonably be drawn from the stated facts; if it can, it is for the jury to say whether it ought to be drawn.—*HOMING PIGEON PUBLISHING CO., LTD. v. RACING PIGEON PUBLISHING CO., LTD.* (1913), 29 T. L. R. 389.

1828. ———.]—*SUTHERLAND v. STOPES*, No. 1739, *ante*.

1829. **Whether personal attack can be reasonably inferred from truly stated facts.**—*DAKHYL v. LABOUCHERE*, No. 1823, *ante*.

1830. ———.]—*HUNT v. STAR NEWSPAPER CO., LTD.*, No. 1702, *ante*.

1831. **Duty to withdraw case from jury—If inference of unfairness impossible.**—*MCQUIRE v. WESTERN MORNING NEWS CO.*, No. 1826, *ante*.

B. The Jury.

1832. **Whether comment fair.**—One newspaper copied a libellous paragraph from another, adding the word "fudge!" at the close. In an action by the party libelled against the publisher of the paper in which the word "fudge" was added:—*Held*: it was for the jury to say whether the object was to vindicate the character of the party by the addition of the word, or whether it was only introduced for the purpose of creating an argument in case proceedings should be afterwards taken.—*HUNT v. ALGAR* (1833), 6 C. & P. 245, N. P.

1833. ———.]—Case for libel. The alleged libel stated that pltf., a tradesman in London, became surety for the petitioner on the Berwick election petition, & stated himself, on oath, to be sufficiently qualified in point of property, when he was not in fact qualified, nor able to pay his debts. It then asked, why pltf., being unconnected with the borough, should take so much trouble, & incur such an exposure of his embarrassments; & proceeded: "there can be but one answer to these very natural & reasonable queries; he is hired for the occasion." Deft. justified, stating that the above-mentioned allegations in the libel, except the hiring, which was not specifically noticed, were true, & that the publication was a correct report of proceedings in a legal ct., "together with a fair

PART VI. SECT. 4, SUB-SECT. 5.—A.

1825 i. **Whether comment capable of being interpreted as unfair.**—*MUNRO v. QUIGLEY* (1898), 30 N. S. R. (18 R. & G.) 360.—CAN.

PART VI. SECT. 4, SUB-SECT. 5.—B.

1832 i. **Whether comment fair.**—In an action for libel, the question

whether the publication was a fair comment, is for the jury.—*DE MESTRE v. SYME* (1883), 9 V. L. R. (L.) 10.—AUS.

1832 ii. ———.]—*CROWLEY v. GLISSAN* (1905), 2 C. L. R. 744.—AUS.

1832 iii. ———.]—*MACKAY v. BACON* (1910), 11 C. L. R. 530.—AUS.

1832 iv. ———.]—*ROFE v. SMITH'S*

NEWSPAPERS, LTD. (1925), 25 S. R. N. S. W. 4; 42 N. S. W. W. N. 3.—AUS.

1832 v. ———.]—*MARTIN v. MANITOBA FREE PRESS CO.* (1892), 8 Man. L. R. 50; *appeal dismissed* (1892), 2 S. C. R. 518.—CAN.

1832 vi. ———.]—*MCVEITY v. OTTAWA CITIZEN* (1912), 23 O. W. R. 15; O. W. N. 37; 5 D. L. R. 882.—CAN.

Sect. 4.—Fair comment: Sub-sect. 5, B.; sub-sect. 6. Sects. 5 & 6.]

& *bonâ fide* commentary thereon." Replication *de injuria*. Issue thereon:—*Held*: the concluding observation in the libel, not being a mere inference from the previous statement, but introducing a substantive fact, required a distinct justification; & therefore, on trial of the above issue, it was properly left to the jury to say, not only whether the evidence made out the facts first alleged, but also whether the imputation, that pltf. had been hired, was a fair comment.—*COOPER v. LAWSON* (1838), 8 Ad. & El. 746; 1 Per. & Dav. 15; 1 Will. Woll. & H. 601; 8 L. J. Q. B. 9; 2 Jur. 919; 112 E. R. 1020.

Annotation:—*Consd.* Sutherland v. Stopes, [1925] A. C. 47.

1834. —.]—*CAMPBELL v. SPOTTISWOODE*, No. 1802, *ante*.

1835. —.]—*R. v. CALTHORPE*, No. 2405, *post*.

1836. —.]—In actions for libel, it is only on the very strongest grounds that the ct. will set aside, as against evidence, a verdict for deft. on the question of fair comment upon the conduct of public men.

Pltf., a well-known public character, in addressing meetings held to protest against a bill recently introduced into Parliament, had burnt the bill, & predicted much popular irritation in event of its being passed. Thereupon deft. published of him, amongst other things, that he was a political cheap jack, half booby & half humbug, & had defied the government & threatened civil discord, & that he was only seeking by agitation to obtain a government appointment:—*Held*: a question for the jury, whether this was fair comment or not; & a rule to set aside, as against evidence, a verdict for deft., refused.

O. [ptf.] is essentially a public man. That being so editors of public newspapers may comment in the strongest possible way upon what he says & does in that character (*BOVILL, C.J.*).—*ODGER v. MORTIMER* (1873), 28 L. T. 472.

Annotation:—*Refd.* Gourley v. Plimsoll (1873), L. R. 8 C. P. 362.

1837. —.]—(1) Where an action of libel is brought in respect of a comment on a matter of public interest the case is not one of privilege, properly so called, & it is not necessary in order to give a cause of action that actual malice on the part of deft. should be proved.

(2) The question whether the comment is or is not actionable depends upon whether in the opinion of the jury it goes beyond the limits of fair criticism. In actions for libel conveyed in the public criticism of literary work, the only questions for the jury are, what is the meaning of the words used, & whether such meaning comes within the limits of "fair criticism."

If it could be shown that the critic had written the words complained of, not for the purpose of criticism, but with a malicious intent to injure the author, that might make a statement libellous which, if written without such intent, would not be beyond the limits of "fair criticism."—*MERIVALE v. CARSON* (1887), 20 Q. B. D. 275; 58 L. T. 331; 52 J. P. 261; 36 W. R. 231; 4 T. L. R. 125, C. A.

Annotations:—*As to* (1) *Consd.* Thomas v. Bradbury, Agnew, [1906] 2 K. B. 627. *Refd.* Walker v. Hodgson, [1909] 1 K. B. 239. *As to* (2) *Consd.* McQuire v. Western Morning News Co., [1903] 2 K. B. 100; Thomas v. Bradbury, Agnew, [1906] 2 K. B. 627; Hunt v. Star Newspaper Co., [1908] 2 K. B. 309. *Refd.* South Hetton Coal Co. v.

North-Eastern News Assocn., [1894] 1 Q. B. 133; Dakhyll v. Labouchere, [1908] 2 K. B. 325, n.; Stopes v. Sutherland (1923), 39 T. L. R. 677.

1838. —.]—*BRENON v. RIDGWAY*, No. 7, *ante*.

1839. —.]—*R. v. MASTERS* (1889), 6 T. L. R. 44, D. C.

1840. —.]—*COONEY v. EDEVEAIN* (1897), 14 T. L. R. 34, C. A.

1841. —.]—*HOMING PIGEON PUBLISHING CO., LTD. v. RACING PIGEON PUBLISHING CO., LTD.*, No. 1827, *ante*.

1842. — *Personal attack.*]—*DAKHYLL v. LABOUCHERE*, No. 1823, *ante*.

1843. —.]—*HUNT v. STAR NEWSPAPER CO., LTD.*, No. 1702, *ante*.

SUB-SECT. 6.—PLEADING.

1844. "Rolled up plea"—Whether particulars must be given.]—*PENRHYN v. "LICENSED VICTUALLERS' MIRROR"* (1890), 7 T. L. R. 1, D. C.

Annotations:—*Consd.* Walker v. Hodgson, [1909] 1 K. B. 239; Sutherland v. Stopes, [1925] A. C. 47.

1845. —.]—(1) The defence to an action for libel in a newspaper article that "in so far as the words consist of statements of fact, the same are in their natural & ordinary signification true in substance & in fact; in so far as they consist of comment, the same were fair & *bonâ fide* comment upon a matter of public interest," is a defence of fair comment & not a justification.

(2) Pltf. advertised in a daily paper for a partner with £250 to complete the formation of a syndicate already registered. In reply to a letter of inquiry from a correspondent of defts., who were the proprietors of a different paper, pltf. forwarded particulars of the syndicate, together with reports & other documents relating to it. An article having been published in defts.' paper, in which the particulars & documents supplied by pltf. were commented upon in a satirical vein, pltf. brought an action for libel, to which the defence set out above was, *inter alia*, pleaded, & particulars of the defence were given. Pltf. applied for further & better particulars of the defence, asking for particulars as to whether defts. alleged that any of the statements made in the particulars & documents sent by pltf. were untrue, & if so, which of them:—*Held*: the defence being one of fair comment only, & no justification having been pleaded, pltf. was not entitled to the particulars sought.

(3) Comment, in order to be fair, must be based upon facts, & if a deft. cannot show that his comments contain no misstatements of fact, he cannot prove a defence of fair comment. . . . If deft. makes a misstatement of any of the facts upon which he comments it at once negatives the possibility of his comment being fair (*COLLINS, M.R.*).—*DIGBY v. FINANCIAL NEWS, LTD.*, [1907] 1 K. B. 502; 76 L. J. K. B. 321; 96 L. T. 172; 23 T. L. R. 117; 51 Sol. Jo. 98, C. A.

Annotations:—*As to* (1) *Consd.* Aga Khan v. Times Publishing Co., [1924] 1 K. B. 675; Sutherland v. Stopes, [1925] A. C. 47. *Refd.* Walker v. Hodgson, [1909] 1 K. B. 239. *As to* (2) *Refd.* Lyons v. Financial News (No. 1) (1909), 53 Sol. Jo. 671; Walker v. Hodgson, [1909] 1 K. B. 239. *As to* (3) *Consd.* Walker v. Hodgson, [1909] 1 K. B. 239. *Apprvd.* Sutherland v. Stopes, [1925] A. C. 47.

1846. —.]—*LYONS v. FINANCIAL NEWS, LTD.* (No. 1) (1909), 53 Sol. Jo. 671, C. A.

Annotation:—*Consd.* Aga Khan v. Times Publishing Co., [1924] 1 K. B. 675.

PART VI. SECT. 4, SUB-SECT. 6.

1844 i. "Rolled-up plea"—Whether particulars must be given.]—*PIKE v. LAWTON* (1910), Royal Gazette, Feb. 15.—*NFLD.*

b. Must be consistent with words of alleged libel.]—*DEVLIN v. MOYLAN* (1867), 4 P. R. 150.—*CAN.*

1847. ———.]—Where in an action of libel deft. relies on the defence of fair comment, & pleads it in the form now commonly known as the "rolled-up plea," i.e., "in so far as the said words consist of allegations of fact the said words are in their natural & ordinary meaning true in substance & in fact, & in so far as the said words consist of expressions of opinion they are fair comment made in good faith & without malice for the benefit of the public upon the said facts which are a matter of public interest," the ct. will not order deft. to specify which of the words complained of he relies on as being statements of fact, & which as being expressions of opinion, for it is for the jury to determine to which class the several statements belong, & deft. ought not to be called upon to forecast the findings of the jury; nor will the ct. order him to give particulars of the facts on which he relies as being the basis of his comments, if the plea, as above, limits those facts to "the said facts," for pltf. is thereby given all the information on the subject that he can require. *Secus*: if the plea is pleaded generally without that limitation.—**AGA KHAN v. TIMES PUBLISHING CO., DAWSON v. SAME**, [1924] 1 K. B. 675; 93 L. J. K. B. 361; 130 L. T. 746; 40 T. L. R. 299, C. A. *Annotation*:—**Consd. Sutherland v. Stopes**, [1925] A. C. 47.

1848. ——— **Plea of fair comment not justification.**—**DIGBY v. FINANCIAL NEWS, LTD.**, No. 1845, *ante*.

1849. ———.]—**SUTHERLAND v. STOPES**, No. 1739, *ante*.

Interrogatories.—*See DISCOVERY*, Vol. XVIII., pp. 208-210, Nos. 1555, 1565-1571.

SECT. 5.—APOLOGY WITH PAYMENT INTO COURT UNDER LORD CAMPBELL'S ACT.

See Part X., Sect. 3, sub-sect. 2, post.

SECT. 6.—OTHER DEFENCES.

1850. Previous libel by plaintiff of defendant.—**PASQUIN'S CASE** (*circa* 1800), cited in 2 Camp. p. 76. *Annotation*:—**Dbtd. Finnerty v. Tipper** (1809), 2 Camp. 72.

1851. ———.]—(1) In an action for a libel, pltf. cannot give in evidence other libels published concerning him by deft., unless they directly refer to the libel set out in the declaration.

(2) It is not a bar to an action for a libel, that pltf. has been in the habit of libelling deft.

If a man is in the habit of libelling others, he complains with a very bad grace of being libelled himself, & he cannot be supposed to suffer much injury from this source. But I cannot say that he suffers none, or that he loses his right to maintain any such action. The evidence opened does not amount to an absolute defence in law but will be most essential with respect to the damages (**MANSFIELD, C.J.**).—**FINNERTY v. TIPPER** (1809), 2 Camp. 72, N. P.

Annotations:—*As to* (1) **Refd. Tarpley v. Blabey** (1836), 2 Bing. N. C. 437; **Hemmings v. Gasson** (1858), E. B. & E. 346.

PART VI. SECT. 6.

1850 i. Previous libel by plaintiff of defendant.—**McELHONE v. BENNETT** (1885), 6 N. S. W. L. R. 262; 2 N. S. W. W. N. 32.—**AUS.**

c. Publication of apology.—**COT-**

TON v. BEATY (1863), 13 C. P. 243.—**CAN.**

d. Defamation in jest.—The defence to an action for slander that the words complained of were spoken in jest & without *animus injuriandi*

1852. ———.]—(1) In an action for a libel, deft. cannot, either in bar of the action or in mitigation of damages, give in evidence other libels of him by pltf. not distinctly relating to me subject.

(2) Declaration stated that pltf. was an & had been employed as vestry clerk in the parish of A. & that whilst he was such vestry clerk, certain prosecutions were carried on against B. for certain misdemeanors, & in furtherance of such proceedings, & to bring the same to a successful issue, certain sums of money belonging to the parishioners were appropriated & applied to the discharge of the expenses incurred on account of the said proceedings, yet deft. intending, etc., to injure pltf. in his profession of an attorney, & to cause him to be esteemed a fraudulent practiser in his said profession & in his office as vestry clerk, & to cause it to be suspected that pltf. had fraudulently applied money belonging to the parishioners on, etc., at, etc., falsely & maliciously & concerning pltf., & of & concerning in his office as vestry clerk, & of & concerning the matters aforesaid, the libel, etc. It appeared on the production of the libel at the trial, that the imputation was, that pltf. had applied the parish money in payment of the expenses of the prosecution after it had terminated:—*Held*: this was no variance, because it did not alter the character of the libel, the fraud imputed to pltf. being the same, whether the money was misapplied before or after the proceedings had terminated; & the allegation, that the libel was published of & concerning the matters aforesaid, did not make it necessary to prove precisely that the libel did relate to every part of the matter previously stated.—**MAY v. BROWN** (1824), 3 B. & C. 113; 4 Dow. & Ry. K. B. 670; 2 L. J. O. S. K. B. 212; 107 E. R. 676.

Annotations:—*As to* (1) **Apld. Wakley v. Johnson** (1826), Ry. & M. 422. **Consd. Watts v. Fraser** (1835), 7 C. & P. 369. **Apld. Tarpley v. Blabey** (1836), 2 Bing. N. C. 437. **Refd. Watts v. Fraser** (1837), 7 Ad. & El. 223. *As to* (2) **Apld. Lewis v. Walter** (1824), 3 B. & C. 138, n. **Distd. Sellers v. Till** (1825), 4 B. & C. 655. **Refd. Rutherford v. Evans** (1830), 4 Moo. & P. 163; **Heming v. Power** (1842), 10 M. & W. 564; **Hemming v. Gasson** (1858), 31 L. T. O. S. 176. *Generally*, **Mentd. Egerton v. Brownlow** (1853), 4 H. L. Cas. 1.

1853. Accord & satisfaction.—Action for words imputing a crime; an agreement on the part of pltf. to waive his action for words spoken, in consideration that deft. will destroy certain documents in his possession or which might afterwards come into his possession, imputing the same crime to pltf., is, when executed by the burning of the papers in his possession, a bar to the action, & may be given in evidence under the general issue.—**LANE v. APPELGATE** (1815), 1 Stark. 97, N. P.

Annotation:—**Apld. Boosey v. Wood** (1865), 3 H. & C. 484.

1854. ——— **Publication of mutual apologies.**—To an action for libel deft. pleaded that, after the commencement of the suit, pltf. & deft. agreed to accept certain mutual apologies to be published by pltf. & deft. respectively, in certain weekly journals belonging to pltf. & deft. respectively, in full satisfaction & discharge of all causes & rights of action in the declaration mentioned, & all damages & costs sustained by pltf.; & that in pursuance of the agreement deft. did publish his part of the mutual apologies in the weekly journal belonging to him, & that pltf. did

is of no avail unless deft. can prove that the words were so understood, nor is it of avail if the words are defamatory *per se* & injure the business of another.—**MASCH v. LEASK**, [1916] T. P. D. 114.—**S. AF.**

Sect. 6.—Other defences. Part VII. Sects. 1 & 2: 11 L. T. 639; 11 Jur. N. S. 181; 13 W. R. 317; 159 E. R. 620.

Sub-sects. 1 & 2, A.]

also in pursuance of the agreement publish his part of the apologies in the weekly journal belonging to him:—*Held*: the plea was a bar to the action as an accord & satisfaction.—*BOOSEY v. WOOD* (1865), 3 H. & C. 484; 5 New Rep. 315; 34 L. J. Ex. 65;

Statute of Limitations.]—See LIMITATION OF ACTIONS.

Public Authorities Protection Act, 1893 (c. 61).]—See PUBLIC AUTHORITIES; LIMITATION OF ACTIONS.

Part VII.—Malice.

SECT. 1.—MALICE IMPLIED IN LAW.

1855. Implied from defamatory words—Need not be expressly alleged.]—*MERCER v. SPARKS* (1596), Noy, 35; Owen, 51; 74 E. R. 1005; *sub nom. MERCER'S CASE*, Jenk. 268.

Annotations:—Expld. M'Pherson v. Daniels (1829), 10 B. & C. 263; *Nevill v. Fine Arts & General Insee.* (1895), 64 L. J. Q. B. 681. *Refd. Bromage v. Prosser* (1825), 4 B. & C. 247; *R. v. Munslow*, [1895] 1 Q. B. 758; *Allen v. Flood*, [1898] A. C. 1.

1856. ———.]—In an indictment a thing must be expressed to be done *falso et malitios*, because that is the usual form, but in a declaration those words are not necessary (*ROLLE, C.J.*).—*ANON.* (1652), Sty. 392; 82 E. R. 804, N. P.

Annotations:—Refd. Bromage v. Prosser (1825), 4 B. & C. 247; *R. v. Munslow*, [1895] 1 Q. B. 758; *Allen v. Flood*, [1898] A. C. 1.

1857. ———.]—In an action for words spoken of pl'tfs. in their trade as bankers, it was proved that A. met deft. & said, "I hear that you say that pl'tfs.' bank at M. has stopped. Is it true?" Dft. answered, "Yes, it is. I was told so. It was so reported at C., & nobody would take their bills, & I came to town in consequence of it myself." It was proved that D. told deft. that there was a run upon pl'tf.'s bank at M. Upon this evidence, the learned judge, after observing that deft. did not appear to have been actuated by any ill will against pl'tfs., directed the jury to find their verdict for deft. if they thought the words were not maliciously spoken:—*Held*: upon motion for a new trial; although malice was the gist of the action for slander, there were two sorts of malice, malice in fact & malice in law; the former denoting an act done from ill will towards an individual; the latter a wrongful act intentionally done, without just cause or excuse; & in ordinary actions for slander, malice in law was to be inferred from the publishing the slanderous matter, the act itself being wrongful & intentional, & without any just cause or excuse; but in actions for slander, *prima facie* excusable on account of the cause of publishing the slanderous matter, malice in fact must be proved; therefore, in this case, the judge ought first to have left it as a question for the jury, whether deft. understood A. as asking for information, & whether he had uttered the words merely by way of honest advice to A. to regulate his conduct, & if they were of that opinion, then, whether in so doing he was guilty of any malice in fact.

In an ordinary action for words it is sufficient to charge that deft. spoke them falsely, it is not

necessary to state that they were spoken maliciously (*BAYLEY, J.*).—*BROMAGE v. PROSSER* (1825), 4 B. & C. 247; 1 C. & P. 673; 6 Dow. & Ry. K. B. 296; 3 L. J. O. S. K. B. 203; 107 E. R. 1051.

Annotations:—Consd. Mitchell v. Jenkins (1833), 5 B. & Ad. 588; *R. v. Munslow*, [1895] 1 Q. B. 758. *Refd. Blackburn v. Blackburn* (1827), 1 Moo. & P. 33; *Coxhead v. Richards* (1846), 2 C. B. 569; *Wason v. Walter* (1868), L. R. 4 Q. B. 73; *Henwood v. Harrison* (1872), L. R. 7 C. P. 606; *Clark v. Molyneux* (1877) 3, Q. B. D. 237; *Capital & Counties Bank v. Henty* (1882), 7 App. Cas. 741; *Hicks v. Faulkner* (1882), 46 L. T. 127; *Nevill v. Fine Arts & General Insee.*, [1895] 2 Q. B. 156; *Allen v. Flood*, [1898] A. C. 1; *Quinn v. Leatham*, [1901] A. C. 495; *London Assocn. For Protection of Trade v. Greenlands*, [1916] 2 A. C. 15. *Mentd. Padmore v. Lawrence* (1840), 4 J. P. 42; *Henderson v. Broomhead* (1859), 7 W. R. 492; *Mogul S.S. Co. v. McGregor, Gow* (1889), 23 Q. B. D. 598.

1858. ———.]—*R. v. TWYN, R. v. DOVER, BREWSTER & BROOKE* (1663), 6 State Tr. 514, 539; Kel. 22, 23; 84 E. R. 1064.

Annotation:—Mentd. Martin v. British Museum Trustees & Thompson (1894), 10 T. L. R. 338.

1859. ———.]—*HOOPER v. TRUSCOTT*, No. 1870, *post*.

1860. ———.]—*DARBY v. OUSELEY*, No. 1979, *post*.

1861. ———.]—*CONCARIS v. DUNCAN & Co.*, [1909] W. N. 51.

SECT. 2.—EXPRESS MALICE.

SUB-SECT. 1.—IN GENERAL.

1862. Nature & definition.]—*DICKSON v. WILTON (EARL)*, No. 1881, *post*.

1863. ———.]—*HIBBS v. WILKINSON*, No. 1788, *ante*.

1864. ———.]—*TURNBULL v. BIRD*, No. 1755, *ante*.

1865. ———.]—*HEDLEY v. BARLOW*, No. 899, *ante*.

1866. ———.]—*LAUGHTON v. SODOR & MAN (BP.)*, No. 1451, *ante*.

1867. ———.]—*CLARK v. MOLYNEUX*, No. 1922, *post*.

1868. ———.]—On the trial of an action for libel against an incorporated co. in respect of a statement contained in a circular composed by the secretary of the co. & sent by him to certain of their customers, the judge having ruled that the occasion was privileged, the jury found that the statement complained of was in excess of the privilege, but did not find actual malice on the part of defts.' secretary:—*Held*: the occasion being privileged, in the absence of a finding of actual malice the defence of privilege was not rebutted, & there appearing on the facts of the case to be

PART VII. SECT. 1.

1858 i. Implied from defamatory words.]—Malice can be inferred from the language of the defamatory words themselves.—*CRATE v. MCCALLUM* (1905), 11 O. L. R. 81; 6 O. W. R. 825.—*CAN.*

1858 ii. ———.]—*MANITOBA FREE PRESS Co. v. NAGY* (1907), 27 C. L. T.

783; 39 S. C. R. 340.—*CAN.*

1858 iii. ———.]—*FISHER v. KINNEY* (1921), 54 N. S. R. 482.—*CAN.*

1858 iv. ———.]—*R. v. WALLACE* (1853), 3 I. C. L. R. 38; 5 Ir. Jur. 179.—*IR.*

1858 v. ———.]—*COUGHLAN v. JONES & JONES* (1915), 35 N. Z. L. R. 41.—*N.Z.*

1858 vi. ———.]—*MITCHELL v. SMITH*,

[1919] S. C. 664; 56 Sc. L. R. 578; [1919] 2 S. L. T. 115.—*SCOT.*

PART VII. SECT. 2, SUB-SECT. 1.

1862 i. Nature & definition.]—*ENGLISH v. LAMB* (1900), 20 C. L. T. 377; 32 O. R. 73.—*CAN.*

*o. Necessity for.]—**RICHARDS v. BOULTON* (1835), 4 O. S. 95.—*CAN.*

no evidence of actual malice in the publication of the statement complained of, the action was not maintainable. *Qu.*: whether malice on the part of their secretary would have made defts. liable.

"Express" malice . . . exception has been taken to the term; but I think that judges using it have always explained its meaning to the jury by telling them in substance that there must have been actual malice, which is a state of mind (LORD ESHER, M.R.).

Where the excess merely is that the statement made with reference to the privileged occasion is too strong, the authorities show that such excess may be evidence of actual malice; but it is not in every case in which the words used are somewhat too strong that there is evidence to be left to the jury of actual malice. They must be too strong to a substantial extent in order to afford evidence upon which a jury can find actual malice (LOPES, L.J.).—NEVILL v. FINE ART & GENERAL INSURANCE CO., [1895] 2 Q. B. 156; 64 L. J. Q. B. 681; 72 L. T. 525; 59 J. P. 371; 11 T. L. R. 332; 14 R. 587, C. A.; *affd.*, [1897] A. C. 68, H. L.

Annotations:—*Consd.* Adam v. Ward, [1917] A. C. 309. *Refd.* Mapey v. Baker (1909), 73 J. P. 289. *Mentd.* Empire Typesetting Machine Co. of New York v. Linotype Co. (1898), 79 L. T. 8; Stollery v. Maskelyne (1898), 15 T. L. R. 79; Cornford v. Carlton Bank, [1899] 1 Q. B. 392; Dauncey v. Holloway (1901), 84 L. T. 649; Floyd v. Gibson (1909), 100 L. T. 761; Banbury v. Bank of Montreal, [1918] A. C. 626; Ware & De Freville v. Motor Trade Assocn., [1921] 3 K. B. 40; Yorkshire Insee. v. Craine, [1922] 2 A. C. 541.

1869. Absence of—Occasion not privileged—No defence.—Communications made to a member of a dissenting congregation, respecting an individual about to be appointed a minister of that congregation, are privileged communications, & cannot be made the subject of an action by such individual. But if, in consequence of those communications, a printed circular be sent round, containing contradictions of them, & reflecting on the motives of the party who made them, & such party afterwards write a letter, & send it to the writer of the circular, in which, after repeating the communications, he adds other statements, which he acknowledges he cannot prove, such letter is not privileged, but will make him liable in damages, though it be specially found by a jury, that he was not actuated by express malice. In such an action a letter written to deft., containing a statement of the facts upon which he founded his charges, is receivable in evidence on his behalf, to show the *bona fides* with which he acted.—BLACKBURN v. BLACKBURN (1827), 4 Bing. 395; 3 C. & P. 146; 1 Moo. & P. 33; 6 L. J. O. S. C. P. 13; 130 E. R. 819.

Annotations:—*Refd.* Child v. Affleck (1829), 9 B. & C. 403; Hopwood v. Thorn (1819), 8 C. B. 293; Jackson v. Hopperton (1864), 16 C. B. N. S. 829.

PART VII. SECT. 2, SUB-SECT. 2.—A.

1872 i. Malice avoids privilege.—SHEPHERD v. WHITE (1876), 11 N. S. R. (2 R. & C.) 31.—CAN.

1872 ii. —.—WATERBURY v. DEWE (1879), 19 N. B. R. (3 P. & B.) 225.—CAN.

1872 iii. —.—WINNIPEG STEEL GRANARY & CULVERT CO. v. CANADA INGOT IRON CULVERT CO. (1912), 22 W. L. R. 387; 3 W. W. R. 356; 22 Man. L. R. 576; 7 D. L. R. 707.—CAN.

1872 iv. —.—PALMER SCHOOL & INFIRMARY OF CHIROPRACTIC v. EDMONTON (CITY), [1921] 2 W. W. R. 6.—CAN.

1872 v. —.—In cases of slander when defender raises his case of privilege pursuer may overcome the privilege by proving that while the occasion was one which gave defender

privilege, yet he used the injurious language from malice, & without probable cause, in the culpable design of injuring pursuer.—GRAHAM v. M'LACHLAN (1853), 1 W. R. 536.—SCOT.

1872 vi. —.—KEYTER v. LE ROUX (1840), 3 Men. 23.—S. AF.

1875 i. Necessity for evidence of malice.—Where defamatory words are spoken on a privileged occasion the presumption arising from the occasion that the speaker had a proper motive will continue until displaced by proof of the presence of an improper motive.—RONALD v. HARPER (1910), 11 C. L. R. 63.—AUS.

1875 ii. —.—McINTYRE v. McBEAN (1856), 13 U. C. R. 534.—CAN.

1875 iii. —.—ROSS v. BUCKE (1891), 21 O. R. 692.—CAN.

1875 iv. —.—QUILLINAN v. STUART

1870. —.—Deft. having some cause for suspicion, went to pltf.'s relations, & charged him with theft; it appearing, however, that his object in making the communication was rather to compromise the felony than to promote inquiry, or to enable the relations to redeem pltf.'s character:—*Held*: this was not a privileged communication; malice must be implied; & the existence of it was not a fact to be left for the consideration of a jury.

In an action of slander, the existence of express malice is only a matter for inquiry where the words complained of are spoken upon a justifiable occasion (TINDAL, C.J.).—HOOPER v. TRUSCOTT (1836), 2 Bing. N. C. 457; 2 Scott, 672; 5 L. J. C. P. 177; 132 E. R. 179.

SUB-SECT. 2.—AS AVOIDING QUALIFIED PRIVILEGE.

A. In General.

Qualified privilege.—See Part VI., Sect. 3, *ante*.

1871. Primâ facie presumption of absence of malice.—WRIGHT v. WOODGATE, No. 1635, *ante*.

1872. Malice avoids privilege.—Although the publication of a fair report of proceedings in a ct. of justice containing defamatory matter is privileged, yet if it be shown by evidence that the person who published such report did so with the object of injuring the character of another, the publication is not protected.

A newspaper has no greater privilege in such a matter than an ordinary person, any person is privileged in publishing such a report if he does so merely to inform the public (HANNEN, J.).—SALMON v. ISAAC (1869), 20 L. T. 885, N. P.

1873. —.—MILISSICH v. LLOYDS, No. 1717, *ante*.

1874. —.—A true report of the proceedings in a ct. of justice sent to a newspaper by a person, who is not a reporter on the staff of the newspaper, is not privileged absolutely; & if it be sent from a malicious motive an action will lie.—STEVENS v. SAMPSON (1879), 5 Ex. D. 53; 49 L. J. Q. B. 120; 41 L. T. 782; 44 J. P. 217; 28 W. R. 87, C. A.

Annotations:—*Consd.* Champion v. Birmingham Vinegar Brewery Co. (1893), 10 T. L. R. 164. *Refd.* Hennessy v. Wright (1888), 4 T. L. R. 662.

1875. Necessity for evidence of malice.—NEVILL v. FINE ART & GENERAL INSURANCE CO., No. 1868, *ante*.

Onus of proof of malice.—See Sub-sect. 2, B. (a), *post*.

1876. Malice of writer—Defeats privilege of innocent publisher.—The writer of a pamphlet employed a firm of printers to print it. This was

(1917), 38 O. L. R. 623; 35 D. L. R. 35.—CAN.

1875 v. —.—GORDON v. BRITISH & FOREIGN METALINE CO., ETC. (1886), 14 R. (Ct. of Sess.) 75; 24 Sc. L. R. 60.—SCOT.

1875 vi. —.—GORMAN v. MOSS'S EMPIRES, LTD., [1913] S. C. 1.—SCOT.

1875 vii. —.—COUPER v. BALFOUR OF BURLEIGH (LORD), [1913] S. C. 492.—SCOT.

1875 viii. —.—MILLS v. KELVIN & WHITE (JAMES), LTD., [1913] S. C. 521; 50 Sc. L. R. 331; [1913] 1 S. L. T. 153.—SCOT.

1875 ix. —.—SUZOR v. BUCKINGHAM, [1914] S. C. 299.—SCOT.

1875 x. —.—SUZOR v. M'LACHLAN, [1914] S. C. 306.—SCOT.

1875 xi. —.—A. B. v. X. Y., C. D. v. X. Y., [1917] S. C. 15.—SCOT.

Sect. 2.—Express malice: Sub-sect. 2, A. & B. (a) & (b).]

a natural & proper means of publishing it. He then circulated the pamphlet among persons having with him a common interest in its contents. It contained statements defamatory of pltf. The writer was actuated by malice. The printers acted in the ordinary course of their business & without malice:—*Held*: the privilege of the occasion extended to the printers, but the malice of the writer defeated the privilege both for the writer & for the printers, & they were joint tortfeasors & jointly liable to pltf.—*SMITH v. STREATFEILD*, [1913] 3 K. B. 764; 82 L. J. K. B. 1237; 109 L. T. 173; 29 T. L. R. 707.

Annotations:—*Refd.* London Asscn. for Protection of Trade v. Greenlands (1915), 85 L. J. K. B. 698; Pratt v. British Medical Asscn., [1919] 1 K. B. 244.

1877. Plea of express malice—Necessity for.]—In a libel action where the statement of claim alleges that the publication was malicious, & privilege is pleaded in the defence, it is not necessary for pltf. to deliver a reply alleging express malice.—*SMITH v. LEWIS* (1917), 33 T. L. R. 195, N. P.

B. Proof of Malice.

(a) Burden of Proof.

1878. Onus on plaintiff to prove malice—After occasion held privileged.]—*WARR v. JOLLY*, No. 1497, *ante*.

1879. ———.]—*WRIGHT v. WOODGATE*, No. 1635, *ante*.

1880. ———.]—*SOMERVILLE v. HAWKINS*, No. 1437, *ante*.

1881. ———.]—(1) Letters from the commanding officer of a regiment to his immediate superior, containing charges against the colonel in command; & a conversation with a Member of Parliament as to a question to be put in the House of Commons relative to the dismissal of the colonel on those charges:—*Held*: communications made on a privileged occasion.

(2) But circumstances showing that the letters were written not from a sense of duty, but from personal resentment on account of other matters, & that the object of the conversation was to prejudice pltf., by reason of such personal resentment:—*Held*: evidence of actual malice, taking away the privilege.

(3) Whether or not the occasion gives that privilege is a question of law for the judge; but whether the party has fairly and properly conducted himself in the exercise of it is a question for the jury (*LORD CAMPBELL, C.J.*).

1877 i. Plea of express malice—Necessity for.]—*BELL v. BLACK & MORRISON* (1866), 38 Sc. Jur. 211; 3 Macph. (Ct. of Sess.) 1026.—*SCOT*.

1877 ii. ———.]—*WALKER v. CUMMING* (1868), 6 Macph. (Ct. of Sess.) 318; 40 Sc. Jur. 175.—*SCOT*.

1877 iii. ———.]—*BRYANT v.*, [1909] S. C. 1080; 46 Sc. L. R. 1 S. L. T. 527.—*SCOT*.

PART VII. SECT. 2, SUB-SECT. 2.—B. (a).

1878 i. Onus on plaintiff to prove malice—After occasion held privileged.]—*WILLIAMS v. SPOWERS* (1882), 8 V. L. R. (L.) 82.—*AUS*.

1878 ii. ———.]—*WILLCOCKS v. HOWELL* (1884), 5 O. R. 360.—*CAN*.

1878 iii. ———.]—Where the occasion is privileged, pltf.'s case fails, unless there is evidence of malice in fact, & the burden of proving this is on

pltf.—*HANES v. BURNHAM* (1895), 26 O. R. 528; *affd.* (1896), 23 A. R. 90.—*CAN*.

1878 iv. ———.]—*CRATE v. MCCALLUM* (1905), 11 O. L. R. 81; 6 O. W. R. 825.—*CAN*.

1878 v. ———.]—In an action for slander where deft. has established that the occasion was privileged, he is presumed to have acted in good faith & the onus is on pltf. to show that he did not.—*MORTON v. DEAN*, [1921] 2 W. W. R. 807; 14 Sask. L. R. 328.—*CAN*.

1878 vi. ———.]—Where the occasion is privileged, the burden of proving actual malice lies on pltf.—*MATI LAL RAHA v. INDRA NATH BANERJEE* (1909), 1 L. R. 36 Calc. 907.—*IND*.

1878 vii. ———.]—*YEATES v. MCLEOD* (1908), 27 N. Z. L. R. 707.—*N.Z.*

(4) It lies on the party who would deprive the other party of his privilege to show what the law calls "malice." But by that term is meant, not only spite, for any indirect motive, other than a sense of duty, is what the law calls "malice" (*LORD CAMPBELL, C.J.*).—*DICKSON v. WILTON (EARL)* (1859), 1 F. & F. 419, N. P.

Annotations:—*As to* (1) *Refd.* Dawkins v. Rokeby (1873), L. R. 8 Q. B. 255. *As to* (2) *Refd.* Cooper v. Blackmore (1886), 2 T. L. R. 746. *As to* (3) *Refd.* Dawkins v. Paulet (1869), L. R. 5 Q. B. 94. *As to* (4) *Refd.* Pratt v. British Medical Asscn., [1919] 1 K. B. 244. *Generally, Mntd.* Beatson v. Skene (1860), 5 H. & N. 838; Hennessy v. Wright (1888), 21 Q. B. D. 509.

1882. ———.]—*HART v. GUMPACH*, No. 1444, *ante*.

1883. ———.]—*LAUGHTON v. SODOR & MAN (BP.)*, No. 1451, *ante*.

1884. ———.]—*CLARK v. MOLYNEUX*, No. 1922, *post*.

1885. ———.]—Where, in an action for slander, the occasion is privileged, pltf. must prove that the statements were made with some indirect motive, & if deft. made the statement believing it to be true, it will not be the less privileged, even though there were no reasonable grounds for his belief.—*HOWE v. JONES* (1885), 1 T. L. R. 461, D. C.

1886. ———.]—The occasion on which the letter was written was privileged, & it is therefore for pltf. to prove that the letter was written maliciously. It is not enough that the circumstances were consistent with malice. It is for pltf. to prove it & there must be some evidence of it (*MANISTY, J.*).—*HESKETH v. BRINDLE* (1888), 4 T. L. R. 199, D. C.

1887. ———.]—In cases of libel no distinction can be drawn between one class of privileged communications & another, but the same considerations apply to all. If the occasion is privileged, it is not for deft. to prove that he was acting from a sense of duty, but for pltf. to prove affirmatively that deft. was acting from some other motive than a sense of duty.—*JENOURE v. DELMEGE*, [1891] A. C. 73; 60 L. J. P. C. 11; 63 L. T. 814; 55 J. P. 500; 39 W. R. 388, P. C.

Annotations:—*Refd.* Baird v. Wallace-James (1916), 85 L. J. P. C. 193; Adam v. Ward, [1917] A. C. 309; Myroft v. Sleight (1921), 90 L. J. K. B. 883.

1888. ———.]—*WHITE v. BATEY & Co., LTD.* (1892), 8 T. L. R. 698.

1889. ———.]—*HEBDITCH v. MACILWAINE*, No. 1460, *ante*.

(b) Intrinsic Evidence.

1890. Malice may be inferred from language used.]—*TOOGOOD v. SPYRING*, No. 1489, *ante*.

1878 viii. ———.]—*SCOTT v. TURNBULL* (1884), 11 R. (Ct. of Sess.) 1131; 21 Sc. L. R. 749.—*SCOT*.

1878 ix. ———.]—*GORDON v. BRITISH & FOREIGN METALINE Co., ETC.* (1886), 14 R. (Ct. of Sess.) 75; 24 Sc. L. R. 60.—*SCOT*.

1878 x. ———.]—*WILKINSON v. TREVETT*, [1922] C. P. D. 393.—*S. AF*.

1878 xi. ———.]—*BOTHA v. BRINK* (1878), Buch. 118.—*S. AF*.

1878 xii. ———.]—*NORDEN v. OIPENHEIM* (1846), 3 Men. 42.—*S. AF*.

PART VII. SECT. 2, SUB-SECT. 2.—B. (b).

1890 i. Malice may be inferred from language used.]—*Held*: though the occasion was a privileged one, the words used, being foreign to the subject-matter in hand created an excess of the privilege, & the statements then made, as well as on the other occasions,

1891. —.]—WRIGHT *v.* WOODGATE, No. 1635, *ante.*

1892. —.]—FOUNTAIN *v.* BOODLE, No. 1511, *ante.*

1893. —.]—GILPIN *v.* FOWLER, No. 1614, *ante.*

1894. — **Angry expressions not necessarily malicious.**—SHIPLEY *v.* TODHUNTER, No. 896, *ante.*

1895. — —.]—HIBBS *v.* WILKINSON, No. 1788, *ante.*

1896. — **Words too strong.**—Where, in an action for libel, deft. insists that the publication is privileged, it is for the judge to rule whether the occasion creates privilege. If the occasion creates such privilege, but there is evidence of express malice, either from extrinsic circumstances or from the language of the libel itself, the question of express malice should be left to the jury.

Deft. was deputy clerk of the peace, & under Representation of the People Act, 1832 (c. 45), ss. 55, 56, Parliamentary Voters Registration Act, 1843 (c. 18), ss. 49, 54, submitted to the quarter sessions his account of the expenses of printing the register of county voters; & previously to this, he addressed a letter to a finance committee of magistrates, explaining why he had taken away the contract for printing from plffs., who were printers whom he formerly employed for the purpose, stating therein that he thought it his duty to report the circumstances, "particularly as the character & conduct of the persons who are chiefly employed by the county as printers & stationers are involved." The letter than stated circumstances to show that, as appeared from a comparison with terms offered by other printers, plffs. had demanded too high terms upon grounds not supported by fact; & it concluded: "under the circumstances I have stated, it will be seen that I had no alternative but to adopt the course I have taken, rather than submit to what appears to have been an attempt to extort a considerable sum from the county by misrepresentation"—*Held*: (1) the occasion was privileged, but there was evidence, from the language of the letter, that there was express malice; (2) it was a question for the jury, whether there was such malice; & the judge could neither nonsuit nor direct a verdict for pltf.—COOKE *v.* WILDES (1855), 5 E. & B. 328; 3 C. L. R. 1090; 24 L. J. Q. B. 367; 25 L. T. O. S. 156; 1 Jur. N. S. 610; 3 W. R. 458; 119 E. R. 504.

Annotations:—As to (1) *Apld.* Cowles *v.* Potts (1865), 6 New Rep. 289. *Refd.* Amann *v.* Damm (1860), 7 Jur. N. S. 47; Roff *v.* British & French Chemical Manufacturing Co. & Gibson, [1918] 2 K. B. 677. As to (2) *Consd.* Lawless *v.* Anglo-Egyptian Cotton Co. (1869), L. R. 4 Q. B. 262. *Refd.* Cowles *v.* Potts (1865), 6 New Rep. 289. *Generally, Refd.* Nevill *v.* Fine Art & General Insee. (1895), 72 L. T. 525.

1897. — —.]—Words having been spoken at a meeting for the election of an overseer,

imputing to a person put up for re-election that he had misappropriated parish moneys while holding the office before:—*Held*: the occasion was privileged, but whether the words were so would depend, not merely on whether they were wilfully false, but whether on the face of them they were so far beyond the occasion that the jury might fairly infer the occasion was merely made use of for the purpose of personal malice.—GEORGE *v.* GODDARD (1861), 2 F. & F. 689.

1898. — —.]—In order to justify the publication of slanderous words *prima facie* actionable, on the ground that the occasion is a privileged one, the words used must be strictly relevant to the occasion. Though in such a publication the use of language intemperate & unnecessarily strong is rightly left to the jury as evidence of malice, yet such language, if spoken honestly, without malice, & strictly with reference to the occasion, does not take away the privilege.

C., pltf.'s employer, asked deft. to sign a protest against a proposal to dismiss pltf. from a trusteeship. Deft. refused, & upon being pressed to give his reasons, said he would never sign "to keep a big rogue like pltf. in the trust," that pltf. had left the parish, as other rogues did, without paying his creditors, & that he had robbed him, deft., of forty shillings, & added, "I am surprised you should keep him in your service to contaminate your son, he is such a rogue." In consequence of this conversation C. dismissed pltf. In an act on for these words, the jury having found that the words were spoken without malice:—*Held*: (1) the communication was privileged, since there was a duty towards those who were concerned in the trusteeship, & an interest of deft.'s own, making it a reasonable occasion warranting deft.'s statement of that which he believed, so far as it was pertinent to the fitness of pltf. for the trusteeship; (2) the intemperance of deft.'s language, & the unnecessary force of his expressions, were rightly left to the jury as evidence of malice, but, the jury having negatived malice, did not take away the privilege.—COWLES *v.* POTTS (1865), 6 New Rep. 289; 34 L. J. Q. B. 247; 30 J. P. 804; 11 Jur. N. S. 949; 13 W. R. 858.

1899. — —.]—To substantial extent.—NEVILL *v.* FINE ART & GENERAL INSURANCE CO., No. 1868, *ante.*

1900. — **Words irrelevant to occasion.**—SENIOR *v.* MEDLAND, No. 1551, *ante.*

1901. — —.]—FRYER *v.* KINNERSLEY, No. 1537, *ante.*

1902. — —.]—ADAM *v.* WARD, No. 1608, *ante.*

1903. **Words not to be strictly scrutinised.**—TODD *v.* HAWKINS, No. 1575, *ante.*

1904. —.]—LAUGHTON *v.* SODOR & MAN (BP.), No. 1451, *ante.*

1905. —.]—R. *v.* PERRY, No. 1531, *ante.*

1906. —.]—ADAM *v.* WARD, No. 1608, *ante.*

were evidence of malice which could not be withdrawn from the jury.—CRATE *v.* MCCALLUM (1905), 11 O. L. R. 81; 6 O. W. R. 825.—CAN.

1890 ii. —.]—MATI LAL RAHA *v.* INDRA NATH BANERJEE (1909), I. L. R. 36 Calc. 907.—IND.

1890 iii. —.]—FORBES *v.* KIRK (1842), 4 Dunl. (Ct. of Sess.) 1177.—SCOT.

1890 iv. —.]—DINNIE *v.* HENGLER, [1910] S. C. 4; 47 Sc. L. R. 1; [1910] 2 S. L. T. 237.—SCOT.

1896 i. — **Words too strong.**—MORAN *v.* LYONS (1878), 4 V. L. R. (L.)

379.—AUS.

1896 ii. — —.]—If language, which would otherwise be privileged, be unnecessarily violent & excessive, & used in a manner not suited to the occasion, it loses its protection as a privileged communication.—BOLSER *v.* CROSSMAN (1886), 25 N. B. R. 556.—CAN.

1903 i. **Words not to be strictly scrutinised.**—The proper test in inquiring whether the nature of the words by themselves afford evidence of malice, is to take the facts as they appeared to deft.'s mind at the time

of publication & to ask whether the words used are such as deft. might have honestly & *bona fide*, in the circumstances, employed; & the particular expressions used ought not to be too closely scrutinised, provided the intention of deft. was good & he acted *bona fide*.—AMRITA NATH MITTER *v.* ABHOY CHARAN GHOSE (1904), I. L. R. 32 Calc. 318; 8 C. W. N. 731.—IND.

i. **Malice not inferred from subsequent omission to apologise.**—BISHWANATH DAS *v.* KESHAB GANDHABANIK (1902), I. L. R. 30 Calc. 402; 7 C. W. N. 74.—IND.

2.—*Express malice: Sub-sect. 2, B. (c) i., ii. & iii.*

(c) *Extrinsic Evidence.*

i. *Untruth of Statement.*

1907. Whether *prima facie* evidence of malice.]—

Though it may be the duty of all persons to give information to His Majesty's proper officers concerning abuses, yet if one write of another in a letter to such officer, that he is doing something to the prejudice of His Majesty's service which is not true, this is sufficient evidence of a malicious intention; & where no excuse is set up by deft., the jury may well find him guilty, though there be no other publication & no further proof of malice.—*ROBINSON v. MAY* (1804), 2 Smith, K. B. 3.

Annotation:—Refd. Munster v. Lamb (1883), 11 Q. B. D. 588.

1908. — Statement false in part.]— Where deft., in a letter addressed to the Secretary of State, stated, that pltf., who was town clerk & clerk to the justices of the borough of A., was in close intimacy with one R. & one D., who had been brought before the justices of that borough on a charge of embezzling the moneys of T. their master, & that when the papers of the two prisoners were produced various accommodation transactions with pltf. were discovered, "thus clearing up the mystery as to the uses to which the plunder had been appropriated," & called on the Secretary of State to institute inquiry, etc. (innuendo, that pltf. had conspired with & was an accomplice of R. & D., in embezzling the moneys of T., & had made use of the proceeds of the embezzlement; & also that pltf., as such clerk & legal adviser as aforesaid, had acted corruptly & dishonestly in his office, etc.:—*Held*: (1) the communication could not be considered privileged or confidential by reason of its being an application addressed to the Secretary of State; (2) the falsehood of part of the statement was sufficient to support the presumption of malice, supposing the occasion of the publication to be evidence to rebut such presumption; (3) the judge properly left it to the jury to say, whether the libel bore the meaning alleged in the innuendo; as the words were such as were capable of conveying that meaning.—*BLAGG v. STURT* (1846), 10 Q. B. 899; 16 L. J. Q. B. 39; 8 L. T. O. S. 135; 11 Jur. 101; 10 J. P. Jo. 756; 110 E. R. 340; *affd. sub nom. STURT v. BLAGG* (1847), 10 Q. B. 906, Ex. Ch.

Annotations:—As to (1) Consd. Harrison v. Bush (1855), 5 E. & B. 344. *Refd. Procter v. Webster* (1885), 53 L. T. 765. *As to (2) Consd. Harris v. Thompson* (1853), 13 C. B. 333. *Refd. Harrison v. Bush* (1855), 5 E. & B. 344. *As to (3) Apld. Hunt v. Goodlake* (1873), 43 L. J. C. P. 54. *Consd. Capital & Counties Bank v. Henty* (1882), 7 App. Cas. 741. *Refd. Little v. Clements* (1851), 17 L. T. O. S. 8; *Nevill v. Fine Arts & General Insco.*, [1895] 2 Q. B. 156.

PART VII. SECT. 2, SUB-SECT. 2.— B. (c) i.

1907 i. Whether *prima facie* evidence of malice.]—At the trial of a libel action where the truth of the libel was not in issue, evidence showing that the statements complained of were false to the knowledge of deft. was properly admitted for the purpose of showing malice in deft., & rebutting the defence of privilege.—*SCHAEFER v. SCHWAB* (1909), 19 Man. L. R. 212.—CAN.

1907 ii. —.]—*MILLER v. GREEN* (1902), 35 N. S. R. 117; *affd. sub nom. GREEN v. MILLER* (1903), 33 S. C. R. 193.—CAN.

1907 iii. —.]—Where L. on a privileged occasion makes slanderous statements concerning S., & persists in them at the trial, & the evidence given on behalf of S., if believed, renders it impossible for those statements to be

true, this in itself constitutes sufficient ground for a finding of malice by the jury, though no other evidence of malice be given.—*SEVENOAKS v. LATIMER* (1919), 54 I. L. T. 11.—IR.

1907 iv. —.]—*MARTIN & STARK v. CRUICKSHANKS* (1896), 23 R. (Ct. of Sess.) 874; 33 Sc. L. R. 683; 4 S. L. T. 62.—SCOT.

PART VII. SECT. 2, SUB-SECT. 2.— B. (c) ii.

1911 i. Honest belief in truth of facts stated—Facts untrue.]—*GRIFFEN v. DIVERS*, [1922] S. C. 605.—SCOT.

g. — Statement in part untrue.]—*BAYNE v. MACGREGOR* (1863), 1 Macph. (Ct. of Sess.) 615; 35 Sc. Jur. 368.—SCOT.

h. — Motive partly malicious.]—*NICHOLSON v. MEEK* (1891), 10 N. Z. L. R. 552.—N.Z.

1909. —.]—*CAULFIELD v. WHITWORTH*, No. 1450, *ante*.

1910. —.]—*PALMER v. HUMMERSTON*, No. 1652, *ante*.

Effect of belief of defendant.]—See Sub-sect. 2, B. (c) ii., *post*.

ii. *Belief of Defendant.*

1911. Honest belief in truth of facts stated—Facts untrue.]—*TODD v. HAWKINS*, No. 1575, *ante*.

1912. —.]—*TREMAINE v. PARKER*, No. 1534, *ante*.

1913. —.]—At a meeting of a school board the chairman drew the attention of the meeting to the fact that a member moving a certain amendment adverse to the headmaster had, as defender in an action of damages for slander at the instance of the headmaster, been found liable in the sum of £400, & moved that this fact should be recorded in the minutes as showing that the member, in moving the amendment, was a prejudiced party. In an action of damages for slander against the chairman at the instance of this member the pursuer innuendoed the statement & motion of defender as representing that pursuer was actuated, not by a sense of public duty, but by private animosity, & was thereby guilty of dishonourable conduct. It was admitted that the occasion was privileged:—*Held*: there was no evidence, in the statement itself or in the circumstances in which it was made, to infer malice.

Qu.: whether, in any event, the statement was capable of bearing the innuendo placed upon it.—*LYAL v. HENDERSON*, [1916] S. C. (H. L.) 167; 53 Sc. L. R. 557.

1914. — No reasonable ground for belief.]—*CLARK v. MOLYNEUX*, No. 1922, *post*.

1915. —.]—*HOWE v. JONES*, No. 1885, *ante*.

1916. —.]—*WHITE v. BATEY & Co., LTD.* (1892), 8 T. L. R. 698.

1917. —.]—*COLLINS v. COOPER* (1902), 19 T. L. R. 118, C. A.

1918. Statement made with knowledge of untruth.]—*TREMAINE v. PARKER*, No. 1534, *ante*.

1919. —.]—At the trial of an action for slander, pltf.'s witnesses proved that the slanderous statements were untrue in fact, but also that they were the natural & reasonable inference from what took place & they professed to describe; & that deft. was present at the occurrence which the slanderous statements referred to. The judge ruled that the occasion was privileged; but that pltf. must have a verdict unless deft. proved that the statements were made without malice:—*Held*: a right direction; the presence of deft. being some evidence that the statements were

1913 i. —.]—*CRATE v. MCCALLUM* (1905), 11 O. L. R. 81; 6 O. W. R. 825.—CAN.

1918 i. Statement made with knowledge of untruth.]—*HANES v. BURNHAM* (1896), 23 A. R. 90.—CAN.

1918 ii. —.]—*GREEN v. MILLER* (1903), 33 S. C. R. 193.—CAN.

1918 iii. —.]—*WOODS v. PLUMMER* (1908), 15 O. L. R. 552; 11 O. W. R. 377.—CAN.

1918 iv. —.]—At the trial of a libel action where the truth of the libel was not in issue, evidence showing that the statements complained of were false to the knowledge of deft. was properly admitted for the purpose of showing malice in deft. & rebutting the defence of privilege.—*SCHAEFER v. SCHWAB* (1909), 19 Man. L. R. 212.—CAN.

1918 v. —.]—*CARNE v. ROBINSON*, [1915] T. P. D. 139.—S. AF.

made with a knowledge that they were untrue.—*HARTWELL v. VESEY* (1860), 3 L. T. 275.

1920. Statement made recklessly.]—(1) When it appears that deft. might have ascertained the truth or falsehood of the allegations which he publishes, & does not do so, the ct. will hold that there is some evidence of his knowing the libel to be false.

(2) *Qu.*: whether a deft. can be convicted of publishing a defamatory libel under Libel Act, 1843 (c. 96), upon an indictment charging the common law offence of publishing a false defamatory libel, knowing it to be false.—*R. v. GRAY* (1862), 26 J. P. 663.

1921. — Publication by editor of newspaper.]—*HARLE v. CATHERALL*, No. 1766, *ante*.

1922. —.]—(1) In an action for libel where the occasion is privileged, it is for pltf. to establish that the statements complained of were made from an indirect motive, such as anger, or with a knowledge that they were untrue, or without caring whether they were true or false, & not for the reason which would otherwise render them privileged; & if deft. made the statements believing them to be true, he will not lose the protection arising from the privileged occasion, although he had no reasonable grounds for his belief.

(2) A defamatory communication made by a clergyman to his curate, for the purpose of obtaining his advice as to the course to be pursued by him in an ecclesiastical matter is privileged.

(3) If a man is proved to have stated that which he knew to be false no one need inquire further. Everybody assumes thenceforth that he was malicious, that he did a wrong thing for a wrong motive. If it be proved that out of anger, or for some other wrong motive, deft. has stated as true that which he does not know to be true, & he has stated it whether it is true or not, recklessly, by reason of his anger or other motive, the jury may infer that he used the occasion, not for the reason which justifies it, but for the gratification of his anger or other indirect motive (*BRETT, L.J.*).—*CLARK v. MOLYNEUX* (1877), 3 Q. B. D. 237; 47 L. J. Q. B. 230; 37 L. T. 694; 42 J. P. 277; 26 W. R. 104; 14 Cox C. C. 10, C. A.

Annotations:—As to (1) Consd. *Murdock v. Fundukliar* (1885), 2 T. L. R. 215; *Stuart v. Bell*, [1891] 2 Q. B. 341. *Apld.* *Jenoure v. Delmege*, [1891] A. C. 73. *Refd.* *Howe v. Jones* (1885), 1 T. L. R. 461; *Baker v. Carrick* (1894), 9 R. 283; *London Assoc. for Protection of Trade v. Greenlands*, [1916] 2 A. C. 15; *Adam v. Ward*, [1917] A. C. 309. *As to (2) Refd.* *Botterill v. Whytehead* (1879), 41 L. T. 588. *As to (3) Consd.* *Botterill v. Whytehead* (1879), 41 L. T. 588; *Stuart v. Bell*, [1891] 2 Q. B. 341. *Refd.* *Royal Aquarium & Summer & Winter Garden Soc. v. Parkinson*, [1892] 1 Q. B. 431; *Pratt v. British Medical Assoc.*, [1919] 1 K. B. 244; *British Ry. Traffic & Electric Co. v. C. R. C. Co. & L. C. C.*, [1922] 2 K. B. 260. *Generally, Mentd.* *Jones v. Canadian Pacific Ry.* (1913), 83 L. J. P. C. 13; *Skeate v. Slaters*, [1914] 2 K. B. 429.

1923. —.]—*WISDOM v. BROWN* (1885), 1 T. L. R. 412.

1924. —.]—*ROYAL AQUARIUM & SUMMER & WINTER GARDEN SOCIETY v. PARKINSON*, No. 1592, *ante*.

iii. Other Statements by Defendant.

1925. General rule.]—In an action for libel to prove that the libels declared on were written by deft., certain documents admitted to be in her handwriting were used as standards of comparison; & pltf. called several witnesses; & to support & strengthen such evidence he produced seven anonymous letters, generally relating to the same matters as the libels declared on. This evidence was admitted to prove malice; & they

were also used as a comparison of the handwriting in dispute, & no objection was made by deft.'s counsel:—*Held*: (1) these seven anonymous letters were admissible; (2) they were relevant to the issue to show malice; but (3) if a proper objection had been made at the time of the trial, they could not have been received as evidence of handwriting.

It is an undisputed rule of law that words spoken or written before or after are evidence, when they reflect on pltf. & show malice (*HILL, J.*).—*HUGHES v. DINORBEN (LADY)* (1859), 32 L. T. O. S. 271.

1926. Publication in newspaper—Subsequent publication in another paper.]—(1) If a party who has summoned another before a magistrate draws up a report of what took place on the investigation, it is his duty to give an impartial statement, without any colouring or exaggeration, putting in all that is in favour of the party accused, as well as that which is against him: & in such an account he has no right to insert an observation to the prejudice of the party made by the magistrate's clerk; & if he do insert such observation, he is liable, on that ground alone, to an action for libel, as in such a case it is what the judge says that is to be looked at, & not what any other person said who was present at the time.

(2) In an action for libel the rule of law is not that if pltf. relies only on general injury to his business, he may show by witnesses the general diminution of that business, because the law assumes the existence of a general injury; & if pltf. seeks specific damages, he must give specific evidence.

(3) In such an action, after pltf. has proved the publication of the libel in one newspaper, evidence may be given, for the purpose of showing malice, that deft. went to the editor of another newspaper, & procured the insertion of the libel in that paper, stating that he had got it inserted in one already; & the circumstances of there being a count in the declaration charging the second insertion as a distinct publication will not make any difference as to the admissibility of the evidence.—*DELEGALL v. HIGHLEY* (1837), 8 C. & P. 444, N. P.

Annotation:—As to (3) Refd. *Pearson v. Le Maitre* (1843), 7 J. P. 336.

1927. Admissions by defendant—Subsequent to speaking words—Of dispute with plaintiff as to money.]—(1) In an action for words which are *prima facie* privileged, evidence tending to make out an admission by deft., subsequently to the speaking of the words of a dispute existing between him & pltf., before the speaking of the words, about a sum of money claimed to be due from deft. to pltf., is admissible to show express malice; & the evidence of the examination of pltf. himself before a comr. in insolvency on occasion of an application by deft. to the ct. to have the debt so claimed by pltf. & inserted in his schedule struck out therefrom, & on which occasion deft. declined to be examined, though called upon, is proper to be left to the jury as evidence of such admission of a previous dispute.

(2) Where a justification of the truth of the words had been pleaded, & pltf. during the trial, offered to accept an apology & a verdict for nominal damages, if deft. would withdraw the plea of justification, which deft. refused to do, though he did not attempt to prove it:—*Held*: this conduct on the part of deft. was also proper to be left to the jury, with reference to the question of malice as well as that of damages.—*SIMPSON v. ROBINSON* (1848), 12 Q. B. 511; 3 New Pract. Cas. 182; 18

Sect. 2.—Express malice: Sub-sect. 2, B. (c) iii., iv., v. & vi., & C.; sub-sect. 3.]

L. J. Q. B. 73; 11 L. T. O. S. 266; 13 Jur. 187; 116 E. R. 959.

Annotations:—As to (1) *Refd.* Hemmings v. Gasson (1858), E. B. & E. 346. As to (2) *Distd.* Mangena v. Lloyd (1908), 98 L. T. 640. *Refd.* Caulfield v. Whitworth (1868), 18 L. T. 527.

1928. Previous publications.]—BARRETT v. LONG, No. 961, *ante*.

1929. Publication after issue joined.]—HEMMINGS v. GASSON, No. 914, *ante*.

Proof of animus in aggravation of damages.]—See Sub-sect. 4, B., *post*.

iv. Manner of Publication.

Publication generally, see Part V., *ante*.

1930. Publication in presence of third party.]—TOOGOOD v. SPYRING, No. 1489, *ante*.

1931. —.]—In an action of slander, if the facts proved are such that the communication is, by the rules of law, privileged, the judge ought not to leave any question to the jury as to malice, unless pltf. gives further evidence showing a probability that the communication was made maliciously rather than that it was made *bona fide*. If a master about to dismiss his servant for dishonesty calls in a friend to hear what passes, the presence of such third person does not take away privilege from words which the master then uses, imputing the dishonesty. A master, having so dismissed his servant, refused to give him a character, alleging, to those who asked the character, that he had discharged him for dishonesty. The servant's brother afterwards inquired of the master why he had treated the servant so, & was keeping him out of a situation. The master said, "He has robbed me; & I believe for years past"; adding that he concluded so from the circumstances under which he had discharged the servant. Only one instance of actual robbing had been imputed:—*Held*: (1) the answer did not go beyond the privilege afforded by the inquiry; (2) on trial of an action for speaking words, as above stated, in presence of a third person & in answer to inquiries by the brother, no further proof being offered by pltf. to show malice, the judge ought not to have left the question of malice to the jury.

(3) Communications made for the fair & reasonable purpose of protecting the interest of the party uttering them are held to be privileged (ERLE, J.).—*TAYLOR v. HAWKINS* (1851), 16 Q. B. 308; 20 L. J. Q. B. 313; 16 L. T. O. S. 409; 15 Jur. 746; 117 E. R. 897.

Annotations:—As to (1) *Refd.* Revis v. Smith (1856), 20 J. P. 453; Henwood v. Harrison (1872), L. R. 7 C. P.

PART VII. SECT. 2, SUB-SECT. 2.— B. (c) iii.

1928 i. Previous publications.]—The fact that on previous occasions defts. used slanderous language of pltf. is admissible & relevant evidence on the question of malice.—*NORTON v. CROOKS*, [1914] E. D. L. 532.—S. AF.

k. — Of similar slander.]—In an action for slander actionable *per se*, evidence of a slander also actionable *per se* other than the slander set forth in the statement of claim, is properly admitted for the purpose of proving malice.—*KING v. LONDERVILLE* (1915), 31 W. L. R. 821; 25 D. L. R. 352; 8 Sask. L. R. 276.—CAN.

l. Subsequent publications.]—In an action for libel the ct. permitted articles, published subsequent to the libel to be read to the jury as evidence of the malicious character of the

defamatory words.—*TOBIN v. SHEA* (1859), 4 Nfld. L. R. 257.—NFLD.

m. —.]—HART v. ROBINSON (1897), 12 E. D. C. 24.—S. AF.

PART VII. SECT. 2, SUB-SECT. 2.— B. (c) iv.

n. Advertisement in newspaper.]—HOLLIDAY v. ONTARIO FARMERS' MUTUAL INSURANCE CO. (1873), 1 A. R. 483.—CAN.

o. Placards in private office & insertion in company's circular books.]—TENCH v. GREAT WESTERN RY. CO. (1873), 33 U. C. R. 8.—CAN.

p. Spreading reports to parties not concerned.]—Brutling about reports to parties who have no concern in the transaction cannot be held to be privileged.—*HEARN v. HAWKER* (1888), 7 Nfld. L. R. 309.—NFLD.

q. Misleading headlines in news-

paper.]—Incorrect headlines attached to a newspaper report of the proceedings of a public body upon a matter of public interest may furnish proof of the existence of *animus injuriandi*.—*SMITH & CO. v. SOUTH AFRICAN NEWSPAPER CO.* (1906), 23 S. C. 310; 16 C. T. R. 440.—S. AF.

PART VII. SECT. 2, SUB-SECT. 2.— B. (c) v.

1933 i. Whether evidence of malice.]—Pleading justification in an action of slander, where no attempt is made to prove the plea, is not in itself evidence of malice entitling pltf. to have the case submitted to the jury, the words in question having been spoken on a privileged occasion.—*CORRIDAN v. WILKINSON* (1893), 20 A. R. 184.—CAN.

1934 i. — Plea abandoned at trial.]—FAUCITT v. BOOTH (1871), 31 U. C. R. 263.—CAN.

v. Plea of Justification.

1933. Whether evidence of malice.]—CAULFIELD v. WHITWORTH, No. 1450, *ante*.

1934. — Plea abandoned at trial.]—WILSON v. ROBINSON, No. 1473, *ante*.

1935. — Refusal to abandon plea—After offer to accept apology & nominal damages.]—SIMPSON v. ROBINSON, No. 1927, *ante*.

As aggravation of damages.]—See Sub-sect. 4, C., *post*.

vi. Characters of Servants.

1936. General rule.]—In all cases where you will maintain an action for words, there ought to be some particular words of slander spoken or written by which the particular loss came. Here is a letter, it had not any slander in it; & it cannot be conceived that the lord turned him away out of his service or office by that letter, which does not touch him in his office of stewardship nor his receivership (RICHARDSON, C.J.).—*NURSE v. POUNFORD* (1629), Het. 161; 124 E. R. 421.

1937. Volunteered statement to former master—To prevent giving character.]—Although a master be not in general bound to prove the truth of a character given by him to a person applying for the character of his servant, yet if he officiously state any trivial misconduct of the servant to a former master in order to prevent him giving a second character, & then himself upon application for a character give the servant a bad character, the truth of which he is not able to prove, the jury may from these circumstances infer malice against the master in an action against him by the servant.—*ROGERS v. CLIFTON* (1803), 3 Bos. & P. 587; 127 E. R. 317.

Annotations:—*Consd.* Fairman v. Ives (1822), 1 Dow. & Ry. K. B. 252. *Refd.* Bromage v. Prosser (1825), 3 L. J. O. S. K. B. 203; Child v. Affleck (1829), 9 B. & C. 403; Fountain v. Boodle (1842), 3 Q. B. 5; Coxhead v. Richards (1846), 2 C. B. 569; Jackson v. Hopperton (1864), 16 C. B. N. S. 829.

1938. Volunteered statement to future employer.]—PATTISON v. JONES, No. 1507, *ante*.

1939. Charge of theft—Refusal to give confirmatory detail.]—A master in giving the character of his late servant to a person intending to take her, charged her with theft; & in support of that charge, stated, that she had borrowed money when she came into his service & repaid it before she received any wages. In reply to an inquiry made afterwards by a relation of the servant, he admitted that the time when he paid the wages was entered in a book, which he produced, but refused to state what the time was, & on the same party remonstrating, & observing that the servant, in consequence of her loss of character, might have gone upon the town, he answered, "What is that to us?"—*Held*: this conduct was evidence to go to the jury, though slight, that the communication to the intended master was made maliciously.—*KELLY v. PARTINGTON* (1833), 4 B. & Ad. 700; 2 Nev. & M. K. B. 460; 110 E. R. 619; *subsequent proceedings* (1834), 5 B. & Ad. 645.

1940. — Offer to give character if theft admitted.]—*JACKSON v. HOPPERTON*, No. 1942, *post*.

C. Functions of Judge and Jury.

1941. Malice or no malice—Question for jury—If any evidence of malice.]—*COOKE v. WILDES*, No. 1896, *ante*.

1942. — — — — —.]—In an action for slander in giving a character of a servant, although the occasion *prima facie* justifies the communication of matter which would otherwise be actionable, yet if, at the close of pltf.'s case, there is any evidence which would warrant the jury in inferring actual or express malice, the judge cannot withdraw the case from them. Where deft., in answer to an inquiry as to her character, charged pltf. with acts of dishonesty, having previously told her that, if she would acknowledge having committed them, he would give her a character:—*Held*: it was properly left to the jury to say whether deft. *bona fide* believed the charge to be true, or was influenced by sinister or corrupt motives.—*JACKSON v. HOPPERTON* (1864), 16 C. B. N. S. 829; 4 New Rep. 242; 10 L. T. 529; 12 W. R. 913; 143 E. R. 1352.

Annotation:—*Reid*. *Caulfield v. Whitworth* (1868), 18 L. T. 527.

1943. — — — — —.]—Pltf. asked deft., his employer, for a testimonial, which deft. wrote out, certifying to his trustworthiness. Pltf. wished the word "honest" to be inserted in it, but deft. declined to do this. Deft., in the presence of pltf., then asked his cashier if there were any difference between the two terms, who said there was none, & deft. thereupon again refused to alter the language of the testimonial. Pltf. then asked deft. if he had not some suspicions as to the honesty of his conduct in a certain transaction, & he said he had. Pltf. having recovered damages in an action of slander, the Div. Ct. set aside the verdict on the ground that the evidence was equally consistent with thorough *bona fides* on deft.'s part as with his having acted maliciously:—*Held*: as there was evidence of malice for the jury, the

verdict given at the trial must stand.—*MURDOCH v. FUNDUKLIAN* (1886), 2 T. L. R. 614, C. A.

1944. Duty of judge to withdraw case from jury—If evidence consistent with bona fides.]—*SOMERVILLE v. HAWKINS*, No. 1437, *ante*.

1945. — — — — —.]—*HARRIS v. THOMPSON*, No. 1598, *ante*.

1946. — — — — —.]—Where a letter containing defamatory words is written upon a privileged occasion, surrounding circumstances are to be considered by the judge at the trial in determining whether the words used are so much too violent for the occasion as to rebut the presumption of the absence of malice arising from the privilege of the occasion; & if from surrounding circumstances it appears that the words are capable of two constructions, one of which is compatible with the absence of malice, then the presumption of the absence of malice which existed in the first instance from the privilege of the occasion should be allowed to prevail throughout.—*SPILL v. MAULE* (1869), L. R. 4, Exch. 232; 38 L. J. Ex. 138; 20 L. T. 675; 17 W. R. 805, Ex. Ch.

Annotations:—*Apprvd.* *Laughton v. Sodor & Man* (Bp.) (1872), L. R. 4 P. C. 495. *Folld.* *Baker v. Carrick* (1894), 70 L. T. 366. *Apprvd.* *Adam v. Ward*, [1917] A. C. 309. *Refd.* *Steward v. Young* (1870), 18 W. R. 492; *Brett v. Watson* (1872), 20 W. R. 723; *Henwood v. Harrison* (1872), L. R. 7 C. P. 606; *Clark v. Molyneux* (1877), 3 Q. B. D. 237; *Gerhold v. Baker* (1918), 35 T. L. R. 102.

1947. — If no evidence of malice.]—*LAWLESS v. ANGLO-EGYPTIAN COTTON CO.*, No. 1481, *ante*.

1948. — — — — —.]—*NEVILL v. FINE ART & GENERAL INSURANCE CO.*, No. 1868, *ante*.

SUB-SECT. 3.—AS AFFECTING FAIR COMMENT.

1949. Whether malice must be proved—Comment unfair.]—*CAMPBELL v. SPOTTISWOODE*, No. 1802, *ante*.

1950. — — — — —.]—*MERIVALE v. CARSON*, No. 1837, *ante*.

1951. — — — — —.]—*HENNESSY v. WRIGHT*, No. 1804, *ante*.

1952. — Comment fair.]—*HENWOOD v. HARRISON*, No. 1735, *ante*.

1953. — — — — —.]—In an action of libel against the publishers of a trade periodical, in respect of an article contained in an issue of their periodical, defts. pleaded by way of defence that, in so far as the words complained of consisted of expressions of opinion, they were fair comment, made in good faith, & without malice, on a matter of public interest, & in so far as they consisted of allegations of fact, they were true in substance & in fact. Pltfs. administered to defts., among others, interrogatories which were substantially as follows: (5) What information had you, when you published the said words, which induced you to believe that the expressions of opinion in the said words contained, & which you allege to be fair comment, made in good faith, & without malice, were true? Did you in fact believe that

PART VII. SECT. 2, SUB-SECT. 2.—C.

1941 i. Malice or no malice—Question for jury—If any evidence of malice.]—In an action for defamatory words, if the question of privilege is raised, the jury should say whether privilege has been exceeded.—*CREEK v. NEWLANDS* (1878), 4 V. L. R. (L.) 412.—*AUS.*

1941 ii. — — — — —.]—*HORNE v. MILNE* (1881), 7 V. L. R. (L.) 296.—*AUS.*

1941 iii. — — — — —.]—*WILLIAMS v. SPOWERS* (1882), 8 V. L. R. (L.) 82.—*AUS.*

1941 iv. — — — — —.]—It is for the jury to say whether in the circumstances the language employed is within the privilege, or is in excess of what the occasion justified & if in excess they can properly draw inference of malice.—*COLVIN v. MCKAY* (1888), 17 O. R. 212.—*CAN.*

1941 v. — — — — —.]—*WELLS v. LINDOP* (1888), 15 A. R. 695.—*CAN.*

1941 vi. — — — — —.]—*ENGLISH v. LAMB* (1900), 32 O. R. 73.—*CAN.*

1941 vii. — — — — —.]—*PRESTON*

v. THOMPSON, 21 C. L. T. 464.—*CAN.*

1941 viii. — — — — —.]—*HOPKINSON v. KENNEDY* (1904), 4 O. W. R. 433; 25 C. L. T. 70; 9 O. L. R. 43.—*CAN.*

PART VII. SECT. 2, SUB-SECT. 3.

r. General rule.]—Every one has a right to comment on matters of public interest & general concern, provided he does so fairly & with an honest purpose. Such comments are not libellous however severe in their

Sect. 2.—Express malice: Sub-sects. 3 & 4, A., B. (a) & (b), C. & D.]

the said opinions were true? (7) From whom did you obtain the information on which you relied in publishing the said expressions of opinion? Defts. objected to answer these interrogatories:—*Held*: the fifth interrogatory was admissible, & must therefore be answered, but, according to the general rule of practice in actions of libel against the publishers of newspapers, in respect of matter published in their newspapers, the seventh interrogatory was, in the absence of special circumstances, inadmissible, & defts. ought not to be compelled to answer it.

If the defence set up in an action of libel is one of privilege, then the existence of what has been called express malice becomes a question of fact which is raised on the issues for trial. Similarly if the defence is one of fair comment, then the fairness or otherwise of the comment is a question which is at issue on the trial (VAUGHAN WILLIAMS, L.J.).

I am clear that both in cases in which the defence of privilege & in those in which the defence of fair document is set up, the state of mind of deft. when he published the alleged libel is a matter directly in issue (FLETCHER-MOULTON, L.J.)—PLYMOUTH MUTUAL CO-OPERATIVE & INDUSTRIAL SOCIETY, LTD. v. TRADERS' PUBLISHING ASSOCN., LTD., [1906] 1 K. B. 403; 75 L. J. K. B. 259; 94 L. T. 258; 54 W. R. 319; 22 T. L. R. 266, C. A.

Annotations:—*Consd.* Thomas v. Bradbury, Agnew, [1906] 2 K. B. 627; Adam v. Fisher (1914), 110 L. T. 537. *Refd.* Maass v. Gas Light & Coke Co. (1911), 80 L. J. K. B. 1313; Lyle-Samuel v. Odhams, [1920] 1 K. B. 135; Aga Khan v. Times Publishing Co., [1924] 1 K. B. 675.

1954. Existence of malice—May negative fair comment—Comment *prima facie* fair.]—MERIVALE v. CARSON, No. 1837, ante.

1955. ———.]—In an action of libel, where the defence is that the writing complained of is fair comment upon a matter of public interest, evidence that deft. was actuated by malice towards pltf. is admissible, upon the ground that comment which is actuated by malice cannot be deemed fair on the part of the person who makes it, &, therefore, proof of malice may take a criticism that is *prima facie* fair outside the limits of fair comment.

The right . . . whether it be called privilege or by any other name does not extend to cover misstatements of fact however *bona fide*. . . It is of course possible for a person to have a spite against another & yet to bring a perfectly dispassionate judgment to bear upon his literary merits; but, given the existence of malice, it must be for the jury to say whether it has warped his judgment (COLLINS, M.R.).—THOMAS v. BRADBURY, AGNEW & CO., LTD., [1906] 2 K. B. 627; 75 L. J. K. B. 726; 95 L. T. 23; 54 W. R. 608; 22 T. L. R. 656, C. A.

Annotations:—*Refd.* Walker v. Hodgson, [1909] 1 K. B. 239; Pratt v. British Medical Asscn., [1919] 1 K. B. 244.

1956. Proof of malice—Subsequent publication—After issue joined.]—MACLEOD v. WAKLEY, No. 1781, ante.

terms, unless they are written intemperately & maliciously.—MASSIE v. TORONTO PRINTING CO. (1886), 11 O. R. 362.—CAN.

—.]—BARROW v. HEM CHUN-HIRI (1908), 1 L. R. 35 Calc. 495.—IND.

1954 i. Existence of malice—May negative fair comment—Comment *prima facie* fair.]—The qualified privilege of fair comment upon a matter of public interest fails to protect if the writer,

in writing the libel complained of, is actuated by malice.—STEWART v. MCKINLEY (1885), 11 V. L. R. 802.—AUS.

1954 ii. ———.]—R. v. ARDOOL WADOOD (1907), 1 L. R. 31 Bom. 293.—IND.

PART VII. SECT. 2, SUB-SECT. 4.—A.

1957 i. General rule.]—HALLREN v. HOLDEN (1914), 20 B. C. R. 489.—CAN.

What interrogatories allowed.]—See DISCOVERY, Vol. XVIII., pp. 208–210, Nos. 1557–1571.

SUB-SECT. 4.—AS AFFECTING DAMAGES.

A. In General.

1957. General rule.]—In an action for defamation, either party may, with a view to the damages, give evidence to prove or disprove the existence of a malicious motive; but if the evidence given for that purpose establishes another cause of action, the jury should be cautioned against giving any damages in respect of such other cause of action.

—PEARSON v. LEMAITRE (1843), 5 Man. & G. 700; 6 Scott, N. R. 607; 12 L. J. C. P. 253; 1 L. T. O. S. 170; 7 J. P. 336; 7 Jur. 748; 134 E. R. 742.

Annotations:—*Folld.* Anderson v. Calvert (1908), 24 T. L. R. 399. *Refd.* Hemmings v. Gasson (1858), 27 L. J. Q. B. 252; Hebditch v. MacIlwaine, [1894] 2 Q. B. 54.

1958. Discretion of jury—To give nominal damages—Though malice proved.]—There is no necessary inconsistency in a jury finding a verdict for pltf. for a farthing damages in an action for libel, even though the jury find that the libel was maliciously written.—COOKE v. BROGDEN & CO. (1885), 1 T. L. R. 497, D. C.

B. Other Statements by Defendant.

(a) In General.

1959. Whether admissible to prove malice.]—GEARE v. BRITTON (1746), Bull. N. P. 7, N. P.

Annotation:—*Refd.* Pearson v. Lemaitre (1843), 5 Man. & G. 700.

1960. ———.]—Words spoken at different times may be given in evidence on one count.—CHARLTER v. BARRET (1790), Peake, 32, N. P.

Annotation:—*Refd.* Pearson v. Le Maitre (1843), 7 J. P. 336.

1961. ———.]—In an action for words spoken to A. concerning pltf., evidence of words, not themselves actionable, spoken to B. may be received to show the malice of deft.—MEAD v. DAUBIGNY (1792), Peake, 168, N. P.

1962. ———.]—(1) Under the plea of not guilty to a declaration for a libel, pltf. cannot go into evidence to show that the allegations in the libel are false. Neither can he give in evidence subsequent declarations by deft., where the intention of the publication is not equivocal.

(2) The editor of one public newspaper is not justified in attacks upon the private character of the writer of another public newspaper.—STUART v. LOVELL (1817), 2 Stark. 93, N. P.

1963. ———.]—On the trial of an action against the publisher of a monthly periodical for a libel contained in it, articles published from month to month alluding to the action, & attacking pltf., are receivable as evidence *quo animo* the libel was published, & as showing that the publisher of the work considered it as applying to pltf.—CHUBB v. WESTLEY (1834), 6 C. & P. 436, N. P.

1964. ———.]—In an action for slander, other slanderous words may be given in evidence to

PART VII. SECT. 2, SUB-SECT. 4.—B. (a).

a. Whether admissible to prove malice—Affidavit made by defendant—In pending criminal proceedings against plaintiff.]—In an action for oral slander an affidavit made by deft. before a magistrate as the foundation of a criminal proceeding against pltf., which is still pending, is not admissible evidence to show malice in deft.—RANKIN v. CLARKE (1838), 2 N. B. R. (Ber.) 470.

show the animus of deft.—*CAMFIELD v. BIRD* (1852), 3 Car. & Kir. 56; 19 L. T. O. S. 365.

1965. — Right of defendant to prove truth.]—In an action for slander, words are given in evidence in order to prove malice, which are not stated in the declaration, deft. may prove the truth of such words.—*WARNE v. CHADWELL* (1819), 2 Stark. 457, N. P.

1966. — Words proved unambiguous.]—In slander where the words proved are unambiguous, subsequent words of the same import are inadmissible.—*PEARCE v. ORNSBY* (1835), 1 Mood. & R. 455, N. P.

*Annotations:—***Refd.** *Symmons v. Blake* (1835), 1 Mood. & R. 477; *Pearson v. Lemaitre* (1843), 5 Man. & G. 700.

1967. — —.]—(1) In slander where the words proved are unambiguous, evidence of subsequent words of the same import is inadmissible.

(2) Previous slander for which damages have been recovered, may be given in evidence.—*SYMMONS v. BLAKE* (1835), 1 Mood. & R. 477, N. P.; *subsequent proceedings, sub nom. SYMONS v. BLAKE*, 2 Cr. M. & R. 416.

*Annotation:—**As to* (1) **Refd.** *Pearson v. Lemaitre* (1843), 5 Man. & G. 700.

1968. — Previous words for which damage recovered.]—*SYMMONS v. BLAKE*, No. 1967, *ante*.

1969. — Expressions omitted from printed libel.]—*TARPLEY v. BLABEY*, No. 1106, *ante*.

1970. — Subsequent publication of same libel.]—On the trial of an action for a libel published in a newspaper, pltf. was allowed to give in evidence a second paragraph subsequently published in the same paper, in which the libellous charge was reasserted, for the purpose of showing deft.'s intention; & in leaving the case to the jury, the judge told them to take the two paragraphs with them, & to give pltf. such damages as they considered him entitled to under the circumstances. An application for a new trial, on the ground of misdirection, was refused.—*BARWELL v. ADKINS* (1840), 1 Man. & G. 807; 2 Scott, N. R. 11; 133 E. R. 558.

1971. — Intention that libel should be subsequently published.]—*WHITNEY v. MOIGNARD* (1890), 24 Q. B. D. 630; 59 L. J. Q. B. 324; 6 T. L. R. 274.

(b) *Statements giving Rise to Fresh Cause of Action.*

1972. Whether admissible.]—*COOK v. FIELD* (1788), 3 Esp. 133, N. P.

*Annotation:—***Mentd.** *Helsham v. Blackwood* (1851), 11 C. B. 111.

1973. — —.]—In an action for a libel, other papers which are themselves libels on pltf. may be given in evidence to increase the damages.—*LEE v. HUSON* (1792), Peake, 223, N. P.

*Annotation:—***Refd.** *Pearson v. Le Maitre* (1843), 7 J. P. 336.

1974. — —.]—*PLUNKETT v. COBBETT*, No. 2001, *post*.

1975. — —.]—In an action for slander, pltf. may give evidence of any thing that deft. afterwards said, that goes to show malice in deft., provided that it cannot be the subject of another action; therefore pltf. may give evidence that deft. repeated the same words at a subsequent time, or spoke on the subject of this action, but cannot go into evidence of other words subsequently spoken, if those words may be the subject of another action.—*DEFRIES v. DAVIS* (1835), 7 C. & P. 112, N. P.

1976. — Indictment preferred by defendant—

Ignored by grand jury.]—*TATE v. HUMPHREY* (1808), 2 Camp. 73, n.

*Annotation:—***Distd.** *Finnerty v. Tipper* (1809), 2 Camp. 72.

1977. — Duty of judge to direct jury not to award damages for subsequent publication.]—You cannot give in evidence special damage not laid in the declaration; but you may give in evidence any words as well as any act of deft. to show *quo animo* he spoke the words which are the subject of the action; still it would be the duty of the judge to tell the jury, that they must give damages only for the words which are the subject of the action (*LORD ELLENBOROUGH, C.J.*).—*RUSTELL v. MACQUISTER* (1807), 1 Camp. 49, n.

*Annotations:—***Consd.** *Pearson v. Lemaitre* (1843), 5 Man. & G. 700. **Refd.** *Finnerty v. Tipper* (1809), 2 Camp. 72; *Hemmings v. Gasson* (1858), 27 L. J. Q. B. 252.

1978. — —.]—*PEARSON v. LEMAITRE*, No. 1957, *ante*.

1979. — — Effect of failure of judge to direct jury.]—Pltf., a tidewaiter in H.M. Customs, brought an action against the publisher of a newspaper for a libel, imputing to him that he was a papal rebel, a traitor, & an idolater; that he was a member of an association for the conversion of England to the Roman Catholic faith, & had enlisted himself in the service of a foreign potentate, & was bound never to decline from the purpose of annihilating all religious beliefs other than the Roman Catholic religion & Popery. Deft. pleaded, not guilty, & a justification of so much of the libel as imputed to him that he was a member of the association etc. At the trial, pltf., who was a witness, stated that he was a Roman Catholic, & had subscribed money to an association for the conversion of England to the Roman Catholic faith; but had done no other act to become a member of it:—**Held:** (1) the imputations being false in fact & without a justifiable occasion, the law implied malice; (2) there was no misdirection in omitting to tell the jury not to give damages in respect of the publication subsequent to the libel.—*DARBY v. OUSELEY* (1856), 1 H. & N. 1; 25 L. J. Ex. 227; 2 Jur. N. S. 497; 156 E. R. 1093; *sub nom. DERBY v. OUSELEY*, 27 L. T. O. S. 70; 4 W. R. 463

*Annotation:—***Generally, Mentd.** *Henman v. Lester* (1862), 12 C. B. N. S. 776.

1980. — — —.]—*ANDERSON v. CALVERT* No. 2014, *post*.

C. *Plea of Justification.*

1981. Whether evidence of malice.]—*RYAN v. WOOD*, No. 1817, *ante*.

1982. — Action for malicious prosecution & slander—Issue of slander not proceeded with.]—Where in an action for maliciously giving pltf. into custody & for slander, deft. pleaded to the latter cause of action a plea in justification, which would have been no answer to the former, & at the trial pltf. failed to prove the slander:—**Held:** the jury ought to disregard this plea in considering the former cause of action.—*BROOKE v. AVRILLO* (1873), 42 L. J. C. P. 126; 21 W. R. 594.

As avoiding qualified privilege.]—See Sub-sect. 2 B. (c) v., *ante*.

D. *Liability of Publisher.*

1983. Malice of writer—Inadmissible against publisher.]—In an action for libel against the publisher of a magazine, evidence of the writer's personal malice against pltf. is inadmissible.—*ROBERTSON v. WYLDE* (1838), 2 Mood. & R. 10, N. P.; *subsequent proceedings*, 7 L. J. C. P. 196.

PART VII. SECT. 2, SUB-SECT. 4.—D.

b. *Inaccuracy of first article corrected in subsequent article—Materiality as question of damage.]—**LIVINGSTON v. TROUT* (1889), 9 O. R. 488.—CAN.

Part VIII.—Damages and Costs.

SECT. 1.—DAMAGES.

SUB-SECT. 1.—IN GENERAL.

See, generally, DAMAGES, Vol. XVII., pp. 78 et seq.

1984. Question for the jury.]—HAWKINS v. SCIFT (1622), Palm. 314; 81 E. R. 1099.

Annotation:—Mentd. Beardmore v. Carrington (1764), 2 Wils. 244.

1985. —.]—WILSON v. REED, No. 5, *ante*.

an action against
deft. for having published in a Liverpool newspaper, of which deft. was proprietor, a series of libels, of a gross & offensive character, on pltf. as the incumbent of a church in Liverpool. It appeared at the trial that the first libel originated in pltf. having preached & published in the local papers two sermons, reflecting on the magistrates for having appointed a Roman Catholic chaplain to the borough gaol. & on the town council for having elected a Jew their mayor; & pltf. had, soon after the libels had commenced, alluded, in a letter to another newspaper, to deft.'s paper as the "dregs of provincial journalism;" & he had also delivered from the pulpit & published a statement, to the effect that some of his opponents had been guilty of subornation of perjury in relation to a charge of assault for which pltf. had been fined 5s. The jury having returned a verdict for a farthing damages, pltf. obtained a rule for a new trial on the ground of the inadequacy of the damages:—*Held*: although on account of the grossness & repetition of the libels, the verdict, in the opinion of the ct., might well have been for larger damages, it was a question for the jury, taking pltf.'s own conduct into consideration, what amount of damages he was entitled to; & the ct. ought not to interfere.—KELLY v. SHERLOCK (1866), L. R. 1 Q. B. 686; 7 B. & S. 480; 35 L. J. Q. B. 209; 30 J. P. 805; 12 Jur. N. S. 937.

Annotations:—Consd. Falvey v. Stanford (1874), L. R. 10 Q. B. 54; Cooke v. Brogden (1885), 1 T. L. R. 497. *Refd.* Bryce v. Rusden (1886), 2 T. L. R. 435.

1987. —.]—In an action for libel the determining the amount of damages is essentially the duty of the jury. In no such case will the ct. interfere unless it appears clearly that the jury have given their verdict from vindictive or improper feelings. Where no such considerations exist the verdict will not be interfered with.—ROBERTS v. OWEN (1889), 53 J. P. 502, D. C.; *previous proceedings* (1888), 5 T. L. R. 11.

1988. —.]—In an action for libel, the judge misdirected the jury in favour of pltf. upon a material part of the libel, & the jury gave a verdict for large damages. The Ct. of Appeal thought that the nature of the libel was such that the jury would have been entitled to give, & would probably have given, the same verdict, even if the direction had been the other way, & refused deft.'s application for a new trial on the ground that in their opinion no "substantial wrong or miscarriage" had been occasioned by the misdirection, within the meaning of R. S. C., Ord. 39, r. 6:—*Held*: since the assessment of damages is the peculiar province of the jury in an action for libel, & since

the jury had not had deft.'s real case submitted to them & might in assessing the damages, have been influenced by the misdirection, there had been a substantial wrong or miscarriage within the above rule, & there must be a new trial.—BRAY v. FORD, [1896] A. C. 44; 65 L. J. Q. B. 213; 73 L. T. 609; 12 T. L. R. 119, H. L.; *reversq.* S. C. *sub nom.* FORD v. BRAY (1894), 11 T. L. R. 32, C. A.

Annotations:—Distd. Barber v. Deutsche Bank (Berlin) London Agency, [1919] A. C. 304. *Refd.* Floyd v. Gibson (1909), 100 L. T. 761; Greenlands v. Wilmshurst & London Assocn. for Protection of Trade, [1913] 3 K. B. 507. *Mentd.* Hamilton v. Seal, [1904] 2 K. B. 262; Bath v. Standard Land Co., [1911] 1 Ch. 618; Banbury v. Bank of Montreal, [1918] A. C. 626; Hill v. Showell (1918), 87 L. J. K. B. 1106.

1989. —.]—Such newspapers as publish libellous statements do so because they find that it pays; many of their readers prefer to read & believe the worst of everybody, & the newspaper proprietors cannot complain if juries remember this in assessing damages. The amount of damages is peculiarly their province, & I see no ground for interference (FARWELL, L.J.).—JONES v. HULTON (E.) & Co., [1909] 2 K. B. 444; 78 L. J. K. B. 937; 101 L. T. 330; 25 T. L. R. 597, C. A.; *on appeal, sub nom.* HULTON (E.) & Co. v. JONES, [1910] A. C. 20, H. L.

Annotations:—Mentd. Spiers & Pond v. John Bull (1916), 85 L. J. K. B. 992; Adam v. Ward, [1917] A. C. 309; Pratt v. British Medical Assocn. (1918), 120 L. T. 41; Shaw v. London Express Newspaper (1925), 41 T. L. R. 475.

1990. Entire damages—Different slanders spoken at same time.]—LUKER'S CASE (1610), Jenk. 301; 145 E. R. 220.

1991. — Different slanders at different times.]—Entire damages may be given for different sets of actionable words spoken to different persons at different times.—JAXON v. TANNER (1631), Cro. Car. 236; 79 E. R. 807.

1992. Nominal damages—Jury not bound to award—Judgment by default—No evidence offered.]—In case for words, deft. suffered judgment by default. At the execution of the writ of inquiry, pltf. offered no evidence, & the jury assessed the damages at £40:—*Held*: it was not incumbent on pltf. to give any evidence, & the jury were not, under such circumstances, bound to give nominal damages only.—TRIPP v. THOMAS (1824), 3 B. & C. 427; 5 Dow. & Ry. K. B. 276; 3 L. J. O. S. K. B. 42; 107 E. R. 792.

1993. — Right of jury to award—No real injury.]—In an action of slander, where there is no real injury, the jury may find for nominal damages, & *semble*: may consider the question of costs. Thus, in an action by a master of a workhouse, for words imputing to himself that he dishonestly got honest men turned out of employment there, in order to get in creatures of his own, for his own purposes:—*Held*: actionable; but, being spoken in angry altercation, & without malice, the jury were directed that they might, if they thought there was no real injury, give nominal damages, so as not to carry costs; & deft.'s counsel was allowed to ask, on cross-examination, what would be the probable amount of costs to deft. if a verdict

PART VIII. SECT. 1, SUB-SECT. 1.

1984 i. Question for the jury.]—SYME (DAVID) & Co. v. SWINBURNE (1909), 10 C. L. R. 43.—AUS.

1984 ii. —.]—TAYLOR v. MASSEY

(1891), 20 O. R. 429.—CAN.

1984 iii. —.]—WATT v. MCQUAIG (1905), 40 N. S. R. 553.—CAN.

1984 iv. —.]—WHITE v. TYRRELL (1856), 5 L. C. L. R. 477; 8 Ir. Jur. 262.—IR.

c. Nominal damages—In absence of pecuniary damage.]—Where there was no proof of any pecuniary damage suffered by pltf. judgment was given for \$10 & costs as of a circuit ct. action of the lowest class.—HEARN v. GRAHAM, 23 C. L. T. 119.—CAN.

for more than a nominal amount were given.—**WAKELIN v. MORRIS** (1860), 2 F. & F. 26, N. P.
Annotation :—**Refd.** **Russell v. Weniwaser** (1868), 16 W. R. 710.

1994. Vindictive damages.—**STONE v. BREWIS** (No. 1) (1902), 47 Sol. Jo. 70, C. A.

1995. — Proof of actual loss.—**LEETHAM v. RANK**, No. 872, *ante*.

SUB-SECT. 2.—MEASURE OF DAMAGES.

A. In General.

1996. General rule — Measured according to damage done.—The amount of damages is in proportion to the damage done & if therefore a paper is of such wide circulation as stated, then an unfounded attack in it is a very serious thing indeed (**ERLE, C.J.**).—**ATTHILL v. SOMAN** (1866), 15 L. T. 36, N. P.

1997. Slander actionable per se.—**SAUNDERS v. EDWARDS** (1662), 1 Sid. 95 ; 82 E. R. 991.

Annotation :—**Mentd.** **Aldridge v. Drake** (1686), 2 Show. 493.

1998. Slander actionable on proof of damage.—**SAUNDERS v. EDWARDS** (1662), 1 Sid. 95 ; 82 E. R. 991.

Annotation :—**Mentd.** **Aldridge v. Drake** (1686), 2 Show. 493.

1999. Crime imputed to plaintiff—Good, sound, substantial damages.—**BRUTON v. DOWNES**, No. 1237, *ante*.

B. Matters for Consideration.

(a) In General.

2000. Loss of office.—**HAWK v. ROWE** (1663), 1 Sid. 131 ; 82 E. R. 1013.

2001. Libel in newspaper—Copies bought after action brought.—In case for a libel published in a weekly paper, after proof, the buying of the paper at deft.'s shop ; in which the libel was contained ; evidence of similar papers purchased at deft.'s shop at other times is admissible evidence, to show that the paper was regularly published, & that the libellous publication was deliberately made.—**PLUNKETT v. COBBETT** (1804), 5 Esp. 136, N. P.

Annotations :—**Refd.** **Pearce v. Ormsby** (1835), 1 Mood. & R. 455 ; **Pearson v. Lemaitre** (1843), 5 Man. & G. 700.

2002. — Extent of circulation.—**GATHERCOLE v. MIALI**, No. 1773, *ante*.

2003. — — — — ——**ATTHILL v. SOMAN**, No. 1996, *ante*.

2004. Libel against partnership—Injury to joint business only.—**HAYTHORN v. LAWSON**, No. 35, *ante*.

2005. — Prospective injury to business.—In case for a libel against a co-partnership, the jury may take into their consideration, in estimating the damages to which plffs. are entitled, the prospective injury which may accrue to the partnership from deft.'s act.—**GREGORY v. WILLIAMS** (1844), 1 Car. & Kir. 568.

2006. Libel against ship owner—Probable profits of voyage.—**INGRAM v. LAWSON**, No. 161, *ante*.

2007. Loss of situation—Though not proved as special damage.—**RUMSEY v. WEBB**, No. 1541, *ante*.

2008. Arrest of plaintiff after action brought—

1994 i. Vindictive damages.—In an action of slander the jury are entitled to give exemplary & punitive damages.—**LAMB v. WEST** (1894), 15 N. S. W. L. R. 120 ; 10 N. S. W. N. 209.—**AUS.**

d. Mode of assessment—Where no appearance to summons.—**STANLEY v. LITT** (1900), 19 P. R. 101.—**CAN.**

PART VIII. SECT. 1, SUB-SECT. 2.— B. (a).

2012 i. General loss of business.—

M'LOUGHLIN v. WELSH (1846), 10 I. L. R. 19.—**IR.**

e. Conduct of plaintiff.—**BUTCHER v. PAYTON** (1891), 9 N. Z. L. R. 240.—**N.Z.**

PART VIII. SECT. 1, SUB-SECT. 2.— B. (b).

2013 i. Whole conduct of defendant—Down to time of verdict—From publica-

In consequence of libellous advertisement—Evidence given with consent of defendant's counsel.—

In an action for a libel, in the form of an advertisement, charging plff. with fraud, & offering a reward for his apprehension, evidence having been given, with the consent of deft.'s counsel, of arrests of plff. in consequence of the advertisement, after the commencement of the action :—**Held** : deft. could not afterwards complain that the judge, in his summing up, did not expressly tell the jury that they were not to take those arrests into their consideration in estimating the damages for the libel.—**GOSLIN v. CORRY** (1844), 7 Man. & G. 342 ; 8 Scott, N. R. 21 ; 3 L. T. O. S. 56 ; 135 E. R. 143.

2009. Libel barred by Statute of Limitations—Single act of re-publication—Caution to jury.—**BRUNSWICK (DUKE) v. HARMER**, No. 1060, *ante*.

2010. Circumstances leading to conviction of plaintiff — Although conviction erroneous.—**GWYNN v. SOUTH-EASTERN RY. CO.**, No. 1279, *ante*.

2011. Circumstances of election contest.—**PANKHURST v. HAMILTON** (1887), 3 T. L. R. 500.

2012. General loss of business.—**CONCARIS v. DUNCAN & CO.**, [1909] W. N. 51.

(b) Conduct of Defendant.

2013. Whole conduct of defendant—Down to time of verdict—From publication.—**PRAED v. GRAHAM**, No. 1087, *ante*.

2014. — — — Before & after publication.—(1) In assessing damages for libel the jury may have regard to the whole conduct of deft. before & after the publication of the libel down to the verdict as showing the existence of a malicious motive, but the jury ought not to treat such prior or subsequent circumstances as giving a separate & independent right to damages, & the judge should caution them against doing so.

(2) The omission of the judge at the trial to direct the jury sufficiently that, though they might give punitive damages for malice they must not give damages for another cause of action :—**Held** : in the circumstances, not a ground for granting a new trial, by reason of R. S. C., Ord. 39, r. 6.—**ANDERSON v. CALVERT** (1908), 24 T. L. R. 399, C. A.

2015. Damage resulting from repetition—General loss of business.—In an action by a surgeon for slander imputing that a female servant had had a bastard child by him, whereby D. would not employ him as an accoucher, & plff. was otherwise injured in the way of his business, it was proved that the words were spoken by deft. in conversation with D. :—**Held** : plff. was not entitled to recover such damages in respect of a general loss of business as might have been caused by repetitions of the slander, but could not have arisen directly from the speaking of the words by deft. to D.—**DIXON v. SMITH** (1860), 5 H. & N. 450 ; 29 L. J. Ex. 125 ; 157 E. R. 1257.

Annotations :—**Consd.** **Riding v. Smith** (1876), 45 L. J. Q. B. 281. **Refd.** **Ratcliffe v. Evans**, [1892] 2 Q. B. 524.

Repetition of defamatory statements generally, see Part V., Sect. 3, *ante*.

2016. Manner of publication.—If, in an action

tion.]—In assessing damages the jury are entitled to take into consideration the whole conduct of deft. in the matter, from the time the libel was published down to the time of the verdict.—**HICKS v. GREGORY** (1904), 6 W. A. L. R. 100.—**AUS.**

2013 ii. — — — — ——**SALZMANN v. HOLMES**, [1914] App. D. 471.—**S. AF.**

LIBEL AND SLANDER.

Sect. 1.—Damages: Sub-sect. 2, B. (b), (c) & (d), & C.; sub-sect. 3, A. & B. (a), (b) & (c).]

for libel, deft., by his pleading, admits the publication, pltf. is still at liberty to show the manner of the publication, with a view to the amount of damages.—*VINES v. SERELL* (1835), 7 C. & P. 163.

2017. Delay in publishing contradiction.]—The *Times* having published in Dec. a libel on a tailor, stating that he had been flogged (which turned out to be a pure fabrication), & having, although it was complained of at once, & they heard of the falsehood of the statement, delayed publishing any contradiction until after action, these circumstances were left to the jury as evidence of negligence, & a verdict for very large damages was not disturbed. *Semble*: in such a case no plea under Libel Act, 1843 (c. 96), would be allowable.—*SMITH v. HARRISON* (1856), 1 F. & F. 565.

2018. Circumstances of election contest—Bona fides of defendant's conduct.]—*PANKHURST v. HAMILTON* (1887), 3 T. L. R. 500.

(c) *Matters in Aggravation and Mitigation.*

See Sub-sect. 3, *post*.

(d) *Effect of Verdict on Costs.*

See *JURIES*, Vol. XXX., pp. 245, 246, Nos. 443–456.

C. Review of Assessment—New Trial.

See *DAMAGES*, Vol. XVII., pp. 164 *et seq.*

SUB-SECT. 3.—AGGRAVATION AND MITIGATION.

A. Aggravation.

See, generally, *DAMAGES*, Vol. XVII., pp. 120 *et seq.*

2019. Aggravation induced by conduct of parties' representative—Whether damages follow aggravation.]—*RISK ALLAH BEY v. WHITEHURST*, No. 1734. *ante*.

2020. ———.]—(1) In extreme cases, such as this is, I think the cts. ought not to allow such an extravagant result, even though the parties have procured it by the conduct of which their representatives have been guilty (*LORD HALSBURY, C.*).

(2) Pltf. was encountered by a most insulting & offensive cross-examination, for some parts of which there does not seem to be the least justification. Even in mitigation of damages it is well settled you cannot go into evidence which, if proved would constitute a justification (*LORD HALSBURY, C.*).—*WATT v. WATT*, [1905] A. C. 115; 74 L. J. K. B. 438; 92 L. T. 480; 69 J. P. 249; 53 W. R. 547; 21 T. L. R. 386; 49 Sol. Jo. 400, H. L.

Annotations:—Generally, Mentd. Jenkins v. Taff Vale Ry.

PART VIII. SECT. 1, SUB-SECT. 3.—A.

1. Refusal by defendant to retract—Although opportunity offered.]—Damages for libel may be aggravated by the fact that pleas of truth & justification are kept on the record up to the time of commencement of trial, & by the refusal of the libeller to avail himself of an opportunity of retraction offered to him.—*KNOTT v. TELEGRAM PRINTING CO., LTD.*, [1917] 1 W. W. R. 974; 27 Man. L. R. 336.—*CAN.*

PART VIII. SECT. 1, SUB-SECT. 3.—B. (a).

2021. Power of court to mitigate.]—

JOHNSON v. EASTMAN (1825), Tay. 243.—*CAN.*

2022. Evidence amounting to justification—Inadmissible.]—*SWITZER v. LAIDMAN* (1889), 18 O. R. 420.—*CAN.*

2022. ———.]—*CROWLEY v. BROWN* (1902), 22 N. Z. L. R. 334.—*N.Z.*

2023. Evidence of matters not amounting to justification—Whether admissible.]—*CREIGHTON v. FINLAY* (1842), Arm. M. & O. 385.—*IR.*

g. Evidence amounting to privilege—Where no plea—Inadmissible.]—When slanderous words were spoken by deft. in a conversation with A., in the

(1912), 106 L. T. 715; *Barber v. Deutsche Bank* (Berlin London Agency, [1919] A. C. 304; *Wing Lee v. Lew*, [1925] A. C. 819.

Malice.]—See Part VII., Sect. 2, sub-sect. 4, *ante*.

B. Mitigation.

(a) *In General.*

See R. S. C., Ord. 36, r. 37.

Mitigation of damages generally, see *DAMAGES*, Vol. XVII., pp. 124 *et seq.*

2021. Power of court to mitigate.]—In slander deft. justified, & verdict for pltf.; the ct. cannot mitigate the damages, but in a case of *mayhem* may increase them.—*BONHAM v. STURTON* (1553), 2 Dyer, 105 a; 73 E. R. 230.

Annotation:—Refd. Hawkins v. Selet (1622), Palm. 314.

2022. Evidence amounting to justification—Inadmissible.]—In an action for words deft. pleaded not guilty & offered to prove the words to be true in mitigation of damages, which the Chief Justice refused to permit.—*UNDERWOOD v. PARKS* (1743), 2 Stra. 1200; 93 E. R. 1127.

Annotations:—Refd. Roberts v. Camden (1807), 9 East, 93; *Manning v. Clement* (1831), 7 Bing. 302; *Rumsey v. Webb* (1842), 11 L. J. C. P. 129.

2023. ———.]—*DENNIS v. PAWLING* (1716), 12 Vin. Abr. 159, pl. 16.

2024. ———.]—In an action for a libel, deft. cannot, under the general issue, give evidence of any fact in mitigation of damages, which would be evidence to prove a justification of any part of the libel. He ought to justify as to that part.—*VESSEY v. PIKE* (1829), 3 C. & P. 512, N. P.

2025. ———.]—*WATT v. WATT*, No. 2020, *ante*.

2026. Evidence of matters not amounting to justification—Whether admissible.]—*Semble*: in an action for a libel, evidence of facts, which do not amount to a justification, may, under circumstances, be received in mitigation of damages, though special pleas of justification, which were on the record, have been withdrawn before the trial, & pltf. in consequence is not prepared with evidence to answer deft.'s proof.—*EAST v. CHAPMAN* (1827), 2 C. & P. 570; Mood. & M. 46, N. P.

Annotation:—Mentd. R. v. Garbett (1847), 1 Den. 236.

2027. ———.]—A libel purported to be a report of what occurred before a comr. of inquiry respecting corps.:—*Held*: (1) deft. could not give evidence of the accuracy of the report as a matter of justification, but he might give such evidence in mitigation of damages; (2) if he did so, pltf. might give evidence in reply, to show the inaccuracy of the report.—*CHARLTON v. WATTON* (1834), 6 C. & P. 385, N. P.

2028. ———.]—*CHALMERS v. SHACKELL*, No. 1282, *ante*.

Particulars furnished to plaintiff—Administration of Interrogatories.]—See Part X., Sect. 4, *post*.

(b) *Character of Plaintiff.*

See R. S. C., Ord. 36, r. 37.

2029. General evidence—Whether admissible.]—*KIRKMAN v. OXLEY* (undated), Phillips on Evi

presence of third persons, & there was no plea of privilege on the record:—*Held*: evidence that it was the duty of deft. to make the communication to A., was not admissible in mitigation of damages.—*BELL v. PARKE* (1860), 11 L. C. L. R. 413.—*IR.*

PART VIII. SECT. 1, SUB-SECT. 3.—B. (b).

2029. General evidence—Whether admissible.]—In an action of slander for charging pltf. with stealing, evidence of the general bad character of pltf. is not admissible in evidence in mitigation of damages.—*WILLISTON v.*

dence, 4th ed., 189, n.; Starkie on Evidence, 3rd ed., Vol. 2, 306, n.

Annotation:—*Refd.* Scott v. Sampson (1882), 8 Q. B. D. 491.

2030. ———.]—DENNIS v. PAWLING (1716), 12 Vin. Abr. 159, pl. 16.

2031. ———.]—WILLIAMS v. CALLENDER (1810), Holt, N. P. 307, n., N. P.

Annotations:—*Dbtd.* Waithman v. Weaver (1822), 11 Price, 257. *Refd.* Saunders v. Mills (1829), 3 Moo. & P. 520; Scott v. Sampson (1882), 8 Q. B. D. 491.

2032. ———.]—When the general issue is pleaded to an action for a libel, it is doubtful whether deft. can call witnesses to speak to the general character of pltf.—RUSHWORTH'S CASE (1823), as reported in 1 L. J. O. S. K. B. 113.

2033. ———.]—ELLERSHAW v. ROBINSON (1824), Starkie on Slander & Libel, 3rd ed., 538; 2 Starkie on Evidence, 3rd ed., 641, n.

Annotation:—*Refd.* Scott v. Sampson (1882), 8 Q. B. D. 491.

2034. ———.]—MAWBY v. BARBER (1826), Starkie on Slander & Libel, 3rd ed., 538, n.; Starkie on Evidence, 3rd ed., 642, n.

Annotation:—*Refd.* Scott v. Sampson (1882), 8 Q. B. D. 491.

2035. ———.]—MOORE v. OASTLER (1836), 2 Starkie on Slander & Libel, 3rd ed., 538, n.; 2 Starkie on Evidence, 3rd ed., 642, n.

Annotations:—*Refd.* Richards v. Richards (1844), 2 Mood. & R. 557; Scott v. Sampson (1882), 8 Q. B. D. 491.

2036. ———.]—HARDY v. ALEXANDER (1837), Starkie on Slander & Libel, 3rd ed., 538, n.

Annotations:—*Refd.* Richards v. Richards (1844), 2 Mood. & R. 557; Scott v. Sampson (1882), 8 Q. B. D. 491.

2037. ———.]—In an action for libel where there is no plea of justification, questions cannot be asked, tending to show pltf.'s previous bad character in mitigation of damages. Where a witness had said nothing in examination-in-chief he cannot be cross-examined to discredit him.—BRACEGIRDLE v. BAILEY (1859), 1 F. & F. 536, N. P.

Annotation:—*Refd.* Scott v. Sampson (1882), 8 Q. B. D. 491.

2038. ———.]—SCOTT v. SAMPSON, No. 2045, *post*.

2039. ———.]—Pltf., a professional jockey, sued to recover damages for a libel charging him with unfairly & dishonestly riding the horses in a particular stable. Deft. pleaded a justification, & afterwards applied to amend his defence by adding a paragraph alleging that at the date of the publication pltf. was commonly reputed to have been in the habit of unfairly & dishonestly riding horses in races, so as to prevent them from winning:—*Held*: as general evidence of pltf.'s bad reputation, if admissible, could only be given in reduction of damages, & not in answer to the action, the paragraph did not contain a statement of material facts on which deft. relied for his defence, within the meaning of R. S. C., Ord. 19, r. 4, or a ground of defence which must be raised under Ord. 19, r. 15, but was a denial or defence as to damages claimed or their amount, within Ord. 21, r. 4, & therefore ought not to be pleaded, & leave to amend must be refused.—WOOD v. DURHAM (EARL) (1888), 21 Q. B. D. 501; 57 L. J. Q. B. 547; 59 L. T. 142; 37 W. R. 222; 4 T. L. R. 778, D. C.

SMITH (1847), 5 N. B. R. (3 Kerr) 443.—CAN.

2029 ii. ———.]—MYERS v. CURRIE (1863), 22 U. C. R. 470.—CAN.

2029 iii. ———.]—MOORE v. MITCHELL (1886), 11 O. R. 21.—CAN.

2029 iv. ———.]—"THE ENGLISHMAN," LTD. v. LAJPAT RAI (1910), 1 L. R. 37 Calc. 760.—IND.

2029 vi. ———.]—CHESTER v. OLDMAN, [1914] T. P. D. 67.—S. AF.

PART VIII. SECT. 1, SUB-SECT. 3.—B. (c).

2048 i. *Whether evidence admissible—Rumours.*—In mitigation of damages,

2040. ———.]—WOOD v. COX, No. 2307, *post*.

2041. ———.]—MANGENA v. WRIGHT, No. 1722, *ante*.

2042. Evidence of particular facts—Inadmissible.]—SMITHIES v. HARRISON (1701), 1 Ld. Raym. 727; 91 E. R. 1385, N. P.

Annotation:—*Refd.* Smith v. Richardson (1737), Willes, 20.

2043. ———.]—JONES v. STEVENS, No. 1236, *ante*.

2044. ———.]—HARDY v. ALEXANDER (1837), Starkie on Slander & Libel, 3rd ed., 538, n.

Annotations:—*Refd.* Richards v. Richards (1844), 2 Mood. & R. 557; Scott v. Sampson (1882), 8 Q. B. D. 491.

2045. ———.]—Action for a libel alleging that pltf., a theatrical critic, had endeavoured to extort money by threatening to publish defamatory matter concerning a deceased actress. Defence—that the allegation was true in substance & fact:—*Held*: (1) evidence of rumours before the publication of the libel that pltf. had committed the offences charged in it, & evidence of particular facts & circumstances tending to show the misconduct of pltf. as a theatrical critic could not be admitted in reduction of damages; (2) assuming such evidence to be material it was rightly rejected, for the particular facts & circumstances were not stated or referred to in the pleadings as required by Ord. 19, r. 4.

On principle, therefore, it would seem that general evidence of reputation should be admitted (CAVE, J.).—SCOTT v. SAMPSON (1882), 8 Q. B. D. 491; 51 L. J. Q. B. 380; 46 L. T. 412; 46 J. P. 408; 30 W. R. 541, D. C.

Annotations:—*Fold.* Wood v. Cox (1888), 4 T. L. R. 652. *Refd.* Wood v. Durham (1888), 21 Q. B. D. 501; Scaife v. Kemp (1892), 61 L. J. Q. B. 515; Mangena v. Wright, [1909] 2 K. B. 958.

2046. ———.]—WOOD v. COX (1888), 4 T. L. R. 550, D. C.

2047. ———.]—MANGENA v. WRIGHT, No. 1722, *ante*.

(c) Rumours and Suspicions.

2048. *Whether evidence admissible—Rumours.*—EAMER v. MERLE (*circa* 1808), cited in 2 Camp. at p. 253, N. P.

Annotations:—*Consd.* Waithman v. Weaver (1822), 11 Price, 257, n.; Scott v. Sampson (1882), 8 Q. B. D. 491. *Refd.* Leicester v. Walter (1809), 2 Camp. 251; Saunders v. Mills (1829), 3 Moo. & P. 520.

2049. ———.]—In an action of slander, imputing a specific charge of unnatural practices to pltf., where the declaration contains the usual allegation of good fame, etc., deft. may, upon cross-examination, ask pltf.'s witness whether he had not heard reports in the neighbourhood that pltf. had been guilty of similar practices, in order to diminish the damages.——— v. MOOR (1813), 1 M. & S. 284; 105 E. R. 106.

Annotations:—*Expld.* Thompson v. Nye (1850), 16 Q. B. 175. *Consd.* Scott v. Sampson (1882), 8 Q. B. D. 491.

2050. ———.]—WYATT v. GORE, No. 2062, *post*.

2051. ———.]—The declaration in the usual form alleged pltf. to have been of good fame & repute. Plea, not guilty. Pltf. & deft. were rival

defts. cannot give evidence of rumour & suspicions of bad character.—"THE ENGLISHMAN," LTD. v. LAJPAT RAI (1910), 1 L. R. 37 Calc. 760.—IND.

2048 ii. ———.]—BELL v. PARE (1860), 11 I. C. L. R. 413.—IR.

2048 iii. ———.]—MACCULLOCH v. LITT (1851), 13 Dunl. (Ct. of Sess) 960; 23 Sc. Jur. 144.—SCOT,

a patent; whereas deft. was not, but pltf. was, the first inventor of the invention in question, & deft. had never any interest in opposing the grant of a patent to pltf.: whereby the Solicitor General refused to allow pltf.'s application for letters patent, etc.:—*Held*: the declaration was bad; the allegation of the refusal in the statement of special damage could not be called in aid to supply a substantial traversable allegation of the refusal; & the special damage alleged did not appear to be the necessary or natural result of the facts stated in the declaration.—*HADDAN v. LOTT* (1854), 15 C. B. 411; 3 C. L. R. 144; 24 L. J. C. P. 49; 24 L. T. O. S. 96; 139 E. R. 484.

2093. —.]—*Qu.*: whether a wife can maintain an action against a third person for words occasioning to her the loss of the *consortium* of the husband? If she can, the words must be such that from them the loss of the *consortium* follows as a natural & reasonable consequence: Where therefore a wife, her husband being joined for conformity as pltf., brought an action to recover damages from A. for slander uttered by him to her husband, imputing to her that she had been almost seduced by B. before her marriage, & that her husband ought not to let B. visit at his house, & the ground of special damage alleged was, that in consequence of the slander the husband forced her to leave his house & return to her father, whereby she lost the *consortium* of her husband:—*Held*: the cause of complaint thus set forth would not sustain the action, for the alleged ground of special damage did not show, in the conduct of the husband, a natural & reasonable consequence of the slander.

I strongly incline to agree, that to make the words actionable, by reason of special damage, the consequence must be such as, taking human nature as it is, with its infirmities, & having regard to the relationship of the parties concerned, might fairly & reasonably have been anticipated & feared would follow from the speaking the words, not what would reasonably follow, or we might think ought to follow. . . . I cannot agree that the special damage must be the natural & legal consequence of the words, if true (*LORD WENSLEYDALE*).—*LYNCH v. KNIGHT* (1861), 9 H. L. Cas. 577; 5 L. T. 291; 8 Jur. N. S. 724; 11 E. R. 854, H. L.

Annotations:—*Folld.* Chamberlain v. Boyd (1883), 11 Q. B. D. 407. *Distd.* Weld-Blundell v. Stephens, [1920] A. C. 956. *Refd.* Parkins v. Scott (1862), 1 H. & C. 153; Roberts v. Roberts (1864), 5 B. & S. 384; Davies v. Solomon (1871), L. R. 7 Q. B. 112; Miller v. David (1874), L. R. 9 C. P. 118; Riding v. Smith (1876), 45 L. J. Q. B. 281; Bowen v. Hall (1881), 6 Q. B. D. 333; Ecklin v. Little (1890), 6 T. L. R. 366; Whitney v. Moignard (1890), 24 Q. B. D. 630; Wilkinson v. Downton, [1897] 2 Q. B. 57. *Mentd.* Butterworth v. Butterworth & Englefield, Collins v. Collins & Harrison, Barratt v. Barratt & Fox, Howell v. Howell & Walker, Adams v. Adams & Ward, Ellworthy v. Ellworthy & Ledgard, [1920] P. 126; Gray v. Gee (1923), 39 T. L. R. 429; Hambrook v. Stokes, [1925] 1 K. B. 141.

2094. —.]—Action by a trader charging that deft. falsely & maliciously spoke & published of the wife of pltf., who assisted him in his business, & in relation to such business, certain words charging her with having committed adultery upon the premises where pltf. resided & carried on business, whereby pltf. was injured in his business, & certain specified persons & others who had theretofore dealt with him ceased to do so:—*Held*: (1) the action was maintainable on the ground that the injury to pltf.'s business was the natural consequence of the words spoken, which would prevent persons resorting to pltf.'s shop.

It appears to me that if a man states of another, who is a trader earning his livelihood by dealing in articles of trade, anything, be it what it may, the natural consequence of uttering which would

be to injure the trade & prevent persons from resorting to the place of business & it so leads to loss of trade, it is actionable (*KELLY, C.B.*).

(2) Special damage might be proved by general evidence of the falling off of pltf.'s business, without showing who the persons were who had ceased to deal with pltf., or that they were the persons to whom the statements were made.—*RIDING v. SMITH* (1876), 1 Ex. D. 91; 45 L. J. Q. B. 281; 34 L. T. 500; 24 W. R. 487.

Annotations:—*As to* (1) *Consd.* Thomas v. Williams (1880), 14 Ch. D. 864; Thorley's Cattle Food Co. v. Massam (1880), 14 Ch. D. 763; Allen v. Flood, [1898] A. C. 1. *As to* (2) *Expld.* Ratcliffe v. Evans, [1892] 2 Q. B. 524; *Refd.* Clarke v. Morgan (1877), 38 L. T. 354. *Generally, Refd.* Ripley v. Arthur (1901), 45 Sol. Jo. 165; Weld-Blundell v. Stephens [1920] A. C. 956.

2095. —.]—Claim, that pltf. was a candidate for membership of the R. Club, but upon a ballot of the members was not elected; that a meeting of the members was called to consider an alteration of the rules regarding the election of members; that deft. falsely & maliciously spoke & published of pltf. as follows: "The conduct of" pltf. "was so bad at a club in M. that a round robin was signed urging the committee to expel" him; "as, however," he was "there only for a short time, the committee did not proceed further;" whereby deft. induced a majority of the members of the club to retain the regulations under which pltf. had been rejected, & thereby prevented pltf. from again seeking to be elected to the club:—*Held*: the claim disclosed no cause of action; for the words complained of, not being actionable in themselves, must be supported by special damage in order to enable pltf. to sue; & the damage alleged was not pecuniary or capable of being estimated in money, & was not the natural & probable consequence of deft.'s words.—*CHAMBERLAIN v. BOYD* (1883), 11 Q. B. D. 407; 52 L. J. Q. B. 277; 48 L. T. 328; 47 J. P. 372; 31 W. R. 573, C. A.

2096. —.]—The alleged slander was in respect of words not actionable *per se*, & the consequences were stated to be that pltf. had suffered annoyance, loss of friends, credit, & reputation & that through deft. having caused an irreparable breach between pltf. & her husband, her husband had deprived her of her own house & of an income:—*Held*: the damage alleged as the consequence of the slander was not special damage so as to give a cause of action.

The law is perfectly plain & has been long settled that, in respect of slanderous words such as these in question, however distasteful they may be to pltf., an action will not lie unless they have produced that which the law recognises as special damage. To constitute such damage it is necessary to prove something more than injury to pltf.'s feelings, because that is not a legal cause of action; though, by way of damage, where there is a cause of action, the law does take notice of such injury. Therefore slander causing mere injury to feelings gives no cause of action. Another rule is that the special damage must be the natural & reasonable result of the words spoke. If the damage alleged is not so, but is the result of mere caprice or ill-feeling on the part of some one else, the injury does not flow from the words, but from the caprice or ill feeling of the person who does the injury (*BRETT, M.R.*).—*WELDON v. DE BATHE* (1884), 14 Q. B. D. 339; 54 L. J. Q. B. 113; 53 L. T. 520; 33 W. R. 328; 1 T. L. R. 171, C. A.

Annotation:—*Mentd.* Shipman v. Shipman, [1924] 2 Ch 140.

2097. —.]—The wrongful refusal of a third party to fulfil a contract may give a right to special

Sect. 1.—Damages: Sub-sect. 4, B. (a) i., ii., iii.

damage for a slander, if such refusal be the probable consequence of the utterance of the slander.—*SOCIÉTÉ FRANÇAISE DES ASPHALTES v. FARRELL* (1885), Cab. & El. 563.

2098. Legitimate consequence of defendant's statement.]—*VICARS v. WILCOCKS*, No. 2091, *ante*.

2099. —.]—In an action for words, imputing to pltf., a governess, that she had had a child by her master, the declaration alleged, as special damage, that her master had dismissed her from his employment. The words were spoken by deft. to pltf.'s father, at a time when pltf. was visiting her father, & were repeated by the father to the master, who then declined to receive pltf. again, though he knew the charge to be false, on the ground that it might be injurious to her character to do so, & would be unpleasant to both of them:—*Held*: the special damage was the direct & natural & legitimate consequence of the slander; & was therefore sufficient to support the action.—*GILLETT v. BULLIVANT* (1846), 7 L. T. O. S. 490.

2100. —.]—*LYNCH v. KNIGHT*, No. 2093, *ante*.

2101. Material temporal loss necessary.]—The special damage necessary to support an action for defamation, when the words spoken are not actionable in themselves, must be the loss of some material temporal advantage.

A declaration for slander imputing unchastity to a married woman alleged as special damage that she was not allowed to continue any longer a member of a society & congregation of Calvinistic Methodists, & was turned out of the same, & that the leaders or elders of the society refused to certify that she was fit to be a member of the sect., or of any society or congregation of the same, whereby she was prevented becoming a member of the said society in L. & was prevented from attending religious worship, & that she became greatly injured in her good name & reputation & became sick & ill, & pltf. R., the husband, incurred great expense in nursing her and in endeavouring to get her cured:—*Held*: the declaration was bad, as it showed no sufficient special damage to support the action.—*ROBERTS v. ROBERTS* (1864), 5 B. & S. 384; 4 New Rep. 271; 33 L. J. Q. B. 249; 10 L. T. 602; 10 Jur. N. S. 1027; 12 W. R. 909; 122 E. R. 874.

Annotation:—Distd. Davies v. Solomon (1871), L. R. 7 Q. B. 112.

2102. — Capable of pecuniary estimation.]—*CHAMBERLAIN v. BOYD*, No. 2095, *ante*.

2103. — Actual not threatened loss necessary.]—*MICHAEL v. SPIERS & POND, LTD.*, No. 552, *ante*.

2104. Person acting in consequence of words spoken—Belief in words unnecessary.]—In order to support an action for defamatory words actionable only in respect of special damage, it is not necessary that the person whose act constitutes the special damage should have believed the defamatory charge, provided he acted in consequence of the words having been spoken.

In case for slanderous words, by reason of which pltf. was turned out of her lodging & employment, it appeared that deft. complained to E., the mistress of the house, who was his tenant, that her lodgers,

of whom pltf. was one, behaved improperly at the windows; & he added that no moral person would like to have such people in his house. E. stated in her evidence that she dismissed pltf. in consequence of the words, not because she believed them, but because she was afraid it would offend her landlord if pltf. remained:—*Held*: the action was maintainable, the special damage being the consequence of slanderous words used by deft.—*KNIGHT v. GIBBS* (1834), 1 Ad. & El. 43; 3 Nev. M. K. B. 467; 3 L. J. K. B. 135; 110 E. R. 1124.

Annotations:—Appld. Gillett v. Bullivant (1846), 7 O. S. 490. *Refd. Green v. Button* (1835), 5 L. J. Ex. 81; *Lynch v. Knight* (1861), 5 L. T. 291.

ii. Loss of Custom.

2105. Whether sufficient to sustain action—Where words not actionable per se.]—*PERRY v. PERRY* (1732), Kel. W. 71; 25 E. R. 496.

2106. —.]—In a declaration for slander pltf. stated that he was a jobber or dealer in the funds, & as such had been accustomed lawfully to contract; that deft. said of him, as such jobber or dealer, "He is a lame duck;" meaning that he had not fulfilled his contracts in respect of the said stocks or funds; in consequence of which divers persons refused to fulfil their contracts with him, specifying the contracts, & he was prevented from fulfilling his contracts with other persons:—*Held*: it did not sufficiently appear either that the words were spoken of lawful contracts, or that pltf. was a lawful jobber or dealer in the funds; & the declaration was therefore bad. *Qu.*: whether it can be stated as a special damage that divers persons refused to fulfil their contracts with pltf., since he might recover a compensation by action, if the contracts were lawful.—*MORRIS v. LANGDALE* (1800), 2 Bos. & P. 284; 126 E. R. 1284.

Consd. Lumley v. Gye (1853), 2 E. & B. 216.

Expld. Foulger v. Newcomb (1867), L. R. 2 Exch. 327. *Refd. Lynch v. Knight* (1861), 9 H. L. Cas. 577. *Mentd. Green v. Button* (1835), 2 Cr. M. & R. 707; *Greville v. Chapman* (1843), 8 Jur. 189.

2107. Possible illegality of business lost—Stock jobber & dealer.]—*MORRIS v. LANGDALE*, No. 2106, *ante*.

2108. Loss partly direct & partly indirect—Repetition.]—In an action for verbal slander not actionable *per se*, the declaration alleged for special damage, that, in consequence of the speaking of the words, four of pltf.'s customers had ceased to deal with him. Three of those persons proved only that they ceased to deal with pltf. in consequence of reports they had heard in the neighbourhood; but the fourth proved the speaking by deft. of words substantially as charged, & stated that he did not deal with pltf. afterwards:—*Held*: some evidence of special damage.—*BATEMAN v. LYALL* (1860), 7 C. B. N. S. 638; 1 L. T. 290; 141 E. R. 966.

Pleading & proof of loss.]—See Sub-sect. 3, B., *post*.

iii. Loss of Hospitality.

2109. Sufficient special damage.]—If in consequence of words spoken pltf. is deprived of substantial benefit arising from the hospitality of friends, this is a sufficient temporal damage

In a declaration by a husband & wife for the slander of the wife in accusing her of adultery:—*Held*: sufficient allegation of special damage that the wife had lost & been deprived of the hospitality of friends.—*CAMPBELL v. CAMPBELL* (1875), 25 C. P. 368.—*CAN*

PART VIII. SECT. 1, SUB-SECT. 4.—B. (a) ii.

2105 i. Whether sufficient to sustain action—Where words not actionable per se.]—*GEORGE v. BLOW* (1899), 20 N. S. W. L. R. 395; 16 N. S. W. W. N. 81.—*AUS.*

2105 ii. —.]—*SHEAHAN v. AHEARNE* (1875), 1 R. 9 C. L. 412.—*IR.*

PART VIII. SECT. 1, SUB-SECT. 4.—B. (a) iii.

2109 i. Sufficient special damage.]—

whereon to maintain an action.—**MOORE v. MEAGHER** (1807), 1 Taunt. 39; 127 E. R. 745, Ex. Ch.; *previous proceedings, sub nom. MEAGHER v. MOORE* (1806), 3 Smith, K. B. 135.

Annotations:—**Consd.** *Lynch v. Knight* (1861), 9 H. L. Cas. 577. **Expld.** *Davies v. Solomon* (1871), L. R. 7 Q. B. 112. **Refd.** *Parkins v. Scott* (1862), 1 H. & C. 153.

2110. —.]—The fact that defamatory words, not actionable in themselves, have occasioned illness, does not constitute special damage so as to give a right of action, either to the person defamed or, if a married woman, to her husband, illness not being the natural or immediate result of words spoken.

A declaration by husband & wife alleged that deft. falsely & maliciously spoke certain words of the wife imputing incontinence to her, whereby she lost the society of her neighbours, & became ill & unable to attend to her necessary affairs & business, & her husband incurred expense in curing her, & lost the society & assistance of his wife in his domestic affairs:—**Held**: the declaration disclosed no cause of action.—**ALLSOP v. ALLSOP** (1860), 5 H. & N. 534; 29 L. J. Ex. 315; 2 L. T. 290; 6 Jur. N. S. 433; 157 E. R. 1292; *sub nom. ALSOPP v. ALSOPP*, 8 W. R. 449.

Annotations:—**Apprvd.** *Lynch v. Knight* (1861), 9 H. L. Cas. 577. **Expld.** *Wilkinson v. Downton*, [1897] 2 Q. B. 57. **Refd.** *Chamberlain v. Boyd* (1883), 11 Q. B. D. 407. **Mentd.** *Jones v. Jones*, [1916] 2 A. C. 481; *Janvier v. Sweeney*, [1919] 2 K. B. 316.

2111. —.]—Declaration, by husband & wife, charged a slander imputing want of chastity to the wife, whereby she was “injured in her character & reputation, & became alienated from & deprived of the cohabitation of her husband, & lost & was deprived of the companionship, & ceased to receive the hospitality of divers friends, & especially of her husband,” & others named, who had “by reason of the premises withdrawn from the companionship & ceased to be hospitable to or friendly with her”:—**Held**: the loss of the hospitality of friends was the reasonable & natural consequence of the slander, & a loss to the wife herself of benefits which her husband was not bound to bestow upon her; & therefore, such loss of hospitality was special damage which would support an action by husband & wife.—**DAVIES v. SOLOMON** (1871), L. R. 7 Q. B. 112; 41 L. J. Q. B. 10; 25 L. T. 799; 36 J. P. 454; 20 W. R. 167.

2112. —.]—In an action for slander, evidence that a particular person, who was not present when the slander was uttered, has ceased to show hospitality to pltf. in consequence of a subsequent repetition by some one in such person’s hearing of the slander complained of is no evidence of special damage.

Semble: evidence of a general falling off, since the time when the slander was uttered, of the hospitality shown to pltf. is evidence of special damage.—**CLARKE v. MORGAN** (1877), 38 L. T. 354.

Annotation:—**Refd.** *Weld-Blundell v. Stephens*, [1920] A. C. 956.

iv. Loss of Marriage.

2113. By a man.—An action for defamation, *per quod* pltf. lost his marriage, will lie, although the words were only cognisable in the Spiritual Ct.—**MATTHEW v. CRASSE** (1613), 2 Bulst. 89; Cro. Jac. 323; 80 E. R. 983.

Annotation:—**Refd.** *Harrison v. Cage* (1697), 1 Ld. Raym. 386.

2114. —.]—**SELLY v. FACY** (1615), 3 Bulst. 48; 1 Roll. Rep. 79; 81 E. R. 41.

Annotations:—**Expld.** *Jeveson v. Moor* (1699), 12 Mod. Rep. 262. **Refd.** *Harrison v. Cage* (1697), 1 Ld. Raym. 386. **Mentd.** *Cane v. Golding* (1649), Sty. 176.

2115. —.]—An action reciting that A. being seised in fee, married B. & had issue C. between whom & D. there was a communication concerning marriage, & that deft. said, “Hath that bastard C. arrested you?” *per quod* C. lost his marriage, is maintainable, although the words be interrogative, & it be not averred that C. was the son of A. or that A. was seised in fee when the slander was spoken.—**NELSON v. STAFF** (1617), Cro. Jac. 422; 79 E. R. 360; *sub nom. NELSON’S CASE*, Jenk. 336.

2116. —.]—**TAYLOR v. TOLWIN** (1623), Lat. 218; Palm. 385; 82 E. R. 354.

2117. —.]—In slander, special damage is a good cause of action, although the words themselves be not actionable.—**WICKS v. SHEPHERD** (1629), Cro. Car. 155; 79 E. R. 735.

2118. —.]—To accuse another of adultery *per quod* he lost his marriage, is actionable.—**SOUTHOLD v. DAUNSTON** (1632), Cro. Car. 269; 79 E. R. 834.

Annotation:—**Refd.** *Harrison v. Cage* (1697), 1 Ld. Raym. 386.

2119. —.]—Slander, whereby he lost his marriage: & no agreement of marriage or mutual love alleged, & the words were spoken only in the innuendo, yet good.—**EDWARDS v. FRENCH** (1646), Aleyn, 6; 82 E. R. 885.

2120. —.]—**SHEPHERD v. WAKEMAN** (1662), 1 Keb. 459; 1 Lev. 53; 1 Sid. 79; 83 E. R. 1052.

Annotations:—**Expld.** *Haddan v. Lott* (1854), 15 C. B. 411. **Refd.** *Barnardiston v. Soame* (1674), 6 State Tr. 1063; *Lumley v. Gye* (1853), 2 E. & B. 216. **Mentd.** *Allen v. Flood*, [1898] A. C. 1.

2121. By a woman.—To say of a woman that “S. did get her with a child, & she had a child by him,” whereby she lost her marriage with D. is actionable; because if the woman had a bastard, she was punishable by 18 Eliz. c. 3; & though the words were a spiritual slander, yet the loss of marriage was temporal. For spiritual defamation, as calling one a whore, heretic, or adulterer, etc. no action lies without special damage. But it is actionable to say of a clergyman “he is an heretic,” etc. whereby he loses his preferment; or to charge a woman with incontinence, who is bound to live chaste, or holds an estate *quamdium casta vixerit*; or an innkeeper with having an infectious disease, by which she loses her guests.—**DAVIS v. GARDINER** (1593), 4 Co. Rep. 16 b.; Poph. 36; 76 E. R. 897.

Annotations:—**Expld.** *Brokes Case* (1595), Moore, K. B. 409. **Distd.** *Holwood v. Hopkins* (1600), Cro. Eliz. 787. **Apld.** *Matthew v. Crasse* (1614), 2 Bulst. 89. **Consd.** *Barnes v. Prudlin* (1669), 1 Sid. 396; *Anon.* (1695), 2 Salk. 694; *Byron v. Elms* (1696), Comb. 391. **Refd.** *Sneade v. Badley* (1615), 3 Bulst. 74; *Bernard v. Beale* (1618), Poph. 140; *Elborrow v. Allen* (1622), Palm. 299; *Law v. Harwood* (1628), Cro. Car. 140; *Wicks v. Shepherd* (1629), Cro. Car. 155; *Holder v. Dickeson* (1673), Freem. K. B. 95; *Potter v. Elliott* (1674), Freem. K. B. 274. **Mentd.** *Bold v. Bacon* (1594), Cro. Eliz. 346. *Darby Corpn. v. Foxley* (1615), 1 Roll. Rep. 118; *Vaughan v. Scandish* (1622), Palm. 298; *Savill v. Roberts* (1697), 1 Ld. Raym. 374; *Ogden v. Turner* (1703), Holt, K. B. 40; *Graves v. Blanchett* (1704), 6 Mod. Rep. 148.

2122. —.]—**RESTON v. POMFREICT** (1598), Cro. Eliz. 639; 78 E. R. 879.

2123. —.]—Spiritual defamation is not maintainable at common law, though a special damage ensue, unless it appear that the words were spoken for the purpose of the injury which ensues.

2109 ii. —.]—**PALMER v. SOLMES** (Sask.), [1918] 3 W. W. R. 55.—**CAN.** 45 U. C. R. 15.—**CAN.**

2109 iii. —.]—**BALL v. DONNELLY**

(Sask.), [1918] 3 W. W. R. 55.—**CAN.** 2109 iv. —.]—Loss of association & hospitality of friends has been held

to be special damages.—**MITCHELL v. CLEMENT**, [1919] 1 W. W. R. 183.—**CAN.**

Sect. 1.—Damages: Sub-sect. 4, B. (a) iv., v., vi., vii. & viii., & (b).]

If the words had been spoken to him who was in communication to have married her, so as it had appeared that he purposely intended to hinder the marriage, the action had been maintainable for the loss which she sustained (*per Cur.*).—*HOLWOOD v. HOPKINS* (1600), Cro. Eliz. 787; 78 E. R. 1017.

Annotation:—Mentd. Ratcliffe v. Evans, [1892] 2 Q. B. 524.

2124. —.]—*SHEPHERD v. WAKEMAN* (1662), 1 Keb. 459; 1 Lev. 53; 1 Sid. 79; 83 E. R. 1052.

Annotations:—Expld. Haddan v. Lott (1854), 15 C. B. 411. *Refd. Barnardiston v. Soame* (1674), 6 State Tr. 1063; *Lumley v. Gye* (1853), 2 E. & B. 216. *Mentd. Allen v. Flood, [1898] A. C. 1.*

v. Loss of consortium.

2125. Action by wife.]—LYNCH v. KNIGHT, No. 2093, *ante*.

2126. — Jointly with husband.]—*DAVIES v. SOLOMON*, No. 2111, *ante*.

2127. Action by husband—Wife not present when slander spoken.]—ARGENT v. DONIGAN (1892), 8 T. L. R. 432, N. P.

Consortium generally.]—See HUSBAND & WIFE, Vol. XXVII., pp. 78 et seq.

vi. Loss of Office or Employment.

2128. Whether sufficient special damage.]—HAWK v. ROWE (1663), 1 Sid. 131; 82 E. R. 1013.

2129. —.]—In an action for consequential damage from slander, imputing incontinence to pltf., it is enough to state that he was employed to preach to a dissenting congregation at a certain licenced chapel situated at A.; that he derived considerable profit from his preaching; & that, by reason of the scandal, "persons frequenting the chapel had refused to permit him to preach there, & had discontinued giving him the profits which they usually had & otherwise would have given," without saying who those persons were, or by what authority they excluded him, or that he was a preacher duly qualified according to 10 Anne, c. 2.—*HARTLEY v. HERRING* (1799), 8 Term Rep. 130; 101 E. R. 1305.

Annotations:—Apld. Moore v. Meagher (1807), 1 Taunt. 39; *Rogers v. Rajendro Dutt* (1860), 13 Moo. P. C. C. 209. *Refd. Hopwood v. Thorn* (1849), 8 C. B. 293; *Hoey v. Felton* (1861), 11 C. B. N. S. 142; *Pickering v. James* (1873), 42 L. J. C. P. 217; *Clarke v. Morgan* (1877), 38 L. T. 354; *Ratcliffe v. Evans, [1892] 2 Q. B. 524.*

2130. —.]—An allegation in a declaration in slander, which states, that "by reason of the premises, divers persons, to wit," etc., "who would otherwise have retained & employed pltf., wholly declined & refused so to do," is not supported by evidence which shows that other persons would have recommended pltf. & that the persons named in the declaration would have employed him on such recommendation.—*STERRY v. FOREMAN* (1827), 2 C. & P. 592.

2131. —.]—*KELLY v. PARTINGTON*, No. 200, *ante*.

2132. —.]—*KNIGHT v. GIBBS*, No. 2104, *ante*.

2133. —.]—(1) The dismissal by the police comrs. of a police constable, in consequence of a report duly made to them of a censure uttered on such police officer by a justice of the peace, is in itself sufficient evidence of special damage to sustain an action against the justice.

(2) In such an action evidence of malice is necessary; for it is the duty of the justice to express his opinion of the conduct of police constables, in order that the police comrs. may have proper information on which to proceed in making inquiries to enable them to regulate the force under their direction.

(3) I have no doubt in my mind that a magistrate, be he the highest judge in the land, is answerable in damages for slanderous language, either not relevant to the cause before him or uttered after the cause is at an end; but for words uttered in the course of his duty no magistrate is answerable, either civilly or criminally, unless express malice & the absence of reasonable or probable cause be established (*LORD DENMAN, C.J.*).—*KENDILLON v. MALTBY* (1842), Car. & M. 402; 2 Mood. & R. 438, N. P.

Annotations:—As to (2) Refd. Rogers v. Rajendro Dutt (1860), 13 Moo. P. C. C. 209; *Parkins v. Scott* (1862), 2 F. & F. 799; *Speight v. Gosnay* (1891), 60 L. J. Q. B. 231. *As to (3) Consd. Seaman v. Netherclift* (1876), 1 C. P. D. 540. *Dbtd. Munster v. Lamb* (1883), 11 Q. B. D. 588.

2134. —.]—*ECKLIN v. LITTLE* (1890), 6 T. L. R. 366, D. C.

2135. —.]—Where an action of slander was brought in respect of a statement made by deft. to pltf.'s employers that pltf. had removed from premises, leaving rent due to his landlord, pltf. alleging that he had in consequence of that statement been dismissed from the service of his employers:—*Held*: the action would not lie, the damage alleged being too remote.—*SPEAKE v. HUGHES, [1904] 1 K. B. 138; 73 L. J. K. B. 172; 89 L. T. 576, C. A.*

vii. Damage resulting from Repetition.

Repetition generally.]—See Part V., Sect. 3, ante.

2136. Insufficient.]—Pltf. alleged special damage from words spoken by the deft.:—Held: this allegation could not be supported by proof that deft. had spoken the words to B., & that damage ensued in consequence of B.'s repeating them as the words of deft.—*WARD v. WEEKS* (1830), 7 Bing. 211; 4 Moo. & P. 796; 9 L. J. O. S. C. P. 6; 131 E. R. 81.

Annotations:—Folld. Parkins v. Scott (1862), 1 H. & C. 153; *Clarke v. Morgan* (1877), 38 L. T. 354. *Apprvd. Weld-Blundell v. Stephens, [1920] A. C. 956. Refd. Green v. Button* (1835), 2 Cr. M. & R. 707; *Gillett v. Bullivant* (1846), 7 L. T. O. S. 490; *Hopwood v. Thorn* (1849), 8 C. B. 293; *Bateman v. Lyall* (1860), 7 C. B. N. S. 638; *Rogers v. Rajendro Dutt* (1860), 13 Moo. P. C. C. 209; *Lynch v. Knight* (1861), 5 L. T. 291; *Hirst v. Goodwin* (1862), 3 F. & F. 257; *Riding v. Smith* (1876), 1 Ex. D. 91; *Thorley's Cattle Food Co. v. Massam* (1880), 14 Ch. D. 763; *Ecklin v. Little* (1890), 6 T. L. R. 366; *Ratcliffe v. Evans, [1892] 2 Q. B. 524. Mentd. Pilmore v. Hood* (1838), 5 Bing. N. C. 97; *Keene v. Dilke* (1849), 4 Exch. 388; *Lumley v. Gye* (1853), 2 E. & B. 216; *Harnett v. Bond, [1924] 2 K. B. 517.*

2137. —.]—A. spoke slanderous words of B. in the hearing of A., B. & C. only; C. repeated the slander to D., who in consequence would not employ B.:—*Held*: in an action by B. against A. this special damage could not be gone into as D. did not hear A. speak the words.—*TUNNICLIFFE v. MOSS* (1850), 3 Car. & Kir. 83.

2138. —.]—*CLARKE v. MORGAN*, No. 2112, *ante*.

2139. —.]—*SPEIGHT v. GOSNAY*, No. 1188, *ante*.

2140. —.]—*ARGENT v. DONIGAN* (1892), 8 T. L. R. 432, N. P.

PART VIII. SECT. 1, SUB-SECT. 4.— B. (a) v.

2125 i. Action by wife.]—A declara-

tion by a married woman for slander imputing that she had committed incest & adultery with her father, & alleging as grounds of special damage

the loss of the consortium of her husband:—*Held*: good.—*PALMER v. SOLMES* (1880), 45 U. C. R. 15.—*CAN.*

viii. Other Cases.

2141. Likelihood of divorce.]—Likelihood of divorce cannot be laid as special damage.—**BARMUND'S CASE** (1818), Cro. Jac. 473; 79 E. R. 404.

2142. Loss of tenancy.]—**ROUNGS v. WOODYARD** (1854), Sty. 426; 82 E. R. 833.

2143. Loss of theatre profits—Libel on one of plaintiff's performers.]—Case will not lie for libelling a performer on the stage who is thereby prevented from acting, whereby pltf. lost the profits of her performance.—**ASHLEY v. HARRISON** (1793), 1 Esp. 48; Peake, 256, N. P.

Annotations:—**Refd.** **Rogers v. Rajendro Dutt** (1860), 13 Moo. P. C. C. 209; **Chamberlain v. Boyd** (1883), 11 Q. B. 407; **Ratcliffe v. Evans**, [1892] 2 Q. B. 524. **Mentd.** **Lumley v. Gye** (1853), 2 E. & B. 216.

2144. Loss of business transaction—Though possibly unprofitable.]—(1) The saying of a commission agent that he is an unprincipled man, & borrowed money without repaying it, is not actionable unless there be special damage; but if this was said to a person who was going to deal with him, & did not do so in consequence of the speaking of the words, that is special damage, although, if the person had dealt with him, the dealing might have turned out unprofitable.

(2) If A. is going to have dealings with B., & he make inquiries of C., who gives A. information respecting B., this is a privileged communication, as every one is quite at liberty to state his opinions *bonâ fide* of the respectability of a party thus inquired about.—**STOREY v. CHALLANDS** (1837), 8 C. & P. 234, N. P.

Annotation:—**As to** (2) **Consd.** **Greenlands v. Wilmshurst & London Assn. for Protection of Trade**, [1913] 3 K. B. 507.

2145. Non-delivery of goods bought.]—If A. has sold goods to B. a tradesman, &, before the delivery of them C., without being asked or solicited in any way to do so, speak words injurious to the credit of B. as a tradesman, this is not a privileged communication; but if he had been asked by A. as to the credit of B., it would have been so.—**KING v. WATTS** (1838), 8 C. & P. 614, N. P.

Annotation:—**Refd.** **Coxhead v. Richards** (1846), 2 C. B. 569.

2146. Illness of wife.]—In an action for a libel which imputed that pltf.'s house was opened as a gaming-house, under the leadership of a woman of notorious character. Pltf. alleged in his declaration that his house was a club-house, & that divers persons paid annual subscriptions. The payment of subscriptions was denied by one of deft.'s pleas, & evidence was given that a book was kept for subscribers' names, & that two gentlemen wrote their names in this book; but no evidence was given of the payment of any subscription:—**Held:** (1) there was evidence to go to the jury in support of the allegation in the declaration. Def. pleaded several pleas, but none of them at all referring to pltf.'s wife; (2) pltf. could not go into evidence to show that his wife was a respectable person, as on these

pleadings she must be taken to be so:—**Held:** (3) pltf. could not go into evidence to show that his wife had become ill, & died soon after the publication of the libels.

Pltf. could not in this action recover damages either for the sufferings of his wife, or for the loss occasioned by her death (**COLERIDGE, J.**).—**GUY v. GREGORY** (1840), 9 C. & P. 584, N. P.

2147. ———.]—**ALLSOP v. ALLSOP**, No. 2110, *ante*.

2148. ———.]—**ROBERTS v. ROBERTS**, No. 2101, *ante*.

2149. Injury to feelings.]—**WELDON v. DE BATHE**, No. 2096, *ante*.

2150. Delay in settlement of claim.]—**HANCOCK v. CASE** (1862), 2 F. & F. 711.

2151. Loss of membership—Of religious society.]—**ROBERTS v. ROBERTS**, No. 2101, *ante*.

2152. ——— **Election to club.]**—**WALKLIN v. JOHNS** (1891), 7 T. L. R. 292, C. A.

(b) Pleading and Proof.

2153. Pleading—To be pleaded specially & with certainty.]—**RATCLIFFE v. EVANS**, No. 2086, *ante*.

2154. ——— **Loss of marriage—Name of person refusing to marry.]**—In an action for saying, "You are a whore," by which she lost her marriage, the name of the person who refused to marry her must be set forth.—**WETHERELL v. CLERKSON** (1701), 12 Mod. Rep. 597; 2 Lut. 1295; 88 E. R. 1544.

2155. ——— **Loss of custom—No names of customers pleaded.]**—**GROVE v. HART** (1752), Bull. N. P. 7, N. P.

Annotation:—**Refd.** **Ratcliffe v. Evans** (1892), 56 J. P. 837.

2156. Proof—To be proved specially & with certainty.]—**RATCLIFFE v. EVANS**, No. 2086, *ante*.

2157. ——— **Loss of custom—Particular customer & others—Evidence only as to particular customer.]**—Case for words by which he lost the custom of S. & several others; pltf. shall only be admitted to prove the loss of S.'s custom particularly.—**BROWNING v. NEWMAN** (1725), 1 Stra. 666; 93 E. R. 769.

2158. ——— **Evidence of general loss of custom—Admissibility.]**—In an action for slander of pltf. in his business of innkeeper, it is sufficient to allege & prove, as special damage, a general loss of custom, without stating the names of the customers who ceased to frequent the inn.—**EVANS v. HARRIES** (1856), 1 H. & N. 251; 26 L. J. Ex. 31; 156 E. R. 1197.

Annotations:—**Consd.** **Bateman v. Lyall** (1860), 7 C. B. N. S. 638. **Appld.** **Riding v. Smith** (1876), 1 Ex. D. 91. **Consd.** **Clarke v. Morgan** (1877), 38 L. T. 354; **Ratcliffe v. Evans**, [1892] 2 Q. B. 524.

2159. ——— ——— ———.]—**RIDING v. SMITH**, No. 2094, *ante*.

2160. ——— ——— ———.]—**RATCLIFFE v. EVANS**, No. 2086, *ante*.

2161. ——— **Loss of employment & emoluments thereof—Names & authority of persons depriving plaintiff.]**—**HARTLEY v. HERRING**, No. 2129, *ante*.

PART VIII. SECT. 1, SUB-SECT. 4.—
B. (a) viii.

2142 i. Loss of tenancy.]—**MANITOBA FREE PRESS CO. v. NAGY** (1907), 27 C. L. T. 783; 39 S. C. R. 340.—**CAN.**

i. Falling off of sale of lottery tickets.]—**WESTERN AUSTRALIA NEWS-PAPER CO., LTD. v. SALTER** (1916), 18 W. A. L. R. 103.—**AUS.**

PART VIII. SECT. 1, SUB-SECT. 4.—
B. (b).

2153 i. Pleading—To be pleaded

specially & with certainty.]—**JACKSON v. SIMPSON** (1848), 4 U. C. R. 287.—**CAN.**

2153 ii. ———.]—Where special damages are sought to be recovered in an action of libel, or for verbal slander where the words are actionable *per se*, such special damage must be alleged & pleaded with particularity.—**ASHDOWN v. MANITOBA "FREE PRESS" CO.** (1891), 20 S. C. R. 43.—**CAN.**

2153 iii. ———.]—**CATTON v. GLEASON** (1891), 14 P. R. 222.—**CAN.**

2155 i. ——— **Loss of custom—No names**

of customers pleaded.]—**ALLMAN v. KENSEL** (1862), 3 P. R. 110.—**CAN.**

2156 i. Proof—To be proved specially & with certainty.]—**GAMBLE v. HIRSCH-FIELD** (1894), 26 N. S. R. (14 R. & G.) 468.—**CAN.**

2156 ii. ———.]—**WHITLING v. FLEMING** (1908), 16 O. L. R. 263; 11 O. W. R. 820.—**CAN.**

2156 iii. ———.]—Where special damage is alleged, it must be strictly proved.—**STEWART v. STERLING** (1918), 42 O. L. R. 477; 14 O. W. N. 56; 41 D. L. R. 728.—**CAN.**

Sect. 1.—Damages: Sub-sect. 5. Sect. 2: Sub-sects. 1 & 2, A.]

SUB-SECT. 5.—THE AWARD AND JUDGMENT THEREON.

2162. Statement only partly actionable—Award of entire damages—Whether plaintiff entitled to judgment.]—LYNKER v. STANWEL (1610), 1 Bulst. 37; 80 E. R. 741.

2163. ————.]—MEFLYNE v. FARNEDEN (1617), 3 Bulst. 283; 81 E. R. 239.

2164. ————.]—In an action for words laid to have been spoken at different times, if some of them are actionable & others not, & entire damages be given, etc., judgment shall be arrested.—STEBBING v. WARNER (1709), 11 Mod. Rep. 255; 88 E. R. 1023.

2165. ————.]—The ct. will not arrest the judgment in an action for words in one count, though some of them be not actionable. *Secus*, where there are two counts & none of the words in one are actionable, & a general verdict for plffs.—LLOYD v. MORRIS (1743), Willes, 443; 125 E. R. 1259.

2166. ————.]—GRIFFITHS v. LEWIS, No. 327, *ante*.

2167. ————.]—One of several counts not actionable.]—LLOYD v. MORRIS, No. 2165, *ante*.

2168. ————.]—No valid judgment can be given upon an assessment of entire damages upon several counts in slander, one of which counts discloses no cause of action.—DAY v. ROBINSON (1835), 1 Ad. & El. 554; 4 Nev. & M. K. B. 884; 3 L. J. Ex. 381; 110 E. R. 1319, Ex. Ch.

*Annotations:—*Refd. West v. Smith (1836), Tyr. & Gr. 825; Empson v. Griffin (1839), 11 Ad. & El. 186; Lewin v. Edwards (1842), 6 Jur. 401. *Mentd.* Williams v. Gardiner (1836), 1 M. & W. 245.

2169. ————.]—Where one of several counts in a declaration for slander was bad, & some of the defamatory words in it were proved at the trial, & the jury found a general verdict, with damages, for plff., the ct. set aside an order of the judge who tried the cause to confine the verdict & damages to one of the good counts, & awarded a *venire de novo*.—EMPSON v. GRIFFIN (1839), 11 Ad. & El. 186; 3 Per. & Dav. 160; 9 L. J. Q. B. 23; 113 E. R. 385.

*Annotation:—*Mentd. R. v. Virrier (1840), 4 Per. & Dav. 161.

2170. ————.]—PEMBERTON v. COLLS, No. 427, *ante*.

2171. Severing damages—Entire judgment for both issues—One issue erroneous.]—If several damages be given on two issues, & an entire judgment entered for both; if one of the issues be erroneous, it shall be reversed for the whole.—LOYD v. PEARSE (1612), Cro. Jac. 424; 79 E. R. 362.

2172. ————.]—Joint defendants—Power of jury.]—Plff. claimed damages in respect of a libel from two defts. who joined in their defence. The jury found a verdict for plff., assessing the damages at £500—£495 against one deft. & £5 against the other:—*Held*: the jury had no power in such a case to sever the damages, & judgment was properly entered for £500 against both defts.—

PART VIII. SECT. 1, SUB-SECT. 5.

*a. Function of jury.]—*KENDALL v. SYDNEY POST PUBLISHING CO. (1909), 7 E. L. R. 410.—CAN.

*b. Jury finding no damages—Reconsideration of verdict.]—*If in an action for slander, the words in question not being actionable *per se*, the

jury bring in a verdict for plff., but find no damages, the proper course is to instruct them that damages is of the essence & send them back to reconsider their verdict, & the jury may bring in a verdict for nominal damages. *REID v. ARNOTT*, [1921] 2 W. W. R. 983.—CAN.

—.]—KAPT v. STAR

DAMIENS v. MODERN SOCIETY, LTD. (1910), 27 T. L. R. 164.

*Annotations:—*Refd. Greenlands v. Wilmshurst & London Asscn. for Protection of Trade, [1913] 3 K. B. 507; Pratt v. British Medical Asscn., [1919] 1 K. B. 244.

2173. ————.]—Action for libel & slander—Verdict for plaintiff on both issues.]—SHIPLEY v. TODHUNTER, No. 896, *ante*.

2174. ————.]—Entire damages to cover both issues—No judgment for either party.]—Plff. sued deft. for a slander & for a libel. Dft. pleaded an apology, & paid into ct. two sums of £105 each, one in respect of the slander & the other in respect of the libel. The jury returned a verdict for a lump sum of £200 to cover both causes of action:—*Held*: no verdict, & no judgment could be entered upon it for either party.

By R. S. C. Ord. 22, r. 2, "Payment into ct. shall be signified in the defence, & the claim or cause of action in satisfaction of which such payment is made shall be specified therein."

Semble: a plea of payment into ct. of one sum in respect of two or more separate causes of action is a bad plea under R. S. C., Ord. 22, r. 2, & not merely a ground for an application by plff. for particulars.—WEBER v. BIRKETT, [1925] 2 K. B. 152; 94 L. J. K. B. 767; 133 L. T. 598; 41 T. L. R.

*consolidated—Apportionment of entire sum.]—*STONE v. PRESS ASSOCN., No. 2300, *post*.

2176. Specific sum claimed—Interlocutory judgment in default of defence—Assessment by sheriff's jury of higher sum—Judgment signed for latter sum without amendment of statement of claim.]—In an action of libel plff. claimed £1000 damages. No defence was delivered, & interlocutory judgment was signed for the damages to be assessed in the Sheriff's Ct. The jury returned a verdict for £2,500. Plff., without applying to amend the statement of claim, signed judgment for this amount:—*Held*: the judgment was bad.—CHATTELL v. "DAILY MAIL" PUBLISHING CO., LTD. (1901), 18 T. L. R. 165, C. A.

SECT. 2.—COSTS.

SUB-SECT. 1.—IN GENERAL.

*Costs generally.]—*See R. S. C., Ord. 65, & PRACTICE.

2177. Apology by defendant—& agreement to pay costs—Proceedings stayed on these terms—Effect of failure to pay costs.]—Where, after notice of declaration in an action of slander, deft. signs a paper containing an apology, & a statement, that at his request plff. has consented, on his paying the costs as between attorney & client, & making such apology, to stay the proceedings therein, & notice of trial is accordingly countermanded, the ct. will require deft. to pay such costs, & empower plff. to sign judgment as for want of a plea, in case of non-payment thereof.—YARDREW v. BROOK (1833), 2 Nev. & M. K. B. 835.

2178. Consecutive actions—Plaintiff non-sued on first—Second action stayed until costs of first paid.]—Where plff. in an action of slander had been

PUBLISHING CO., LTD., [1925] 4 D. L. R. 129; 3 W. W. R. 177.—CAN.

PART VIII. SECT. 2, SUB-SECT. 1.

*d. Apology by defendant—Effect of failure to pay costs.]—*EASTWOOD v. HENDERSON (1897), 17 P. R. 578.—CAN.

nonsuited upon the merits, & afterwards brought a second action against deft. substantially for the same supposed cause of action, though slightly varying the words charged to have been spoken, the ct. stayed the proceedings in the second action, until the costs of the first should have been paid.—*HOARE v. DICKSON* (1849), 7 C. B. 164; 6 Dow. & L. 577; 18 L. J. C. P. 158; 12 L. T. O. S. 402; 137 E. R. 67.

Annotations:—*Refd.* *Cobbett v. Warner* (1866), L. R. 2 Q. B. 108; *Morton v. Palmer* (1882), 9 Q. B. D. 89. *Mentd.* *Hoare v. Silverlock* (1850), 9 C. B. 20.

2179. Certificate for costs in slander—Power of court.—The judge may certify for costs in an action of slander.—*MOWERS v. CHATFIELD* (1860), 2 F. & F. 200.

SUB-SECT. 2.—WHERE PLAINTIFF SUCCESSFUL.

A. In General.

See Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 50, & R. S. C., Ord. 65, r. 1.

2180. Whether costs follow event.—In an action for slander the jury found the main issue in favour of pltf., but returned a verdict for one farthing damages only:—*Held*: pltf. was entitled to the costs of the action.—*MACALISTER v. STEEDMAN* (1911), 27 T. L. R. 217.

2181. — Discretion of court.—Pltf. sued deft. for slander in respect of a statement that pltf. had at a Parliamentary election voted twice in one division. Deft. admitted publication, & paid £10 10s. into ct. in respect of the words complained of without the meanings alleged in the innuendo which he denied, & pleaded in mitigation of damages certain letters of apology which he had written. At the trial the jury found a verdict for pltf. with one farthing damages:—*Held*: there was no reason shown for interfering with the exercise of the judge's discretion in giving pltf. his costs of the action.

It was plain from R. S. C. Ord. 22, r. 1, that in actions for libel and slander money could not be paid into ct. in respect of matters as to which deft. denied liability in his pleadings (*VAUGHAN WILLIAMS, L.J.*).—*KINNELL v. WALKER* (1911), 27 T. L. R. 257, C. A.

2182. ——21 Jac. 1, c. 16, s. 6, by which in actions for slanderous words, if the damages are

under 40s. pltf. shall only recover as much costs as damages is not repealed by the Jud. Acts.

Therefore, where pltf. in an action for slander for words actionable without special damage, recovered one farthing, & no order was made as to costs:—*Held*: pltf. was entitled to one farthing costs only.—*BOWEY v. BELL* (1877), 36 L. T. 640, C. A.; *subsequent proceedings, sub nom. BOWEY v. BELL, BROOKS v. ISRAEL, NORTH v. BILTON, SIDMONS v. LAWRENCE* (1878), 4 Q. B. D. 95, D. C. *Annotation*:—*Expld.* *Bowey v. Bell, Brooks v. Israel, North v. Bilton, Siddons v. Lawrence* (1878), 4 Q. B. D. 95.

See, now, No. 2184, post.

2183. — No certificate as to costs.—Pltf. in an action of libel recovered one farthing damages. The judge at the trial refused to give any certificate with regard to costs:—*Held*: pltf. was entitled to costs.—*PARSONS v. TINLING* (1877), 2 C. P. D. 119; 46 L. J. Q. B. 230; 35 L. T. 851; 41 J. P. 311; 25 W. R. 255.

Annotations:—*Folld.* *Bowey v. Bell* (1877), 36 L. T. 550. *Apprvd.* *Garnett v. Bradley* (1878), 3 App. Cas. 944. *Refd.* *Bowey v. Bell, Brooks v. Israel, North v. Bilton, Siddons v. Lawrence* (1878), 4 Q. B. D. 95; *Myers v. Defries* (1880), 49 L. J. Q. B. 266. *Mentd.* *Green v. Wright* (1877), 2 C. P. D. 354; *Clark v. Wallond* (1883), 52 L. J. Q. B. 321; *Re Wood's Estate, Ex p. Works & Buildings Comrs.* (1886), 31 Ch. D. 607.

2184. ——Where in an action for slander tried by a jury, pltf. obtained a verdict with nominal damages, the judge at the trial refusing to certify for costs:—*Held*: pltf. was entitled to his full costs.—*GARNETT v. BRADLEY* (1878), 3 App. Cas. 944; 48 L. J. Q. B. 186; 39 L. T. 261; 43 J. P. 20; 26 W. R. 698, H. L.; *revsq.* (1877), 2 Ex. D. 349, C. A.

Annotations:—*Consd.* *Bowey v. Bell, Brooks v. Israel, North v. Bilton, Siddons v. Lawrence* (1878), 4 Q. B. D. 95. *Apld.* *King v. Hawksworth* (1879), 48 L. J. Q. B. 484. *Refd.* *Ex p. Mercers' Co.* (1879), 10 Ch. D. 481. *Mentd.* *Clarke v. Roche* (1877), 36 L. T. 727; *Monmouth Corp'n. & Monmouth Churchwardens & Overseers, etc.* (1878), 38 L. T. 612; *Barton v. Titmarsh* (1880), 49 L. J. Q. B. 573; *The Ganges* (1880), 5 P. D. 247; *Marsden v. L. & Y. Ry.* (1880), 42 L. T. 630; *Myers v. Defries* (1880), 5 Ex. D. 180; *Pellas v. Neptune Marine Insee.* (1880), 28 W. R. 405; *Tennant v. Ellis* (1880), 6 Q. B. D. 46; *Re Morris, Ex p. Streeter* (1881), 19 Ch. D. 216; *Turner v. Bridgett & Wright* (1882), 51 L. J. Q. B. 377; *Bradlaugh v. Clarke* (1883), 8 App. Cas. 354; *Re Knight's Will* (1884), 26 Ch. D. 82; *Hasker v. Wood* (1885), 54 L. J. Q. B. 419; *Parnell v. Mort, Liddell* (1885), 33 W. R. 481; *Snelling v. Pulling* (1885), 52 L. T. 335; *Re Mills' Estate, Ex p. Works & Public Buildings Comrs.* (1886), 34 Ch. D. 24; *Stokes v. Stokes* (1887), 19 Q. B. D. 419; *Re Williams, Jones v. Williams* (1887), 36 Ch. D. 573; *Re Jones* (1889), 59 L. J. Ch. 157; *Rockett v. Chippingdale*,

2179i. Certificate for costs in slander—Power of court.—*STEWART v. MOFFATT* (1869), 20 C. P. 89.—CAN.

2179ii. ——*SHILLINGLAW v. WHILLIER* (1909), 19 Man. L. R. 149.—CAN.

e. Written or spoken defamation—Costs on same footing.—11 Vict. No. 13, s. 1, according to its true construction, placed an action for words spoken upon the same footing as regards costs & other matters as an action for written slander.—*HARRIS v. DAVIES* (1885), 10 App. Cas. 279.—AUS.

f. Not question for jury.—The jury in an action for slander have no right to give costs by their verdict.—*CAMPBELL v. LINTON* (1868), 27 U. C. R. 563.—CAN.

g. Discretion of judge.—*SKINNER v. MAIR* (1837), 5 O. S. 337.—CAN.

h. ——*HOGLE v. HOGLE* (1858), 16 U. C. R. 518.—CAN.

k. ——*LUOYK v. GOSKI* (1912), 21 W. L. R. 581; 2 W. W. R. 669.—CAN.

PART VIII. SECT. 2, SUB-SECT. 2.—A.

2180i. Whether costs follow event.—In an action for libel the jury found a verdict for pltf. with one farthing

damages. It was not apparent what had actuated the minds of the jury in assessing the damages at one farthing:

—*Held*: in the circumstances the ordinary rule should prevail, & costs should be awarded to pltf.—*LATHAM v. SIMONS* (1920), 23 W. A. L. R. 15.—AUS.

2180ii. ——*PEDDER v. MOORE* (1855), 1 P. R. 117.—CAN.

2180iii. ——*WOOD v. MACKAY* (1880), 20 N. B. R. (4 P. & B.) 262.—CAN.

2180iv. ——*WILSON v. ROBERTS* (1885), 11 P. R. 412.—CAN.

2180v. ——*BARSS v. WALLACE* (1888), 20 N. S. R. (8 R. & G.) 504.—CAN.

2180vi. ——*CROFT v. JODREY* (1895), 28 N. S. R. (16 R. & G.) 78.—CAN.

2180vii. ——When the jury in an action for libel finds a verdict for pltf. with only one dollar damages, deft. should not be ordered to pay costs.—*MANITOBA FARMERS' HEDGE & WIRE FENCE CO. v. STOVEL CO.* (1903), 14 Man. L. R. 55.—CAN.

2180viii. ——Where in an action for libel pltf. recovers only five

cents by way of damages, he is entitled to his costs in the absence of evidence of misconduct or of any reason for depriving him of costs other than the smallness of the damages awarded.—*EMERSON v. FORD-McCONNELL, LTD.* (1911), 16 B. C. R. 193.—CAN.

2180ix. ——*GALLAGHER v. O'NEILL* (1896), 34 N. B. R. 194.—CAN.

2180x. ——*BELL v. WILSON* (1900), 19 P. R. 167.—CAN.

2180xi. ——The fact that a pltf. in a libel action recovers merely a nominal sum as damages does not *per se* warrant his being deprived of costs.—*MACKENZIE v. CUNNINGHAM* (1901), 8 B. C. R. 206.—CAN.

2180xii. ——The practice of allowing no greater costs than damages in actions of slander, where the verdict is under forty shillings, is no longer the practice in either the Supreme Ct. or in the county cts. The costs now follow the event, unless otherwise ordered.—*ROSENBERG v. RICH* 45 N. B. R. 86.—CAN.

2181i. — Discretion of court.—*ADAMS v. MCKENZIE* (1889), 22 N. S. R. (10 R. & G.) 50.—CAN.

2181ii. ——*MAGEE v. MOYERS* (1870), 18 W. R. 842.—CAN.

Sect. 2.—Costs: Sub-sect. 2, A., B. (a) & (b), & C.; sub-sect. 3.]

[1891] 2 Q. B. 293; *Goldhill v. Clarke* (1892), 68 L. T. 414; *Re Fisher* (1894), 63 L. J. Ch. 235; *R. v. L. C. C. JJ.*, [1894] 1 Q. B. 453; *The Dragoon* (1895), 11 T. L. R. 428; *R. v. London JJ.*, [1895] 1 Q. B. 616; *Ston College v. London Corp.*, [1900] 2 Q. B. 581; *R. v. Speyer*, [1916] 2 K. B. 858; *Banbury v. Bank of Montreal*, [1918] A. C. 626; *Roid, Hewitt v. Joseph*, [1918] A. C. 717.

2185. — Application to Liverpool Court of Passage.]—A pltf. who recovers a shilling damages in an action for slander tried by a jury in the Liverpool Ct. of Passage is entitled to his costs, unless the judge before whom the action was tried has ordered otherwise.—*KING v. KAWKESWORTH* (1879), 4 Q. B. D. 371; 48 L. J. Q. B. 484; 41 L. T. 411; 27 W. R. 660, D. C.

Annotations:—*Mentd.* *Poyser v. Minors* (1881), 50 L. J. Q. B. 555; *Ex p. Spelman*, [1895] 2 Q. B. 174.

2186. —.]—The Law of Libel Amendment Act, 1888 (c. 64), is not retrospective. In spite of the provision in Law of Libel Amendment Act, 1888 (c. 64), s. 5, that where actions have been consolidated the judge at the trial, if he awards to pltf. the costs of the action, shall thereupon make such order as he shall deem just for the apportionment of such costs between & against defts., R. S. C., Ord. 65, r. 1, still applies, & therefore costs ought to follow the event unless good cause is shown.

Costs ought to follow the event, unless good cause be shown. It has been held that contemptuous damages are good cause. Here the damages though not large are not contemptuous (*CHARLES, J.*).—*HOPLEY v. WILLIAMS* (1889), 53 J. P. 822; 6 T. L. R. 3.

2187. — Sum awarded indicating jury's approval of plaintiff.]—In considering whether to certify for costs upon a verdict being found for pltf. in an action for slander, the judge, although he disapproves himself of the action having been brought, will give effect to an indication by the jury of a contrary opinion, & will treat a verdict for 40s. as such an indication.—*HUME v. MARSHALL* (1877), 37 L. T. 711; 42 J. P. 136.

— **Good cause for depriving plaintiff of costs.]**
—*See Nos. 2199–2204, post.*

2188. — More than one defendant—Consolidation of actions.]—*HOPLEY v. WILLIAMS*, No. 2186, *ante*.

2189. Discretion of master—Cost of witnesses.]—The master is in general sole judge of what witnesses shall be allowed on taxation, & therefore when he had, in an action of libel, disallowed all witnesses to prove innuendoes, the ct. refused to interfere to make him review his taxation.—*SKELTON v. SEWARD* (1832), 1 Dowl. 411.

2190. Apology of defendant—Accepted by plaintiff—Discretion of court.]—Def. tendered an apology & paid money into ct. in satisfaction of pltf.'s claim. After certain further proceedings pltf. accepted the apology & the money paid into ct. in satisfaction. The judge at chambers allowed pltf. full costs. Def. contended that he should be allowed costs incurred subsequent to the payment into ct. & appealed:—*Held*: there is no provision whereby "good cause" in such a case can be shown to deprive pltf. of his costs; the costs were in the discretion of the judge, & therefore no appeal lay.—*MARRIAGE v. WILSON* (1889), 53 J. P. 120, D. C.

2191. Less sum awarded than sum paid into

court.]—*BEST v. OSBORNE, GARRETT & Co.* (1896), 12 T. L. R. 419.

Annotation:—*Refd.* *Brown v. Feeney* (1906), 22 T. L. R. 393.

2192. Mayor's court—Jurisdiction to order costs—No scale provided—Less than five pounds recovered.]—The fact that in a particular case no scale of costs is provided by the Mayor's Ct. of London Rules, 1890, is not in itself sufficient to show that that ct. has no inherent jurisdiction to order costs in the cases not specifically provided for.

Semble: in actions for libel tried in the Mayor's Ct. of London, in which less than £5 is recovered the ct. has jurisdiction to order costs to be paid to the pltf., beyond ct. fees & allowances to witnesses although no scale is provided by the rules for such a case.—*HALL v. LAUNSPACH*, [1898] 1 Q. B. 513; 67 L. J. Q. B. 372; 78 L. T. 243; 14 T. L. R. 215; 42 Sol. Jo. 251, C. A.

2193. Apportionment of costs—Between various defendants—Different defences.]—In an action of libel against two defts. one deft. admitted his liability & pleaded an apology, the other pleaded justification. At the trial a verdict was found against both defts. for £750, & judgment was entered for pltf. for that sum, with costs to be taxed:—*Held*: deft. who pleaded the plea of justification was alone liable for the costs occasioned to pltf. by & in consequence of that plea, & other deft. was not liable for those costs.—*HOBSON v. LENG (W. C.) & Co.*, [1914] 3 K. B. 1245; 83 L. J. K. B. 1624; 111 L. T. 954; 30 T. L. R. 682; 59 Sol. Jo. 28, C. A.

B. Depriving Plaintiff of Costs.

(a) In General.

See R. S. C., Ord. 65, r. 1.

2194. Discretion of judge—Power of Court of Appeal to review.]—In 1838, pltf. having obtained a verdict, with one farthing damages, in an action of libel, the judge certified to deprive him of costs under 43 Eliz. c. 18. Pltf. did not sign judgment until after the passing of 3 & 4 Vict. 1841, c. 24, which repeals the provisions of 43 Eliz. c. 18 as to costs in personal actions. He then signed judgment, & gave notice to tax full costs; but the Master refused to allow more than one farthing. Pltf. afterwards obtained a rule for a review of taxation, which was argued; but before judgment was given, 4 & 5 Vict. c. 28, was passed, under which deft. obtained a rule to show cause why all proceedings should not be stayed, on such terms as the ct. should direct:—*Held*: (1) the proceedings should be stayed, upon payment by deft., within three weeks, of all costs incurred by pltf. since the passing of 3 & 4 Vict. c. 24, & also the costs of this application.

(2) The ct. would not review the opinion of the judge, who certified at the trial to deprive the pltf. of his costs.—*MERRICK v. WAKLEY* (1842), 11 L. J. Q. B. 249; 6 Jur. 803.

Annotations:—*Generally, Mentd.* *Barrow v. Arnaud* (1846), 10 Jur. 319; *Barber v. Jessopp* (1857), 1 H. & N. 578.

2195. —.]—(1) The mere fact that the jury have given only a farthing damages to pltf. in an action for libel is not conclusive to show that "good cause" existed for depriving pltf. of costs, but it is an element to be taken into account.

(2) The Ct. of Appeal will review the decision of a judge that good cause existed for depriving

PART VIII. SECT. 2, SUB-SECT. 2.—
B. (a).

1. Discretion of judge.]—Although

rule 428 gives to the judge or ct. the power of depriving any of the parties to an action, pltf. or deft., of their costs; it does not confer the

power of compelling a successful party to pay the costs of an unsuccessful party.—*WILLS v. CARMAN* (1888), 14 A. R. 656.—**CAN.**

pltf. of costs, but not a decision that no good cause existed.—*MOORE v. GILL* (1888), 4 T. L. R. 738, C. A.

2196. ———.]—*MARRIAGE v. WILSON*, No. 2190, *ante*.

———.]—*See, also*, No. 2207, *post*.

2197. **Necessity for prompt application.**—In two actions of slander, the verdict being a farthing damages in each case, the ct. refused an application to deprive pltf. of his costs, which was made more than two years after trial; & determined to consider upon its merits another which was made about ten days after trial.—*BOWEY v. BELL*, *BROOKS v. ISRAEL*, *NORTH v. BILTON*, *SIDDONS v. LAWRENCE* (1878), 4 Q. B. D. 95; 48 L. J. Q. B. 161; 39 L. T. 607; 43 J. P. 287; 27 W. R. 247, D. C.

(b) *Grounds for.*

2198. **General rule—Good cause must be shown.**—*HOPLEY v. WILLIAMS*, No. 2186, *ante*.

2199. **Small amount of damages**—

———.]—*MYERS v. FINANCIAL NEWS* (1888), 5 T. L. R. 42.

2201. ———.]—*MOORE v. GILL*, No. 2195, *ante*.

2202. ———.]—Pltf. claimed damages from deft. in respect of an alleged libel & slander. Deft. counter-claimed in respect of statements made about him by pltf. At the trial of the action the jury found for pltf. on the claim with one farthing damages & for deft. on the counter-claim with 48s. damages:—*Held*: pltf. should be deprived of his costs, & deft. was entitled to the costs of his counter-claim.—*NICOLAS v. ATKINSON* (1909), 25 T. L. R. 568.

2203. ———.]—Pltfs. sued defts. for libel & obtained a verdict for one farthing damages:—*Held*: the conclusion to be drawn from the verdict was either that the jury thought that the charges were nearly true, or that they thought that pltfs. had suffered no commercial damage, & in those circumstances each party should bear their own costs.—*RED MAN'S SYNDICATE, LTD. v. ASSOCIATED NEWSPAPERS, LTD.* (1910), 26 T. L. R. 394.

2204. ——— **Small amount not necessarily contemptuous.**—*HOPLEY v. WILLIAMS*, No. 2186, *ante*.

———.]—*Compare* Nos. 2180–2187, *ante*.

2205. **Acceptance of money paid into court.**—*MARRIAGE v. WILSON*, No. 2190, *ante*.

2206. **Conduct of plaintiff.**—In an action to recover damages for an alleged libel contained in a private letter, the jury awarded pltf. £10 damages. The judge, on the application of deft.'s counsel, & on the ground that the pltf.'s own conduct had led to the libel being written, gave judgment for the £10 without costs:—*Held*: on appeal, the judgment was right.—*HARNETT v. VISE* (1880), 5 Ex. D. 307; 43 L. T. 645; 29 W. R. 7, C. A.

Annotations:—*Apld.* *Bostock v. Ramsay* U. C., [1900] 2 Q. B. 616. *Consd.* *Westgate v. Crowe*, [1908] 1 K. B. 24; *Dann v. Curzon* (1910) 104 L. T. 66. *Refd.* *Roberts v. Jones*, *Willey v. G. N. Ry.*, [1891] 2 Q. B. 194; *Ritter v. Godfrey*, [1920] 2 K. B. 47.

2207. ——— **Oppression on part of plaintiff.**—

Pltf. brought an action for damages for a libel published in the *Star*. The *Times* had published a letter signed by pltf., & in the same issue a leading article thereon, & a few days after a letter from some one else upon the subject of the letter. The *Star* thereupon published the article complained of, commenting upon what had appeared in the *Times*, & making a personal attack upon pltf. Defts. pleaded that their article was fair comment upon a matter of public interest. The jury found a verdict for pltf. with 1s. damages. The ct. was of opinion that it was obvious that the letter was not really written by pltf., but that she had allowed her name to be used for the purpose of raising a political controversy & injuring political opponents:—*Held*: it was, under these circumstances, oppression on the part of pltf. to bring the action, & that there was, therefore, good cause for which the judge might, in the exercise of his discretion, deprive pltf. of costs.—*O'CONNOR v. STAR NEWSPAPER CO., LTD.* (1893), 68 L. T. 146; 9 T. L. R. 233; 4 R. 271, C. A.

C. *Amount Recovered Within Limits of County Court Acts.*

See County Courts Act, 1888 (c. 43), s. 56; County Courts Act, 1919 (c. 73), s. 11; Administration of Justice Act, 1925 (c. 28), s. 20.

SUB-SECT. 3.—WHERE BOTH PARTIES PARTIALLY SUCCESSFUL.

See, now, R. S. C., Ord. 65.

2209. **What costs allowed—Part of statement not actionable—Right of plaintiff to entire costs.**—*JACOB v. MILLS* (1614), Cro. Jac. 343; Jenk. 339; 1 Roll. Rep. 24; 79 E. R. 293; *sub nom.* *MILES v. JACOB*, Hob. 6, Ex. Ch.

Annotations:—*Refd.* *Cutting v. Wilkins* (1702), 11 Mod. Rep. 24; *Button v. Heyward* (1721), 8 Mod. Rep. 24. *Mentd.* *Fleetwood v. Curley* (1619), Hob. 267; *Oates v. Aylett* (1648), Aleyn, 74; *Mayne v. Digle* (1672), Freem. K. B. 46; *R. v. Gripe* (1696), 1 Ld. Raym. 256; *Whithers v. Warner* (1720), 1 Stra. 309.

2210. ——— **Costs of successful issues—Issue found for defendant—Subsequently held bad in law.**—In an action of libel, deft. pleads the general issue & six special pleas; verdict for pltf. on general issue & one special plea, for deft. on the other five. Upon motion, judgment is entered up for pltf., *non obstante veredicto*, as the five pleas, the issues on which are found for deft., are bad in law:—*Held*: on application for costs, that neither party was entitled to the costs of the issues found for deft., on which the judgment of the ct. was finally entered for pltf.—*GOODBURNE v. BOWMAN* (1833), 9 Bing. 667; 2 Dowl. 206; 3 Moo. & S. 69; 2 L. J. C. P. 148; 131 E. R. 764.

2211. ———.]—Where, in case for libel, on the general issue, the jury found for pltf., & also found as a fact, that a great part of the declaration did not apply specifically to pltf., though there were innuendoes by which it was endeavoured to connect him with the matter complained of:—*Held*: deft. was entitled to the costs of that part.—*PRUDHOMME v. FRASER* (1835), 2 Ad. & El. 645

PART VIII. SECT. 2, SUB-SECT. 2.—
B. (b).

2198 i. **General rule—Good cause must be shown.**—Pltf. can be deprived of costs for good cause only.—*WELL-BANKS v. CONGER* (2) (1888), 12 P. R.

447.—CAN.

2198 ii. ———.]—*BELL v. WILSON* (1900), 19 P. R. 167.—CAN.

2198 iii. ———.]—*PICKLES v. SINFIELD*, 24 C. L. T. 27.—CAN.

2206 i. **Conduct of plaintiff.**—*PICKELS*

v. LANE (1913), 13 E. L. R. 276; 13 D. L. R. 79; 46 N. S. R. 301.—CAN.

PART VIII. SECT. 2, SUB-SECT. 3.

2211 i. **What costs allowed—Costs of successful issues.**—*WELLY v. WITSON*. [1922] V. L. R. 420

Sect. 2.—Costs: Sub-sects. 3 & 4. Part IX. Sect. 1: Sub-sects. 1 & 2. Sect. 2: Sub-sect. 1, A.]

1 Har. & W. 5; 4 Nev. & M. K. B. 512; 4 L. J. K. B. 87; 111 E. R. 248.

*Annotations:—*Apld. Doe d. Errington v. Errington (1836), 4 Dowl. 602. *Consd.* Anderson v. Chapman (1839), 5 M. & W. 483; Biddulph v. Chamberlayne (1851), 17 Q. B. 351. *Refd.* Bird v. Penrice (1840), 4 Jur. 970; Delisser v. Towne (1841), 1 Q. B. 333; Daniel v. Barry (1843), 12 L. J. Q. B. 113; Doe d. Bowman v. Lewis (1844), 13 M. & W. 241.

2212. ———.]—In case, for libel, there was a plea of not guilty, on which the verdict was found for deft., & several pleas of justification, on which the jury found for pltf., because deft. offered no evidence in support of them:—*Held*: though deft. was entitled to the general costs, pltf. was entitled to the costs of the issues on the pleas of justification, including both the costs of the pleadings, & of evidence provided to rebut them.—SPENCER v. HAMERTON (1836), 4 Ad. & El. 413; 1 Har. & W. 700; 6 Nev. & M. K. B. 22; 5 L. J. K. B. 114; 111 E. R. 843.

*Annotations:—*Apld. Newton v. Holford (1845), 1 C. B. 141; Howell v. Rodbard (1849), 4 Exch. 309. *Mentd.* Bird v. Higginson (1836), 5 Ad. & El. 83; Partridge v. Gardner (1849), 4 Exch. 303; Callander v. Howard (1850), 10 C. B. 290.

2213. ———.]—WELLS v. THOMPSON (1855), 26 L. T. O. S. 176.

2214. ———.]—Upon a reference of all matters in difference in a cause, the costs to abide the event of the award, the party in whose favour the action is decided by the award is entitled to the costs of the cause, although some of the issues may be found in favour of the other party. To one of several counts in an action of slander deft. pleaded a multifarious plea of justification, setting forth a series of statements of facts, any one of which was a sufficient answer to such count. Upon a reference of the cause, the arbitrator found that one of such statements in the plea was true, &

that the others were untrue. The finding on the issues as to another count was for pltf., who had the general costs of the cause:—*Held*: (1) the finding of part of such plea to be untrue was not a finding of an issue for pltf. within C. L. P. Act, 1852 (c. 76), s. 31, or of r. 74, 1831, & pltf. was, therefore, not entitled to the costs of the issue on such plea; (2) deft. was entitled to the costs of so much of the plea as was found in his favour, including costs of evidence applicable to such part, though also applicable to the residue of the plea, but not to the costs of any evidence applicable only to that part of the plea which was found to be untrue.—REYNOLDS v. HARRIS (1858), 3 C. B. N. S. 267; 28 L. J. O. P. 26; 30 L. T. O. S. 275; 4 Jur. N. S. 856; 5 Jur. N. S. 365; 140 E. R. 743.

*Annotations:—*As to (2) *Consd.* Brown v. Houston, [1901] 2 K. B. 855. *Refd.* Calvert v. Seinde Ry. (1865), 18 C. B. N. S. 306.

2215. ——— Damages remitted by plaintiff—In respect of particular counts—Costs of such counts.]—In an action of slander, the declaration contained ten counts, the jury found a verdict for pltf., with £50 damages on the seventh count, & £100 on the other nine counts. On a writ of error being brought, the ct. held the sixth count was bad, & consequently, a *venire de novo* must be awarded; but on pltf. consenting to remit the £100 damages, the Ct. of Exch. directed that the verdict should be retained on the seventh count:—*Held*: pltf. was not entitled to the costs of the other nine counts.—DADD v. CREASE (1833), 2 Cr. & M. 223; 4 Tyr. 74; 149 E. R. 742; *sub nom.* DANN v. CREASE, 2 Dowl. 269; *sub nom.* DODS v. CREESE, 3 L. J. Ex. 12.

SUB-SECT. 4.—EFFECT OF VERDICT ON COSTS.

See JURIES, Vol. XXX., pp. 245, 246, Nos. 443–450.

Part IX.—Injunction.

SECT. 1.—JURISDICTION OF COURT.

SUB-SECT. 1.—IN GENERAL.

See, now, Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 45.

2216. *Interlocutory injunction.*—QUARTZ HILL CONSOLIDATED GOLD MINING CO. v. BEALL, No. 2249, *post*

2217. ———.]—LIVERPOOL HOUSEHOLD STORES ASSOCN. v. SMITH, No. 2254, *post*.

2218. ———.]—Deft. having published a document containing charges of fraud, perjury, & conspiracy against pltf., pltf. brought an action for libel, & recovered judgment for £1,000 damages, of no part of which could he obtain payment. Deft. continued to publish documents repeating the same charges, & pltf. commenced the present action for an injunction & damages:—*Held*: though the ct. had jurisdiction to grant an interlocutory injunction to restrain further publication of the libel, there was in this case no reason to apprehend any such danger of injury to pltf., in person or property, as to make it right to grant one.—SALOMONS v. KNIGHT, [1891] 2 Ch. 294; 60 L. J. Ch. 743; 64 L. T. 589; 39 W. R. 506, C. A.

2219. ———.]—OPPENHEIM v. MACKENZIE (1898), 42 Sol. Jo. 748.

2220. ——— Under special circumstances.]—The ct. has jurisdiction to restrain by injunction, & even by an interlocutory injunction, the publication of a libel. But the exercise of the jurisdiction is discretionary, & an interlocutory injunction ought not to be granted except in the clearest cases; in cases in which, if a jury did not find the matter complained of to be libellous, the ct. would set aside the verdict as unreasonable. An interlocutory injunction ought not to be granted when deft. swears that he will be able to justify the libel, & the ct. is not satisfied that he may not be able to do so.—BONNARD v. PERRYMAN, [1891] 2 Ch. 269; 60 L. J. Ch. 617; 65 L. T. 506; 39 W. R. 435; 7 T. L. R. 453, C. A.

*Annotations:—**Consd.* Collard v. Marshall, [1892] 1 Ch. 571. *Fold.* Champion v. Birmingham Vinegar Brewery Co. (1893), 10 T. L. R. 164; Monson v. Tussauds, Monson v. Tussaud, [1894] 1 Q. B. 671; Leslie v. Tucker (1896), 40 Sol. Jo. 780; Newton v. Amalgamated Musicians' Union (1896), 12 T. L. R. 623. *Distd.* London & Northern Bank v. Newnes (1899), 16 T. L. R. 76. *Consd.* Corelli v. Wall (1906), 22 T. L. R. 532. *Refd.* Salomons v. Knight, [1891] 2 Ch. 294; Lee v. Gibbings (1892), 67 L. T. 263; *Re* Evelyn, *Ex p.* General Public Works & Assets Co. (1894),

PART IX. SECT. 1, SUB-SECT. 1.

2216 i. *Interlocutory injunction.*—

Though in England the cts. have not of late restrained publication before the question of libel has been sub-

mitted to a jury, there is undoubted power to do so.—WOLFENDEN v. GILES (1892), 2 B. C. L. 279.—CAN.

1 Mans. 195; Mellin v. White (1895), 59 J. P. 628; White v. Mellin, [1895] A. C. 154; Lyons v. Wilkins, [1896] 1 Ch. 811; Ellis v. National Union of Conservative & Constitutional Assocs. Middleton & Southall (1900), 44 Sol. Jo. 750; Watson v. Daily Record (Glasgow), [1907] 1 K. B. 853; R. v. Blumenfeld, *Ex p.* Tupper (1912), 28 T. L. R. 308. *Mentd.* Cowley v. Cowley, [1900] P. 305; Dyson v. A.-G., [1911] 1 K. B. 410.

2221. — — —.]—There is jurisdiction to restrain a libel, but the injunction ought not to be granted except in the clearest cases, which are defined to be those in which, if the jury do not find the matter complained of to be libellous, the ct. will set aside the verdict as unreasonable (CHITTY, J.).—LESLIE & Co., LTD. v. TUCKER (1896), 40 Sol. Jo. 780.

2222. — — — Libel calculated to injure plaintiff in his trade.]—PINK v. FEDERATION OF TRADES & LABOUR UNIONS CONNECTED WITH SHIPPING, CARRYING & OTHER INDUSTRIES, No. 126, *ante*.

2223. — — —.]—The ct. has power to restrain by injunction on interlocutory motion the publication of placards & circulars containing false statements injurious to trade where the ct. is satisfied upon the facts & evidence before it that such statements are false.—COLLARD v. MARSHALL, [1892] 1 Ch. 571; 61 L. J. Ch. 268; 66 L. T. 248; 40 W. R. 473; 8 T. L. R. 265.

Annotations :—*Consd.* Pink v. Federation of Trades & Labour Unions connected with Shipping, Carrying, etc. Industries (1892), 67 L. T. 258; Lloyd's Bank v. Royal British Bank (1903), 19 T. L. R. 548. *Refd.* Lee v. Gibbings (1892), 67 L. T. 263; Jarrahdale Timber Co. & M'Lean v. Temperley & Elliott (1894), 11 T. L. R. 119; Monson v. Tussauds, Monson v. Tussaud, [1894] 1 Q. B. 671.

2224. Perpetual injunction—Restraint of further publication of matter found to be defamatory—At hearing of action.]—HINRICHS v. BERNDEN, [1878] W. N. 11.

Annotation :—*Consd.* Thorley's Food for Cattle Co. v. Massam (1879), 41 L. T. 543.

2225. — — —.]—The ct. has power to issue an injunction to restrain deft. from publishing of pltf., to the injury of his trade, matter which a jury have found to be libellous. *Semble* : this power may be exercised by the judge who tries the cause.—SAXBY v. EASTERBROOK & HANNAFORD (1878), 3 C. P. D. 339; 27 W. R. 188.

Annotations :—*Consd.* Thorley's Cattle Food Co. v. Massam (1880), 14 Ch. D. 763. *Refd.* Shaw v. Jersey (1879), 4 C. P. D. 120; Thomas v. Williams (1880), 14 Ch. D. 864; Mogul SS. Co. v. McGregor, Gow (1885), 15 Q. B. D. 476; Armstrong v. Armit (1886), 2 T. L. R. 887; Bonnard v. Perryman, [1891] 2 Ch. 269; Champion v. Birmingham Vinegar Brewery Co. (1893), 38 Sol. Jo. 142; Monson v. Tussauds, Monson v. Tussaud, [1894] 1 Q. B. 671.

2226. — — — Matter injurious to plaintiff's trade.]—THORLEY'S CATTLE FOOD CO. v. MASSAM, No. 2612, *post*.

2227. — — —.]—THOMAS v. WILLIAMS, No. 2611, *post*.

SUB-SECT. 2.—EXTENT AND LIMITS OF JURISDICTION.

2228. Whether slander included.] — B. was employed to manage one of L.'s branch offices for the sale of machines, & resided on the premises. He was dismissed by L., & on leaving gave the postmaster directions to forward to his private residence all letters addressed to him at L.'s branch office. He admitted that among the letters so forwarded to him were two which related to L.'s business, & that he did not hand them to L., but returned them to the senders. After his dismissal

he went about among the customers making oral statements reflecting on the solvency of L., & advised some of them not to pay L. for machines which had been supplied through himself. L. brought an action to restrain B. from making statements to the customers or any other person or persons that L. was about to stop payment, or was in difficulties or insolvent, & from in any manner slandering L. or injuring his reputation or business, & from giving notice to the post office to forward to B.'s residence letters addressed to him at L.'s office, & also asking that he might be ordered to withdraw the notice already given to the post office :—*Held* : the ct. has jurisdiction to restrain a person from making slanderous statements calculated to injure the business of another person, & this jurisdiction extends to oral as well as written statements, though it requires to be exercised with great caution as regards oral statements; & in the present case an injunction ought to be granted.—LOGG (HERMANN) v. BEAN (1884), 26 Ch. D. 306; 53 L. J. Ch. 1128; 51 L. T. 442; 32 W. R. 994; *sub nom.* LOGG (HERMANN) v. BEAN, 48 J. P. 708, C. A.

Annotations :—*Distd.* Liverpool Household Stores Asscn. v. Smith (1887), 37 Ch. D. 170. *Refd.* Monson v. Tussauds, Monson v. Tussaud, [1894] 1 Q. B. 671. *Mentd.* Puddephatt v. Leith, [1916] 1 Ch. 200.

2229. — — —.]—CLARKE v. MAIN (1904), *Times*, Mar. 24.

2230. Whether confined to trade libels.]—MONSON v. TUSSAUDS, LTD., MONSON v. TUSSAUD (LOUIS), No. 23, *ante*.

2231. — — —.]—This was a motion on behalf of pltf., an author, to restrain deft., a publisher, from publishing or selling a certain book otherwise than in the form in which it was prepared by the author, or from representing that pltf. was the author of the book published by deft. The book was originally published in its complete form in 1886. In 1892 the publisher issued an edition of the book, omitting the preface, table of contents, introduction, bibliographical notice, & index. The ground of the motion was that the publication of the book in a mutilated form caused an injury to pltf.'s reputation as an author :—*Held* : pltf.'s remedy in law was libel, with the exception of a case of trade libel, the ct. would not grant an injunction to restrain a libel before the case had been submitted to a jury.—LEE v. GIBBINGS (1892), 67 L. T. 263; 8 T. L. R. 773; 36 Sol. Jo. 713.

Annotation :—*Refd.* Monson v. Tussaud, Monson v. Tussaud (1894), 63 L. J. Q. B. 454.

SECT. 2.—GROUNDS FOR GRANTING OR REFUSING.

SUB-SECT. 1.—INTERIM INJUNCTION.

A. In General.

2232. Conditions precedent to grant—Decision by court as to whether statement libellous.]—The question of libel or no libel is for the jury. It is for the jury & not for the ct. to construe the document, & to say whether it is a libel or not. To justify the ct. in granting an *interim* injunction it must come to a decision upon the question of libel or no libel, before the jury decides whether it is a libel or not. The jurisdiction is of a delicate nature. It ought only to be exercised in the clearest cases, where any jury will say that the

PART IX. SECT. 2, SUB-SECT. 1.—A. m. Conditions precedent to grant.]—When deft. takes upon himself the onus of justification & the ct. is not

satisfied that he may not be able to justify the libel, an interlocutory injunction ought not to be granted.—GALLAGHER v. TUOHY (1924). 58

I. L. T. 131.—IR.

n. — — —.]—Before granting an interdict on motion to restrain the

Sect. 2.—Grounds for granting or refusing: Sub-sect. 1, A. & B.; sub-sect. 2.]

matter complained of is libellous. The ct. must also be satisfied that in all probability the alleged libel was untrue, & if written on a privileged occasion that there was malice on the part of deft. (LORD ESHER, M.R.).—**COULSON (WILLIAM) & SONS v. COULSON (JAMES) & Co.** (1887), 3 T. L. R. 846, C. A.

Annotations:—**Apprvd. & Foll.** Liverpool Household Stores Assocn. v. Smith (1887), 37 Ch. D. 170; Poulett v. Chatto & Windus (1887), 4 T. L. R. 142; Bonnard v. Perryman, [1891] 2 Ch. 269. **Consd.** Monson v. Tussauds, Monson v. Tussaud, [1894] 1 Q. B. 671. **Apprvd.** Oppenheim v. Mackenzie (1898), 42 Sol. Jo. 748. **Refd.** Champion v. Birmingham Vinegar Brewery Co. (1893), 38 Sol. Jo. 142; Re Evelyn, Ex p. General Public Works & Assets Co. (1894), 1 Mans. 195; Lyons v. Wilkins (1896), 74 L. T. 358; Newton v. Amalgamated Musicians' Union (1896), 12 T. L. R. 623.

2233. ———.] — LIVERPOOL HOUSEHOLD STORES ASSOCN. v. SMITH, No. 2254, post.

2234. ———.] — LLOYDS BANK, LTD. v. ROYAL BRITISH BANK, LTD. (1903), 19 T. L. R. 548; 47 Sol. Jo. 603; *on appeal*, 19 T. L. R. 604, C. A.

2235. ——— Decision of court that statement untrue.] —(1) To obtain an interlocutory injunction restraining deft. from issuing circulars, etc., stating the wrongful user by pltf. upon his manufactured articles of labels claimed by deft., & from threatening pltf.'s customers with legal proceedings for selling his articles bearing the labels in question, pltf. must satisfy the ct. that the statements in the circulars, etc., complained of are in fact untrue.

(2) The fact that deft., having commenced actions against pltf. & his customers for injunctions restraining the wrongful user of the labels in question, had not thought fit to move for interlocutory injunctions:—**Held:** no ground by itself for granting pltf. the injunction sought for.—**ANDERSON v. LIEBIG'S EXTRACT OF MEAT CO., LTD.** (1881), 45 L. T. 757.

2236. ———.] — QUARTZ HILL CONSOLIDATED GOLD MINING CO. v. BEALL, No. 2242, post.

2237. ———.] — ARMSTRONG v. ARMIT, No. 2253, post.

2238. ———.] — COULSON (WILLIAM) & SONS v. COULSON (JAMES) & Co., No. 2232, ante.

2239. ———.] — POULETT v. CHATTO & WINDUS (1887), 4 T. L. R. 142, C. A.

2240. ———.] — BONNARD v. PERRYMAN, No. 2220, ante.

2241. ———.] —Pltfs. in an action for libel, six labour candidates for the office of borough councillor at a municipal election then about to be held, moved to restrain defts. from publishing statements to the effect that pltfs. were communists. Defts. alleged that they were prepared to justify the statements complained of at the trial:—**Held:** (1) although a statement that a man was a communist was probably libellous, where justification was pleaded, an interlocutory injunction ought not to be granted unless the ct. was satisfied that defts. had no reasonable prospect of success at the trial; (2) the statements complained of were not false statements as to personal character within Municipal Elections Corrupt & Illegal Practices Act, 1884 (c. 70). Injunction refused.—**BURNS v. ASSOCIATED NEWSPAPERS, LTD.** (1925), 89 J. P. 205; 42 T. L. R. 37.

2242. ——— Decision of court that defendant

to be satisfied that the publication threatened would necessarily be defamatory; that no defence such as, e.g., truth & public benefit, could be established in an action on the publication;

& that nothing has occurred such as, e.g. consent to the publication, to deprive appt. of his remedy.—**ROBERTS v. THE CRITIC, LTD.**, [1919] W. L. D. 26.—S. AF.

actuated by malice—Privilege.] —A solr., acting for some shareholders in a co., printed & circulated, but only among the shareholders, a circular containing very strong reflections on the mode in which the co. had been brought out, & on the conduct of the promoters & directors, & proposing a meeting of shareholders to take steps to protect their interests. The co. commenced an action to restrain the further publication, & applied for an interlocutory injunction, which was granted:—**Held:** (1) the ct. had jurisdiction to interfere on interlocutory application to restrain the publication of a libel; (2) but this jurisdiction was to be exercised with great caution, & would not in general be exercised unless applt. satisfied the ct. that the statements in the document complained of were untrue; (3) still more caution was requisite where the document in question was *prima facie* a privileged communication, so as not to be actionable unless express malice was proved, the question of malice being one which cannot conveniently be tried on interlocutory application.

In the present case the ct. not being satisfied on the evidence that the statements in the document were false or malicious, the order for an injunction was discharged.—**QUARTZ HILL CONSOLIDATED GOLD MINING CO. v. BEALL** (1882), 20 Ch. D. 501; 51 L. J. Ch. 874; 46 L. T. 746; 30 W. R. 583, C. A.

Annotations:—*As to* (1) **Consd.** Bonnard v. Perryman, [1891] 2 Ch. 269. **Refd.** Pollard v. Photographic Co. (1888), 40 Ch. D. 345. *As to* (2) **Refd.** Poulett v. Chatto & Windus (1887), 4 T. L. R. 35. *As to* (3) **Refd.** London Motor-Cab Proprietors Assocn. & British Motor-Cab Co. v. Twentieth Century Press (1912), Ltd. (1917), 34 T. L. R. 68. **Generally, Mentd.** Quartz Hill Consolidated Gold Mining Co. v. Eyre (1883), 11 Q. B. D. 674.

2243. ———.] — COULSON (WILLIAM) & SONS v. COULSON (JAMES) & Co., No. 2232, ante.

2244. ——— Decision of court as to probable damage.] — SALOMONS v. KNIGHT, No. 2218, ante.

B. Particular Instances.

2245. Privileged occasion—Existence of malice doubtful.] — MULKERN v. WARD, No. 1758, ante.

2246. ———.] — COULSON (WILLIAM) & SONS v. COULSON (JAMES) & Co., No. 2232, ante.

2247. ———.] — QUARTZ HILL CONSOLIDATED GOLD MINING CO. v. BEALL, No. 2242, ante.

2248. ———.] —The law has been settled by a decision of the Ct. of Appeal in *Bonnard v. Perryman*, No. 2220, ante. The law has been settled to be that an injunction ought not to be granted in such case unless the ct. be absolutely satisfied that a wrong is being done, & that it is not so if a jury may, on any ground reasonably suggested, find that a wrong has not been done. The occasions on which these alleged libels were issued were all occasions on which, unless abused, privilege might exist (LORD COLERIDGE, C.J.).—**CHAMPION & Co., LTD. v. BIRMINGHAM VINEGAR BREWERY CO., LTD.** (1893), 10 T. L. R. 164; 38 Sol. Jo. 142, D. C.

2249. ———.] — OPPENHEIM v. MACKENZIE (1898), 42 Sol. Jo. 748.

2250. ———.] —The Home Secretary made an order sanctioning an increase of taxi-cab fares in London, & the drivers' trade union instructed defts., who were printers, to print a circular stating that the proprietors, with their usual greed & rapacity, were claiming the whole of the increase. Defts. printed the circular & delivered four thousand copies to the trade union. Thereupon

PART IX. SECT. 2, SUB-SECT. 1.—B.

o. Imputation of murder.] —Injunction granted until the trial to restrain defts., who professed to be mind readers, from pretending to give

pltf., who were an unincorporated body of taxicab owners, suing by their chairman, & a limited co. also owning taxicabs, brought an action against defts. for libel & moved for an injunction to restrain them, until the trial, from publishing the circular. At the hearing of the motion the evidence was that no further order had been given to defts., & they did not intend to print any more copies:—*Held*: as the injunction would, in the circumstances, do no good, & as there was a question whether the issue of the circular was not privileged, & as it was doubtful whether the action was properly framed, the motion must be refused.—*LONDON MOTOR CAB PROPRIETORS ASSOCN. & BRITISH MOTOR CAB CO., LTD. v. TWENTIETH CENTURY PRESS (1912), LTD. (1917)*, 34 T. L. R. 68.

2251. Untrue statement as to financial position—Of friendly society.]—(1) An interlocutory injunction was granted to restrain the circulation of an untrue statement as to the financial position of a friendly society.

(2) A circular by a member of a friendly society issued to members for the purpose of obtaining a statutory investigation into the solvency of the society is not privileged unless believed to be true.—*HILL v. HART-DAVIES (1882)*, 21 Ch. D. 798; 51 L. J. Ch. 845; 47 L. T. 82; 31 W. R. 22.

Annotation:—*As to (1) Consd. Liverpool Household Stores Asscn. v. Smith (1887)*, 37 Ch. D. 170.

2252. — Of bank.]—The ct. granted an *interim* injunction to restrain the publication of a statement that pltf. bank was in liquidation.—*LONDON & NORTHERN BANK, LTD. v. NEWNES (GEORGE), LTD. (1899)*, 16 T. L. R. 76; *subsequent proceedings (1900)*, 16 T. L. R. 433, C. A.

2253. Libel not completely traversed.]—Defts. had in a newspaper article stated that pltf., with whom were included a public co., had, by means of the use of corrupt influence with government officials obtained a number of contracts. Pltf. applied for an *interim* injunction restraining defts. from further publishing such libels, but produced one affidavit only, in which it was not stated that the whole of the libels were untrue:—*Held*: upon principle & authority the application must be refused.—*ARMSTRONG v. ARMIT (1886)*, 2 T. L. R. 887, D. C.

2254. Difficulty of framing injunction — Insufficiently precise terms.]—(1) The jurisdiction to restrain by interlocutory injunction the publication of a libel is of a very delicate nature, & will not be exercised except in a case where the ct. can see that the publication proposed to be restrained must necessarily be of such a character that no jury could reasonably fail to find it to be libellous.

(2) Where a trading co. claimed an interlocutory injunction to restrain the publication in the newspaper of letters & statements in the future similar to others which had already been inserted in the same newspaper reflecting on the solvency & financial condition of the co., the Ct. of Appeal refused the application, on the ground that it would be almost, if not entirely, impracticable so to frame the injunction as not possibly to include in its terms something that might not be libellous, independently of the difficulty, which could not be overlooked, arising from the fact that the question whether the statement complained of was libellous or not would have to be decided by the judge on the application to commit for breach

of the injunction.—*LIVERPOOL HOUSEHOLD STORES ASSOCN. v. SMITH (1887)*, 37 Ch. D. 170; 57 L. J. Ch. 85; 58 L. T. 204; 36 W. R. 485; 4 T. L. R. 93, C. A.

Annotations:—*As to (1) Refd. Monson v. Tussauds, Monson v. Tussaud, [1894] 1 Q. B. 671. As to (2) Refd. Bonnard v. Perryman, [1891] 2 Ch. 269.*

2255. Justification pleaded.]—*BURNS v. ASSOCIATED NEWSPAPERS, LTD., No. 2241, ante.*

2256. Libel too unimportant—Though unjustifiable.]—*SALOMONS v. KNIGHT, No. 2218, ante.*

2257. Question for jury—Truth of libel.]—*PLUMBLY v. PERRYMAN, [1891] W. N. 64.*

2258. — Meaning of words.]—*NEWTON v. AMALGAMATED MUSICIANS' UNION (1896)*, 12 T. L. R. 623; 40 Sol. Jo. 716.

2259. Case not sufficiently clear—Conflict of evidence.]—*MONSON v. TUSSAUDS, LTD., MONSON v. TUSSAUD (LOUIS), No. 23, ante.*

2260. —.]—*PLANT v. EAST HAM CORPN. (1906)*, 70 J. P. Jo. 244.

2261. Publication of "black list by trade union."]—In consequence of a dispute with reference to an alleged preferential employment of non-union men by a building firm, a trade union published a poster headed "Trollope's Black List," containing the names of non-union men employed by the firm. Upon motion for an interlocutory injunction to restrain the publication, it was decided that the publication was a purely malicious act & that therefore an interlocutory injunction must be granted. Defts. appealed:—*Held*: a *prima facie* case had been established that defts. were doing more than was in fact necessary for their own protection; & therefore the order for an interlocutory injunction ought not to be interfered with.—*TROLLOPE & SONS v. LONDON BUILDING TRADES FEDERATION (1895)*, 72 L. T. 342; 11 T. L. R. 280, C. A.; *subsequent proceedings (1896)*, 12 T. L. R. 373, N. P.

Annotations:—*Refd. Newton v. Amalgamated Musicians' Union (1896)*, 40 Sol. Jo. 716; *Taff Vale Ry. v. Amalgamated Soc. of Railway Servants, [1901] A. C. 426. Mentd. Lyons v. Wilkins, [1896] 1 Ch. 811; Pratt v. British Medical Asscn. (1918)*, 120 L. T. 41.

2262. Husband & wife—Publication of libellous affidavits.]—*H. v. H. (1900)*, 44 Sol. Jo. 706.

2263. Case disclosing no right of action—Portrait of plaintiff on picture post cards—Untrue likeness.]—Defts. published & sold, without the consent of pltf., post cards on which were coloured representations of pltf. depicting imaginary incidents in her life, & upon pltf. objecting they did not withdraw them. The portraits of pltf. were stated to be unlike her. Pltf. thereupon brought an action for an injunction to restrain the publication & sale of the post cards upon the ground either that they were a libel upon her or that she was entitled to restrain the publication of a portrait of herself without her authority, & applied for an *interim* injunction:—*Held*: the ct. would not grant an *interim* injunction, as no sufficient case had been made out on either ground.

It is well settled that a person may be defamed as well by a picture or effigy as by written or spoken words (*SWINFEN EADY, J.*).—*CORELLI v. WALL (1906)*, 22 T. L. R. 532.

SUB-SECT. 2.—PERPETUAL INJUNCTION.

2264. Statements disclosing no right of action—Disparagement of rival's goods.]—Where there are

information at their public entertainments as to the cause of death of pltf.'s husband, intimating as they had done at such entertainments, that he met with his death at the hands of a sup-

posed friend, & thereby suggesting the idea that his late partner & pltf. were concerned in the matter.—*QUIRK v. DUDLEY (1902)*, 22 C. L. T. 388; 4 O. L. R. 532; 1 O. W. R. 637.—*CAN.*

PART IX. SECT. 2, SUB-SECT. 2.

p. Advertisement calculated to deceive.]—*LEWIN v. KENNEDY (1923)*, 44 N. L. R. 380.—*S. AF.*

LIBEL AND SLANDER.

Sect. 2.—Grounds for granting or refusing: Sub-sect.
2. Sects. 3, 4, 5 & 6. Part X. Sect. 1: Sub-
1 & 2, A., B. & C.; sub-sects. 3 & 4.
. 2 & 3: Sub-sects. 1 & 2.]

two rival works, the ct. will restrain the proprietor of one of them from advertising it in terms calculated to induce the public to believe that it is the other work but will not restrain him from publishing an advertisement tending to disparage that other work.—*SEELEY v. FISHER* (1841), 11 Sim. 581; 10 L. J. Ch. 274; 59 E. R. 998.

2265. ———.]—(1) In order to entitle pltf. to maintain an action for damages for, or to obtain an injunction against, statements disparaging his goods, it must be shown that such statements were in disparagement of the goods of pltf. in particular; that they were untrue; & that they occasioned special damage.

(2) *Qu.*: whether an action will lie in any case for disparaging a trader's goods merely by saying that some other trader's goods are better either generally or in this or that respect.

W., proprietor of V.'s food for infants, etc., bought from M. & sold to his customers M.'s infants' food. W. was in the habit of affixing to the wrappers on M.'s food a label stating that V.'s food was far more nutritious & healthful than any other:—*Held*: W.'s conduct did not amount to a trade libel, but was merely a puff by a rival trader, & no injunction should be granted.—*WHITE v. MELLIN*, [1895] A. C. 154; 64 L. J. Ch. 308; 72 L. T. 334; 43 W. R. 353; 11 T. L. R. 236; 11 R. 141; *sub nom.* *MELLIN v. WHITE*, 59 J. P. 628, H. L.

Annotations:—As to (1) **Expld. & Apld.** *Royal Baking Powder Co. v. Wright, Crossley* (1900), 18 R. P. C. 95. **Consd.** *Dunlop Pneumatic Tyre Co. v. Maison Talbot, Shrewsbury & Talbot & Weigel, Clipper Pneumatic Tyre Co. v. Maison Talbot, Shrewsbury & Talbot & Weigel* (1903), 20 T. L. R. 579; *British Ry. Traffic & Electric Co. v. C. R. C. Co. & L. C. C.*, [1922] 2 K. B. 260. **Refd.** *Bullivant v. Wright* (1897), 13 T. L. R. 201; *British Empire Typesetting Machine Co. v. Linotype Co.* (1898), 14 T. L. R. 511; *Alcott v. Millar's Karri & Jarrah Forests* (1904), 91 L. T. 722; *Lyne v. Nicholls* (1906), 23 T. L. R. 86. As to (2) **Consd.** *Hubbuck v. Wilkinson, Heywood & Clark*, [1899] 1 Q. B. 86; *British Ry. Traffic & Electric Co. v. C. R. C. Co. & L. C. C.*, [1922] 2 K. B. 260. **Refd.** *Bullivant v. Wright* (1897), 13 T. L. R. 201; *Cundey v. Lerwill & Pike* (1908), 99 L. T. 273.

2266. ——— **Suspension of ship's class—In ship's registry.**—Upon motion for an injunction by subscribers to an assocn. called the Underwriters' Registry, who had had a ship registered by the assocn., in the highest class, to restrain defts., the committee of the assocn., from inserting after a subsequent survey allowed by pltfs., in their published registry of ships the words "Class suspended" against pltfs.' ships:—*Held*: the defts. were justified in notifying to their subscribers & the public their honest opinion as to the merits of the ship, & had a right to suspend the class until pltfs. should have altered the ship according to their requirements.—*CLOVER v. ROYDEN* (1873), L. R. 17 Eq. 190; 43 L. J. Ch. 665; 29 L. T. 639; 22 W. R. 254; 2 Asp. M. L. C. 167.

2267. ——— **Erasure of name—From medical register.**—The ct. refused an application for an injunction to restrain defts. from publishing the erasure of pltf.'s name from the dental register.—*ALLINSON v. GENERAL COUNCIL OF MEDICAL EDUCATION & REGISTRATION* (1892), 8 T. L. R. 784, C. A.; *affg. S. C. sub nom. Re GENERAL MEDICAL COUNCIL ORDER, Ex p. ALLINSON*, 8 T. L. R. 727, D. C.; *subsequent proceedings, sub nom. ALLINSON v. GENERAL COUNCIL OF MEDICAL EDUCATION & REGISTRATION*, [1894] 1 Q. B. 750, C. A.

2268. ——— **Misleading account of legal proceedings.**—In an action brought by certain members

against the officers of a trade union, charging them with fraudulent misrepresentation claiming declarations & injunctions, judgment was given for defts. on the issue of misrepresentation, & for pltfs. on the rest of the case. Pltfs. subsequently issued a circular letter to a large number of the members of the union, containing misleading comments on the judgment, including a suggestion that defts. had not been cleared of fraud. Defts. having moved in the action for an injunction to restrain the issue of the circular —*Held*: the action being at an end & judgment delivered there could be no possible interference with the course of justice in the issue of the circular, even if it misrepresented the judgment & proceedings, or was calculated to injure one of the parties, & the motion must be dismissed. Any such publication must be left to be dealt with by the ordinary law of libel.—*DUNN v. BEVAN, BRODIE v. BEVAN*, [1922] 1 Ch. 276; 91 L. J. Ch. 299; 127 L. T. 14; 38 T. L. R. 172.

2269. ——— **Entry in registration book—No evidence of malice or damage.**—Deft. co. hired a motor lorry from pltfs. on hire-purchase, the lorry remaining the property of pltfs. during the currency of the contract. In pursuance of Regulations made under the powers conferred by Roads Act, 1920 (c. 72), defts., the London County Council, issued a registration book to deft. co. who, as the persons "keeping" the lorry, were under Finance Act, 1920 (c. 18), the proper licencees. By Reg. 1 (2) of the above Regulations "owner" is defined as "the person by whom the vehicle . . . is kept & used," & accordingly, defts. were described in the above registration book as owners of the lorry. Pltfs. claimed an injunction against deft. co. from publishing or using, & against deft. council from issuing a registration book containing the said statement, as constituting a slander of pltfs.' title to the lorry. No damages were alleged or claimed:—*Held*: (1) although the above statement constituted a slander on pltfs.' title, there was no evidence of malice in either deft.; & (2) in any case, as pltfs. were claiming an injunction only, no injunction could be granted, as there was no evidence that any damage to pltfs. would necessarily arise.—*BRITISH RAILWAY TRAFFIC & ELECTRIC CO. v. C. R. C. CO. & LONDON COUNTY COUNCIL*, [1922] 2 K. B. 260; 91 L. J. K. B. 824; 126 L. T. 602; 86 J. P. 70; 38 T. L. R. 190; 20 L. G. R. 102.

SECT. 3.—SLANDER OF TITLE.

Whether granted.—See Nos. 2550, 2551, *post*.

SECT. 4.—SLANDER OF GOODS.

See Part XIII., Sect. 3, post.

SECT. 5.—STATEMENTS AT ELECTIONS.

Defamatory of Parliamentary candidates.—*See Corrupt & Illegal Practices Prevention Act, 1895 (c. 40), s. 1.*

2270. ——— **Statement published for purpose of injuring plaintiff—Interim injunction.**—*BAYLEY v. EDMUNDS, BYRON & MARSHALL* (1895), 11 T. L. R. 537, C. A.

Annotation:—*Refd.* *Ellis v. National Union of Conservative & Constitutional Assocns., Middleton & Southall* (1900), 44 Sol. Jo. 750.

Defamatory of municipal candidate.—*See Municipal Elections Corrupt & Illegal Practices Act, 1911 (c. 7), s. 1 (3).*

2271. — Statements not amounting to statements as to personal character—"Communists."]
—BURNS v. ASSOCIATED NEWSPAPERS, LTD., No. 2241, *ante*.

SECT. 6.—STATEMENTS AMOUNTING TO CONTEMPT OF COURT.

See CONTEMPT OF COURT, Vol. XVI., pp. 26, 29, Nos. 236, 271–274.

Part X.—Pleading, Practice and Evidence.

SECT. 1.—PLEADING.

SUB-SECT. 1.—STATEMENT OF CLAIM.

See Part IV., Sect. 6, sub-sect. 1, *ante*; Part V., Sect. 5, *ante*.

SUB-SECT. 2.—DEFENCES.

A: Justification.

See Part VII., Sect. 1, sub-sects. 1, 2.

B. Fair Comment.

See Part VI., Sect. 4, sub-sect. 6, *ante*.

C. Mitigation of Damages.

See Part VIII., Sect. 3, *ante*.

SUB-SECT. 3.—COUNTERCLAIM.

See SET-OFF.

SUB-SECT. 4.—REPLY.

See No. 1877, *ante*.

SECT. 2.—DAMAGES.

Part VIII., Sect. 1, sub-sect. 3, C., sub-sect. 4, B. (b).

SECT. 3.—PAYMENT INTO COURT.

SUB-SECT. 1.—IN GENERAL.

See R. S. C., Ord. 22.

Payment into court generally, see PRACTICE.

2272. When plea available—Not with denial of liability—R. S. C., Ord. 22, r. 1.]—FLEMING v. DOLLAR, No. 1262, *ante*.

2273. — — — — —.]—Defts. in an action for a libel published in a newspaper pleaded by way of defence, in accordance with Libel Act, 1843 (c. 96), s. 2, that the libel was published without actual malice, & without gross negligence, an apology, & payment into ct. of £5. The jury at the trial found that the libel was published without actual malice, but not without gross negligence, & that the apology was sufficient, & they assessed the damages at £5:—*Held*: defts., having made the payment into ct. as part of a defence under Libel Act, 1843 (c. 96), s. 2, & having failed at the trial on that defence, were not entitled to avail themselves of the payment into ct. as being made under R. S. C., Ord. 22, r. 1, & therefore pltf. was entitled to judgment.

There is no reason why under Jud. Act payment into ct. may not be pleaded in an action for libel, provided that liability is not denied. What

R. S. C., Ord. 22, r. 1, forbids is payment into ct. in such an action together with a denial of liability. If liability is admitted payment into ct. may be pleaded in libel as in any other action. A defence does not the less admit liability because, together with such an admission, it states facts in mitigation of damages. I do not see, for instance, that the mere fact that it contains such a statement as that an apology was made precludes deft. from relying at the trial on the payment into ct. as a general payment into ct. under R. S. C., Ord. 22, r. 1 (VAUGHAN WILLIAMS, L.J.).—OXLEY v. WILKES, [1898] 2 Q. B. 56; 67 L. J. Q. B. 678; 78 L. T. 728; 14 T. L. R. 402, C. A.

Annotation:—*Refd.* Sley v. Tillotson (1898), 14 T. L. R. 545.

2274. — — — — —.]—KINNELL v. WALKER, No. 2181, *ante*.

2275. — With admission of liability—Though accompanied by matters in mitigation of damages—Apology.]—OXLEY v. WILKES, No. 2273, *ante*.

2276. — Action against husband & wife—Payment in by husband—Denial of liability by wife.]—In a statement of defence in a common law action of tort against a husband & his wife jointly for a libel published by the wife, the husband pleaded payment of money into ct. in satisfaction of the claim, & the wife pleaded in denial of liability:—*Held*: such a mode of pleading was inadmissible.—BEAUMONT v. KAYE, [1904] 1 K. B. 292; 73 L. J. K. B. 213; 90 L. T. 51; 52 W. R. 241; 20 T. L. R. 183; 48 Sol. Jo. 206, C. A.

Annotation:—*Consd.* Edwards v. Porter, [1925] A. C. 1.

2277. — One sum in respect of two or more separate causes of action.]—WEBER v. BIRKETT, No. 2174, *ante*.

2278. Damages awarded less than amount paid in—Re-payment to defendant—Of amount paid in less damages awarded.]—In an action for slander deft. paid £5 into ct. in full satisfaction of pltf.'s claim, & at the trial the jury found a verdict for pltf. for one farthing damages:—*Held*: the judge had jurisdiction under R. S. C., Ord. 22, r. 5 (b), to direct the sum paid in, less the amount of damages, to be paid out to deft.—GRAY v. BARTHOLOMEW, [1895] 1 Q. B. 209; 64 L. J. Q. B. 125; 71 L. T. 867; 43 W. R. 177; 39 Sol. Jo. 112; 14 R. 50, C. A.

Annotations:—*Consd.* Brown v. Feeney, [1906] 1 K. B. 563.

Apld. Maxwell v. Wolseley, [1907] 1 K. B. 274.

2279. — — — — —.]—KLAMBOROWSKI v. COOKE (1897), 14 T. L. R. 88.

Death of party to action—Abatement of action.]—See EXECUTORS, Vol. XXIII., p. 306, Nos. 3710–3711.

SUB-SECT. 2.—APOLOGY WITH PAYMENT INTO COURT.

Payment into court generally.]—See PRACTICE.

See Libel Act, 1843 (c. 96), s. 2; Libel Act, 1845 (c. 75), s. 2.

PART X. SECT. 3, SUB-SECT. 1.

When plea available—Not with
[.]—Deft. cannot plead

payment into ct. with a defence denying liability in an action for libel.—*HARDWICK v. KINNEY* (1912), 11 E. L. R. 583; 45 N. S. R. 376.—CAN.

r. Sufficiency of amount—Question for jury.]—*TOMPSITT v. WILSON* (1891), 17 V. L. R. 383.—AUS.

Sect. 3.—Payment into court: Sub-sect. 2. Sect. 4: Sub-sects. 1, 2 & 3. Sect. 5: Sub-sects. 1, 2, 3, 4 & 5.]

2280. When plea available—Not together with denial.]—(1) In an action for a libel published in a newspaper, the special plea of apology & payment into ct., given by Libel Act, 1843 (c. 96), s. 2, cannot be pleaded along with not guilty to the same part of the declaration.

(2) Everything printed or written, which reflects on the character of another, & is published without lawful justification or excuse, is a libel, whatever the intention may have been (PARKE, B.).—O'BRIEN v. CLEMENT (1846), 15 M. & W. 435; 15 L. J. Ex. 285; 7 L. T. O. S. 142; 10 Jur. 395; 135 E. R. 920; *subsequent proceedings*, 16 M. & W. 159.

*Annotation:—*Reid. Hawksley v. Bradshaw (1880), 49 L. J.

2281. — Apology as to part—Denial of liability as to remainder—Payment in generally.]—Defts., in an action for libel, admitted part of the innuendo & denied the other part, & added a plea under Libel Act, 1843 (c. 96), with a payment into ct., without stating in respect of which part the payment was made:—*Held*: defts. were wrong, & that they should state in their defence to which part the payment was intended to apply.—MACKAY v. MANCHESTER PRESS CO. (1889), 54 J. P. 22; 6 T. L. R. 16, D. C.

*Annotation:—*Reid. Weber v. Birkett, [1925] 2 K. B. 152.

2282. — Justification as to remainder—Libel not divisible.]—DAVIS v. BILLING (1891), 8 T. L. R. 58; 36 Sol. Jo. 59, C. A.

2283. Replication to plea—Denial of malice & negligence—& sufficiency of amount paid in.]—By Libel Act, 1843 (c. 96), s. 2, deft. may plead that the libel was inserted in a newspaper without actual malice, & without gross negligence; & that he inserted a full apology; & may pay money into ct. by way of amends. The clause further enacts "that, to such plea to such action, it shall be competent to pltf. to reply generally, denying the whole of such plea":—*Held*: under that sect., pltf. is at liberty to deny the whole, or any part of such a plea; & a replication which admitted that the libel was inserted in a newspaper, & the payment of money into ct., & traversed the insertion of the libel without actual malice, & without gross negligence, & the sufficiency of the money paid into ct. as amends, was good.—CHADWICK v. HERAPATH (1847), 3 C. B. 885; 4 Dow. & L. 653; 16 L. J. C. P. 104; 8 L. T. O. S. 389; 136 E. R. 354.

2284. Plea constitutes one defence—Apology & payment not separable.]—OXLEY v. WILKES, No. 2273, *ante*.

2285. —]—SLEY v. TILLOTSON & SON (1898), 62 J. P. 505; 14 T. L. R. 545.

2286. Sufficiency of apology—What amounts to "full apology"—Manner of insertion in newspaper.]—To an action for libel contained in a newspaper, an apology, to be a full apology within the meaning of Libel Act, 1843 (c. 96), s. 2, should be printed in the newspaper in larger size type & inserted in a prominent & conspicuous part of the newspaper, that it might readily catch the eye of, & be seen by ordinary readers.—LAFONE v.

SMITH (1858), 3 H. & N. 735; 28 L. J. Ex. 33; 32 L. T. O. S. 77; 4 Jur. N. S. 1064; 7 W. R. 18; 157 E. R. 664.

*Annotations:—*Reid. Jones v. Mackie (1867), L. R. 3 Exch. 1; Oxley v. Wilks (1898), 67 L. J. Q. B. 678.

2287. — Question for jury—Must be reasonably satisfactory.]—Where an apology is pleaded in an action of libel, it is for the jury to say whether such apology is reasonably sufficient. Deft. is not bound to insert an apology dictated by pltf., but if he inserts one which an impartial person would consider reasonably satisfactory under all the circumstances of the case, he will be protected. The question of the sufficiency of an apology being eminently one for the jury, execution will not be stayed, in the event of a verdict for deft. upon an application showing that pltf. intends to move to set aside the verdict as against the weight of evidence.—RISK ALLAH BEY v. JOHNSTONE (1868), 18 L. T. 620, N. P.

2288. — Publication at earliest opportunity—One month after publication of libel.]—An advertisement was inserted in a newspaper, which amounted to a slander of title to certain property. The libel appeared on Jan. 6. The attention of deft. was called to it on Jan. 13. An action was commenced on Jan. 21 & an apology was published on Feb. 6:—*Held*: the apology had not been published at the earliest opportunity as provided by Libel Act, 1843 (c. 96), s. 2.—RAVENHILL v. UPCOTT (1869), 20 L. T. 233.

2289. Payment into court—Communication to jury—Former practice.]—To an action for a libel in a newspaper deft. pleaded, under Libel Act, 1843 (c. 96), s. 2, the insertion of a full apology & payment of 40s. into ct. The jury having found that the apology was not sufficient, but that the 40s. paid into ct. was sufficient to cover the damage, the judge directed a verdict for pltf. with 1s. damage:—*Held*: pltf. was deprived of costs by 3 & 4 Vict. c. 24, s. 2; *semble*: the jury should have assessed the damages irrespective of the 40s. paid into ct. & deft. was entitled to have such sum returned to him.—LAFONE v. SMITH (1859), 4 H. & N. 158; 32 L. T. O. S. 300; 5 Jur. N. S. 127; 157 E. R. 797.

*Annotations:—*Reid. Roper v. Lendon (1859), 5 Jur. N. S. 491; Oxley v. Wilks (1898), 67 L. J. Q. B. 678.

2290. —]—To an action for a libel, in a newspaper, deft. pleaded a plea, under Libel Act, 1843 (c. 96), s. 2, alleging that he inserted a full apology, etc.; & he paid £5 into ct. The jury, having found the apology not sufficient, & the plea therefore not proved, were directed by the judge to assess the damages irrespective of the £5 paid into ct. & without considering that payment in any way as an admission of liability:—*Held*: a proper direction.—JONES v. MACKIE (1867), L. R. 3 Exch. 1; 37 L. J. Ex. 1; 17 L. T. 151; 31 J. P. 760; 16 W. R. 109.

*Annotations:—*Reid. Dunn v. Devon & Exeter Constitutional Newspaper (1894), 63 L. J. Q. B. 342; Oxley v. Wilks (1898), 67 L. J. Q. B. 678.

2291. — No communication to be made—As to payment or amount paid.]—Payment into ct. under Libel Act, 1845 (c. 75), s. 2, in an action for a newspaper libel, is unconditional & subject to the ancient practice which prevailed as to pay-

PART X. SECT. 3, SUB-SECT. 2.

2280 i. When plea available—Not together with denial.]—In an action for libel:—*Held*: the plea of not guilty was inconsistent with a plea of apology & payment into ct.—DOYLE v. OWEN SOUND PRINTING CO. (1879), 8 P. R.

69.—CAN.

2280 ii. —]—PARKS v. JOURNAL CO., LTD. (1911), 16 W. L. R. 705; 3 Alta. L. R. 76.—CAN.

2280 iii. —]—BARRY v. M'GRATH (1868), 17 W. R. 163.—IR.

2291 i. Payment into court—Com-

*munication to jury—No communication to be made—As to payment or amount paid.]—*Defts. pleaded a mistake & an apology, & paid into ct. \$5, which they alleged was sufficient to satisfy pltf.'s claim. A special jury awarded pltf. \$5,000 damages:—*Held*: there should be a new trial because pltf.'s

ment into ct. without denial of liability. The operation of Ord. 22, r 22, of the R. S. C., 1893, does not alter this practice nor deprive pltf. of his right to the money in ct., although at the trial the jury may assess his damages at a sum less than that paid into ct.

The uniform practice for the last fifty years, ever since the passing of Libel Act, 1843 (c. 96), down to the making of the new rules of Nov. 1893, was simply to ask the jury whether the amount paid into ct. was sufficient. They were not entitled to say that it was too much, except in cases in which the plea was not proved, for that question was not in issue. Now under the new rule R. S. C., Ord. 22, r. 22, the fact of the payment into ct. is concealed from the jury. But the only object of that rule was to counteract the known tendency of juries to invariably give pltf. a little more than the sum paid in. It was never intended by that rule to alter the nature of the issues upon the plea (WILLS, J.).—DUNN v. DEVON & EXETER CONSTITUTIONAL Co., [1895] 1 Q. B. 211, n.; 63 L. J. Q. B. 342; 70 L. T. 593; 10 T. L. R. 335; 38 Sol. Jo. 351; 10 R. 167.

Annotations:—**Consd.** Gray v. Bartholomew, [1895] 1 Q. B. 209. **Refd.** Maxwell v. Wolseley (1906), 76 L. J. K. B. 163.

2292. ————.]—The amount of a payment into ct. by deft. under Libel Act, 1845 (c. 75), s. 2, amending Libel Act, 1843 (c. 96), s. 2, is not to be communicated to the jury, & where money has been so paid in, it is contempt of ct. to publish before the trial a statement that a particular sum has been paid by deft. to pltf.'s solr., inasmuch as the publication of such a statement is calculated to prejudice the fair trial of the action. *Semble*: even the mere fact of such a payment into ct., without mention of the amount, is not to be communicated to the jury. In such a case the proper procedure to be adopted by deft. who alleges that pending the trial of the action pltf. has been guilty of contempt of ct., is not to apply for a rule *nisi* for attachment but to proceed by notice of motion in the action.—R. v. WEALDSTONE NEWS & HARROW NEWS EDITOR, PRINTER & PUBLISHER, HARLEY v. SHOLL (1925), 41 T. L. R. 508; 69 Sol. Jo. 591, 642.

2293. ———— **Contempt of court.**]—R. v. WEALDSTONE NEWS & HARROW NEWS EDITOR, PRINTER & PUBLISHER, HARLEY v. SHOLL, No. 2292, *ante*.

2294. Assessment of damages—Award of amount smaller than sum paid in—Right of plaintiff to sum paid in.]—DUNN v. DEVON & EXETER CONSTITUTIONAL Co., No. 2291, *ante*.

2295. Apology before action—Power to stay proceedings—On payment of plaintiff's costs.]—In an action of slander, where deft. offered such an apology as was satisfactory to pltf. before action, the ct. will stay proceedings on payment of what, in their opinion, is sufficient for pltf.'s attorney's costs.—MILLER v. DRURY (1865), 12 L. T. 464.

2296. Absence of malice & gross negligence—Onus of proof on defendant.]—PETERS v. EDWARDS (1887), 3 T. L. R. 423.

2297. Sum taken out by plaintiff before verdict—Application by defendant for judgment—Mistake.]—BARNES v. JEAFFRESON (1890), 6 T. L. R. 435, C. A.

counsel, in addressing the jury, had referred to the fact that money had been paid into ct. & mentioned the amount.—DICKINSON v. WORLD PRINTING & PUBLISHING Co. (1912), 21 W. L. R. 529; 2 W. W. R. 553; 5 D. L. R. 148; 17 B. C. R. 157.—CAN.

t. *Sum taken out by plaintiff.*]—

Pltf. in an action for libel contained in a newspaper, is not entitled to draw out money lodged in ct. with defence of an apology, under 6 & 7 Vict. c. 96, s. 2, & to proceed with the action for the purpose of recovering greater damages.—HARRIS v. ARNOTT (1889), 24 L. R. Ir. 404.—IR.

SECT. 4.—PARTICULARS.

SUB-SECT. 1.—OF STATEMENT OF CLAIM.

See, generally, PLEADING.

2298. When to be delivered—Discretion of court.]—Pltf. in a libel action alleged in his statement of claim that after the outbreak of war he was engaged, with official sanction, in relief & other work on behalf of British prisoners of war & in conveying to them money, food, & clothing, from their relatives & friends. The statement of claim then set out the alleged libel, which was to the effect that the American Ambassador in Berlin had warned the British public against confiding anything to pltf. Defts., before delivering their defence, obtained a master's order for particulars of pltf.'s allegations as to his official position, his relief & other work, & the things conveyed by him to prisoners, & as to the relatives & friends referred to. An appeal from the master to the judge was dismissed:—*Held*: though the allegations in question might not be necessary, yet, as evidence that they were true would no doubt be given at the trial, they could not be said to be immaterial to pltf.'s case, & therefore he was bound to give the particulars, & the question whether they should be given was a matter of discretion & there was no reason to interfere with the way in which it had been exercised.—GASTON v. UNITED NEWSPAPERS, LTD. (1915), 32 T. L. R. 143, C. A.

SUB-SECT. 2.—OF PUBLICATION.

See Part V., Sect. 4, *ante*.

SUB-SECT. 3.—OF JUSTIFICATION.

See Part VI., Sect. 1, sub-sect. 4, *ante*.

SECT. 5.—EVIDENCE.

SUB-SECT. 1.—PROOF OF STATEMENT.

See Part IV., Sect. 6, sub-sect. 2, *ante*.

SUB-SECT. 2.—MEANING OF STATEMENT.

See Part IV., Sect. 4, sub-sect. 5, *ante*.

SUB-SECT. 3.—PROOF OF PUBLICATION.

See Part V., Sect. 1, sub-sect. 5; Sect. 2, sub-sect. 2, *ante*.

SUB-SECT. 4.—JUSTIFICATION.

See Part VI., Sect. 1, sub-sect. 3, *ante*.

SUB-SECT. 5.—PRIVILEGE—PROOF OF MALICE.

See Part VII., Sect. 2, sub-sect. 2, B., *ante*.

PART X. SECT. 4, SUB-SECT. 1.

a. *Sufficiency of.*]—KING v. CLARK (1923), 19 Tas. L. R. 16.—AUS.

b. ———.]—GOULD v. BEATTIE (1886), 11 P. R. 329.—CAN.

c. ———.]—MACDONALD v. SHEPPARD PUBLISHING Co. (1900), 19 P. R. 282.—CAN.

Sect. 5.—Evidence: Sub-sects. 6 & 7. Sects. 6, 7, 8, & 9. Part XI. Sect. 1: Sub-sect. 1, A., B., C., D., E. & F.; sub-sects. 2, 3 & 4, A. (a).]

SUB-SECT. 6.—DAMAGES.

See Part VIII., Sect. 1, sub-sect. 3, C., sub-sect. 4, B. (b), *ante*.

SUB-SECT. 7.—CRIMINAL LIBEL.

See Part XI., Sect. 2, sub-sect. 8, *post*.

SECT. 6.—CONSOLIDATION OF ACTIONS.

See Law of Libel Amendment Act, 1888 (c. 64), s. 5 & R. S. C., Ord. 49, r. 8.

2299. When ordered—Law of Libel Amendment Act, 1888 (c. 64), s. 5—Different defences set up by different defendants.]—Defts. in two out of three actions of libel brought by the same pltf. justified the libel; third deft. merely pleaded an apology & paid into ct. On the joint application of three defts. the ct. consolidated the actions for the purpose of trial under the above sect.—*EDDISON v. DALZIEL, SAME v. "EVENING NEWS & POST" PROPRIETORS, SAME v. "BRADFORD ARGUS" PROPRIETORS* (1893), 9 T. L. R. 334, D. C.

2300. ——— Before delivery of defences.]—There is jurisdiction under the above sect. to make an order consolidating actions of libel brought by the same person against several defts. in respect of the same or substantially the same libel before the delivery of defences in the action.

If there are several actions consolidated, the jury need not necessarily find against defts. in all the actions. They may find verdicts against defts. in some of them, & they must find against those defts. in one sum, & must then apportion

the one sum which they have found among them (*LORD ESHER, M.R.*).—*STONE v. PRESS ASSOCN.*, [1897] 2 Q. B. 159; 66 L. J. Q. B. 662; 77 L. T. 41; 45 W. R. 641; 13 T. L. R. 463, C. A.

SECT. 7.—NEW TRIAL.

Grounds for granting or refusing.]—*See* DAMAGES, Vol. XVII., p. 177, No. 815, & generally, PRACTICE.

Right of court to impose conditions.]—*See* DAMAGES, Vol. XVII., pp. 164, 167, 171, 172, 176–179, Nos. 648, 655, 675, 716, 720, 730, 737, 739, 793, 802, 809, 815, 822, 823, 825, 829, & generally, PRACTICE.

Costs considered in estimating damages.]—*See* DAMAGES, Vol. XVII., p. 179, No. 829; JURIES, Vol. XXX., pp. 245, 246, Nos. 443–450; PRACTICE.

SECT. 8.—DISCOVERY.

Production & inspection of documents.]—*See* DISCOVERY, Vol. XVIII., pp. 95 *et seq.*

Interrogatories—Libel.]—*See* DISCOVERY, Vol. XVIII., pp. 203 *et seq.*

—— Slander.]—*See* DISCOVERY, Vol. XVIII., pp. 206 *et seq.*

—— Where malice in issue.]—*See* DISCOVERY, Vol. XVIII., pp. 208 *et seq.*

—— Grounds for not answering.]—*See* DISCOVERY, Vol. XVIII., pp. 236 *et seq.*

SECT. 9.—COSTS.

See Part VIII., Sect. 2, *ante*.

Part XI.—Criminal Proceedings.

SECT. 1.—WHEN MAINTAINABLE.

SUB-SECT. 1.—DEFAMATORY LIBEL.

A. In General.

2301. Uttering false statement—Knowledge of falsehood—Indifference to falsehood or truth.]—*R. v. HARVEY & CHAPMAN*, No. 2496, *post*.

2302. Imputation of insanity.]—*R. v. HARVEY & CHAPMAN*, No. 2496, *post*.

B. Where Breach of the Peace Probable.

2303. Proceedings maintainable.]—*HICKS' CASE* (1618), Hob. 215; Poph. 139; 80 E. R. 362.

*Annotations:—**Reid. R. v. Sumner & Hillard* (1665), 1 Sid. 270; *R. v. Beere* (1698), 12 Mod. Rep. 218; *Wilke's Case* (1763), 19 State Tr. 982; *Butt v. Conant* (1820), 1 Brod. & Bing. 548; *R. v. Adams* (1888), 5 T. L. R. 85. *Mentd. A.-G. v. Downing* (1767), Wilm. 1.

2304. ———.]—A scandalous letter indictable before justices of the peace as a libel.

Indictable, because it tended to a breach of the peace (*per CUR.*).—*R. v. SUMMERS* (1665), 1 Lev. 139; 3 Salk. 194; 1 Keb. 788, 931; 83 E. R. 337; *sub nom. R. v. SUMNER & HILLARD*, 1 Sid. 270.

*Annotation:—**Reid. R. v. Wilkes* (1763), 2 Wils. 151.

2305. ———.]—*R. v. SAUNDERS* (1670), T. Raym. 201; 83 E. R. 106.

*Annotation:—**Mentd. R. v. Bright* (1758), 2 Keny. 274.

2306. ———.]—*R. v. HOLBROOK*, No. 1135, *ante*.

2307. ———.]—(1) The law was as laid down in *R. v. Labouchere*, No. 2366, *post*: "A criminal prosecution ought not to be instituted unless the offence be such as can be reasonably construed as calculated to disturb the peace of the community. In such a case the Public Prosecutor has to protect the community in the person of an individual. But private character should be vindicated in an action for libel, & an indictment for libel is only justified when it affects the public, as an attempt to disturb the public peace" (*LORD COLERIDGE, C.J.*).

(2) It is on the authority of that judgment [*Scott v. Sampson*, No. 2045, *ante*], in which I agree, that I admit evidence of the general reputation of pltf. in this case (*LORD COLERIDGE, C.J.*).—*WOOD v. COX* (1888), 4 T. L. R. 652; *on appeal* (1889), 5 T. L. R. 272, C. A.

*Annotations:—**Generally. Mentd. Moore v. Gill* (1888), 4 T. L. R. 676; *O'Connor v. Star Newspaper Co.* (1893), 9 T. L. R. 233.

Libel on class of persons.]—*See* No. 2308, *post*.

Libel on dead person.]—*See* No. 2312, *post*.

PART X. SECT. 6.

d. When ordered.]—*BARNES v. SHARPE* (1910), 11 C. L. R. 462.—*AUS.*

e. ——— Not in respect of two different defendants.]—A. sues B. for libel. He also sues C. for a similar libel. Upon an action to have the

two actions consolidated:—*Held*: the ct. had no power to order consolidation.—*HAYDON v. HERDER* (1910), 9 Nfld. L. R. 447.—*NFLD.*

C. On Administration of Justice.

See CRIMINAL LAW, Vol. XIV., p. 352, Nos. 3714, 3715, 3718, 3719; Vol. XV., pp. 702-703, Nos. 7585-7613.

D. On Class of Persons.

2308. Proceedings maintainable—Breach of the peace probable.]—*R. v. OSBORNE* (1732), Kel. W. 230; 2 Barn. K. B. 166; 25 E. R. 584.

*Annotation:—*Refd. *R. v. Jenour* (1740), 7 Mod. Rep. 400.

2309. — Actors & playgoers.]—PRYNN'S CASE (1633), 3 State Tr. 562.

2310. — Church of England clergy.]—A criminal information granted against the publisher of a newspaper for a libel reflecting upon the clergy of a particular diocese, & generally upon the clergy of the Church of England, though no individual prosecutor was named, & though the libellous matter was not negatived on affidavit.—*R. v. WILLIAMS* (1822), 5 B. & Ald. 595; 1 State Tr. N. S. 1291; 1 Dow. & Ry. K. B. 197; 106 E. R. 1308.

*Annotation:—*Refd. *Williams v. Beaumont* (1833), 3 Moo. & S. 705.

2311. — Roman Catholics.]—A person has a right to discuss the Roman Catholic religion & its institutions, but he has no right in doing so to libel individual members. If a man puts forth a publication calculated to injure private character he must be taken to have intended it to have that effect.—*R. v. GATHERCOLE* (1838), 2 Lew. C. C. 237; 168 E. R. 1140.

*Annotation:—*Refd. *Bowman v. Secular Soc.*, [1917] A. C. 406.

E. On Deceased Persons.

2312. Proceedings not maintainable—Unless family of deceased brought into ridicule & contempt—& breach of the peace probable.]—An indictment for publishing libellous matter, reflecting on the memory of a dead person, not alleging that it was done with a design to bring contempt on the family of the deceased, & to stir up hatred of the King's subjects against them, & to excite his relations to a breach of the peace, cannot be supported.—*R. v. TOPHAM* (1791), 4 Term Rep. 126; 100 E. R. 931.

*Annotations:—*Apld. *R. v. Labouchere* (1884), 12 Q. B. D. 320; *R. v. Ensor* (1887), 3 T. L. R. 366. *Mentd. R. v. Philipps* (1805), 6 East, 464.

2313. — —.]—Deft. published in 1822 Byron's poem *The Vision of Judgment* & was indicted for publishing a libel concerning the late King, George III., with intent to defame him & to disturb & disquiet his descendants, & to bring them into public scandal, disgrace, & contempt.

A publication tending to disturb the minds of living individuals, & to bring them into contempt & disgrace, by reflecting upon persons who were dead, was an offence against the law (ABBOTT, C.J.).—*R. v. HUNT* (1824), 2 State Tr. N. S. 1291.

2314. — —.]—A libel upon a dead person is not a criminal offence unless it can be clearly proved to have caused injury or annoyance to the living.—*R. v. ENSOR* (1887), 3 T. L. R. 366.

2315. — Unless publication very unusual.]—*R. v. LABOUCHERE*, No. 2366, *post*.

F. Between Husband and Wife.

See HUSBAND & WIFE, Vol. XXVII., p. 261, Nos. 2309-2311.

SUB-SECT. 2.—BLASPHEMOUS LIBEL.

See CRIMINAL LAW, Vol. XV., pp. 733-735, Nos. 7914-7949.

SUB-SECT. 3.—INDECENT PUBLICATIONS.

See Obscene Publications Act, 1857 (c. 83); Law of Libel Amendment Act, 1888 (c. 64), ss. 3, 4, 7; & CRIMINAL LAW, Vol. XV., pp. 748-751, Nos. 8068-8099.

SUB-SECT. 4.—SEDITIONOUS LIBEL.

A. What Amounts to.

(a) *Exciting Disaffection or Contempt against Church or State.*

Sedition generally.]—See CRIMINAL LAW, Vol. XV., pp. 633 *et seq.*

2316. Against the Sovereign.]—*R. v. SMITH* (1713), Gilb. 57; 93 E. R. 259.

2317. —.]—*R. v. MATTHEWS* (1719), 15 State Tr. 1323.

*Annotation:—*Consd. *R. v. Horne* (1777), 20 State Tr. 651.

2318. —.]—*R. v. LAMBERT & PERRY*, No. 891, *ante*.

—.]—See, further, CRIMINAL LAW, Vol. XV., p. 633, Nos. 6726-6731.

2319. Against the Government.]—*R. v. TUTCHIN* (1704), as reported in 14 State Tr. 1095; *sub nom. TUCHIN'S CASE*, Holt, K. B. 424; 90 E. R. 1133.

*Annotations:—*Apld. *R. v. Cobbett* (1804), 29 State Tr. 1. *Refd. R. v. Horne* (1777), 2 Cowp. 672; *R. v. Shipley* (1784), 4 Doug. K. B. 73; *R. v. Grant, Ranken & Hamilton* (1848), 7 State Tr. N. S. 507. *Mentd. R. v. Seawood* (1727), 2 Ld. Raym. 1472; *R. v. Ellames* (1734), Cunn. 39; *A.-G. v. Allgood* (1743), Park. 1; *Wynne v. Thomas* (1745), Willes, 563; *R. v. Wilkes* (1770), 4 Burr. 2527; *R. v. Burks* (1796), 7 Term Rep. 4; *A.-G. v. Donaldson* (1842), 10 M. & W. 117; *R. v. Gregory* (1847), 16 L. J. Q. B. 281.

2320. —.]—Even a private man's character is not to be scandalised, either directly or indirectly. Much less is a magistrate's, Minister of State, or other public person's character to be stained either directly or indirectly. The law always punishes libels, even among private persons, because they flow from malice & tend to create disturbances, quarrels, & revenge between them, their families & kindred, & disturb the public peace. The law reckons it a greater offence when the libel is pointed at persons in a public capacity, as it is a reproach to the Govt. to have corrupt magistrates, etc., substituted by His Majesty, & tends to sow sedition, & disturb the peace of the kingdom (LORD RAYMOND, C.J.).—*R. v. FRANCKLIN* (1731), 17 State Tr. 625.

*Annotation:—*Refd. *R. v. Shipley* (1784), 4 Doug. K. B. 73.

2321. —.]—You have been convicted for publicly speaking several scandalous & seditious words, tending to lessen in men's minds, that love & veneration which every honest & good man ought to entertain for our wise & happy constitution, & likewise to withdraw the affections of His Majesty's subjects from His Majesty's Royal person & Govt., & to stir up their minds against all kingly power (*per CUR.*).—*R. v. FROST* (1793), 22 State Tr. 471.

2322. —.]—You have traduced the Govt. of the country & the administration of public affairs of these realms; & by these means endeavoured

PART XI. SECT. 1, SUB-SECT. 4.—

A. (a).

*rule.]—*Words can only be a seditious libel if they are expressive of a seditious intention.

They are expressive of a seditious intention only when they are both calculated & intended to stir up & excite discontent & disaffection.—*R. v. GIESINGER* (Sask.), [1917] 1

W. W. R. 595; 27 Can. Crim. Cas. 53. —CAN.

*g. —.]—**R. v. O'BRIEN* (1848), 6 State Tr. N. S. 591, n.—IR.

*h. —.]—*Those writings are

Sect. 1.—When maintainable: Sub-sect. 4, A. (a) — (b), & B.; sub-sect. 5. Sect. 2: Sub-sects. 1 & 2.

to induce the people of this realm to withdraw their allegiance from His Majesty, his Crown & Govt. You have given an invitation to sixty or seventy thousand of our enemies to invade this country (GROSE, J.).—*R. v. WAKEFIELD* (1799), 27 State Tr. 515.

Annotation:—Mentd. R. v. O'Connell (1844), 5 State Tr. N. S. 1.

2323. —.—.]—The question is whether this paper is such as would be injurious to the individuals & whether it is calculated to be injurious to the particular interests of the country? It is no new doctrine that if a publication be calculated to alienate the affections of the people by bringing the Govt. into disesteem, whether the expedient be by ridicule or obloquy, the person so conducting himself is exposed to the inflictions of the law. It is a crime. It has ever been considered as a crime, whether it be wrapped in one form or in another (LORD ELLENBOROUGH, C.J.).—*R. v. COBBETT* (1804), 29 State Tr. 1.

Annotation:—Reid. R. v. Grant, Ranken & Hamilton (1848), 7 State Tr. N. S. 507.

2324. —.—.]—*R. v. HUNT*, No. 1798, *ante*.

2325. —.—.]—*R. v. BURDETT*, No. 1097, *ante*.

2326. —.—.]—*R. v. COBBETT* (1831), 2 State Tr. N. S. 789.

Annotations:—Mentd. R. v. Charlesworth (1861), 1 B. & S. 460; *Winsor v. R.* (1866), L. R. 1 Q. B. 289.

2327. —.—.]—Expressions intended & tending under the circumstances of the time to produce hatred & contempt of the institutions of the country, & to induce unlawful resistance, are seditious.—*R. v. FUSSELL* (1848), 6 State Tr. N. S. 723; 3 Cox, C. C. 291.

2328. —.—.]—(1) Whoever by language written or spoken incites or encourages others to use physical force or violence in some public matter connected with the State is guilty of publishing a seditious libel.

(2) The accused may not plead the truth of the statements that he makes as a defence to the charges nor may he plead the innocence of his motive.

(3) The test of seditious libel is this:—Was the language used calculated or was it not, to promote public disorder or physical force or violence in a matter of State.

(4) If the accused published the libel, there is no distinction in law between what he wrote in it & what any other person wrote in it.—*R. v. ALDRED* (1909), 74 J. P. 55; 22 Cox, C. C. 1.

2329. —.—.]—*R. v. INKPIN* (1925), *Times*, Nov 26.

2330. —.— Foreign government—No libel.]—*R. v. ANTONELLI & BARBERI*, No. 2341, *post*.

2331. Against Parliament.]—*R. v. RAINER* (1733), 2 Barn. K. B. 293; 94 E. R. 509.

2332. —.—.]—*R. v. OWEN* (1752), 18 State Tr. 1203.

Annotation:—Reid. R. v. Shipley (1784), 4 Doug. K. B. 73.

2333. —.—.]—*R. v. STOCKDALE* (1789), 22 State Tr. 237.

Annotations:—Reid. R. v. Reeves (1796), Peake, Add. Cas. v. O'Connell (1844), 5 State Tr. N. S. 1; *R. v. Duffy* (1849), 7 State Tr. N. S. 795. *Mentd. Monson v. Tussaud*, *Monson v. Tussaud* (1894), 63 L. J. Q. B. 454.

2334. Imputing corruption to judges.]—*R. v. GORDON (LORD)* (1787), 22 State Tr. 177.

Annotations:—Reid. R. v. Peltier (1803), 28 State Tr. 529; *Austria Emperor v. Day & Kossuth* (1861), 2 Giff. 628; *R. v. Antonelli & Barberi* (1905), 70 J. P. 4.

2335. Against the Established Church.]—*R. v. FIELD* (1662), 1 Sid. 69; 82 E. R. 975.

2336. —.—.]—*R. v. KEACH* (1665), 6 State Tr. 701.

2337. Against Royal personages in foreign countries—Tending to prejudice friendly relations.]—*R. v. GORDON (LORD)* (1787), 22 State Tr. 177.

Annotations:—Reid. R. v. Peltier (1803), 28 State Tr. 529; *Austria Emperor v. Day & Kossuth* (1861), 2 Giff. 628; *R. v. Antonelli & Barberi* (1905), 70 J. P. 4.

(b) Incitement to Disturbance of Public Peace and Violence.

2338. Incitements to violence.]—*R. v. BURDETT*, No. 1097, *ante*.

2339. —.—.]—*R. v. COBBETT* (1831), 2 State Tr. N. S. 789.

Annotations:—Mentd. R. v. Charlesworth (1861), 1 B. & S. 460; *Winsor v. R.* (1866), L. R. 1 Q. B. 289.

2340. —.—.]—*R. v. LOVETT*, No. 1100, *ante*.

—.—.]—*See, also, CRIMINAL LAW*, Vol. XV., pp. 636–637, Nos. 6764–6773; & Sub-sect. 4, A. (a), *ante*.

2341. Justification of & incitement to assassination—Of sovereigns & rulers.]—(1) A. was indicted for publishing a libel, in the form of a pamphlet, attempting to justify the crimes of assassination & murder, & to incite persons to commit those crimes upon the sovereigns & rulers of Europe. There were also counts under Offences against the Person Act, 1861 (c. 100), s. 4, charging him with encouraging & endeavouring to persuade persons unknown to murder the sovereigns & rulers of Europe. B. was charged with aiding & abetting A. to commit these misdemeanours:—*Held*: the words “sovereigns of Europe” specified a sufficiently definite class, & that the counts were good. The jury were directed that if they found A. guilty, then B., who had sold copies of the pamphlet, was guilty of aiding & abetting if he knew what was in the pamphlet, or deliberately shut his eyes to what was in it.

(2) *Seem*: a document published in this country, which is calculated to disturb the government of some foreign country is not a seditious libel, nor punishable as a libel at all.—*R. v. ANTONELLI & BARBERI* (1905), 70 J. P. 4.

Libels on foreign sovereign & ambassador.]—*See CRIMINAL LAW*, Vol. XV., p. 729, Nos. 7885–7888.

B. Right of Public Discussion.

2342. Extent of right—Discussion conducted with sobriety & decency.]—*R. v. WHITE* (1808), 1 Camp. 359, n.

2343. —.—.]—*R. v. LAMBERT & PERRY*, No. 891, *ante*.

2344. —.—.]—*R. v. HUNT*, No. 1798, *ante*.

2345. —.—.]—*R. v. BURDETT*, No. 1097, *ante*.

2346. —.—.]—Every man has a right to give every public matter a candid, full, & free discussion; but although the people have a right to discuss any grievances they have to complain of, they must not do it in a way to excite tumult, & if a party publish a paper on any such matter, & it contain no more than a calm & quiet discussion, allowing something for a little feeling in men's minds, that will be no libel; but if the paper go beyond & be calculated to excite tumult, it is a libel.

Deft. was tried for publishing a letter, purporting

or to violate the
of the Govt. or the administration of | promote insurrection, or create
discontent, or bring justice into con-

tempt, or embarrass its functions.—
R. v. SULLIVAN, R. v. PIGOTT (1868),
11 Cox. C. C. 44.—*HR.*

to be the resolutions of a body of persons calling themselves the General Convention, & in one part of it stated that an outrage had been committed on the people of Birmingham by a force, "acting under the authority of men, who, when out of office, sanctioned & took part in the meetings of the people." A witness for the Crown stated in his cross-examination that he had formerly belonged to the Convention, but had since resigned, & had become a town councillor of Birmingham. It was proposed to ask him further in cross-examination, as to what he said at a meeting at which the Convention was agreed on, but which took place nearly a year before the publication of the alleged libel:—*Held*: this could not be done.—*R. v. COLLINS* (1839), 9 C. & P. 456; 3 State Tr. N. S. 1149.

2347. — — —.]—There is undoubtedly no question . . . as to the right of public meeting, & the right of free discussion is also perfectly unlimited, with the exception, of course, that it must not be such as to incite to a breach of the peace or the violation of the law (CAVE, J.).—*R. v. BURNS* (1886), 2 T. L. R. 510; 16 Cox, C. C. 355.

SUB-SECT. 5.—THREATS TO PUBLISH LIBEL—
EXTORTION.

See CRIMINAL LAW, Vol. XV., p. 949, Nos. 10,511–10,516.

SECT. 2.—PROSECUTION.

SUB-SECT. 1.—IN GENERAL.

2348. Copies of libel—Each copy separate publication—Subject to distinct prosecution.]—*R. v. CARLISLE*, No. 2349, *post*.

2349. Prosecution by information & indictment—Restraint of proceedings.]—Every copy of a libel sold by deft. is a separate publication & liable to a distinct prosecution. Though deft. be prosecuted by informations filed by the A.-G., as well as by indictments on the part of a different person for publishing different copies of the same libel, the ct. will not restrain the proceedings.—*R. v. CARLISLE* (1819), 1 Chit. 451.

2350. Apprehension of libeller—Power of justice—Before information filed or indictment found—Bail or commitment in default.]—A justice of the peace out of sessions, before information filed, or indictment found, has jurisdiction in the first instance to issue his warrant to apprehend a party charged on oath with publishing a libel, & require him to find bail, & in default of sureties to commit him to prison to abide his trial.—*BUTT v. CONANT* (1820), 1 Brod. & Bing. 548; 4 Moore, C. P. 195; 129 E. R. 834.

Annotations:—*Refd.* *R. v. Bartlett* (1843), 12 L. J. M. C. 127; *Haylock v. Sparke* (1853), 1 E. & B. 471; *Lansbury v. Riley*, [1914] 3 K. B. 299. *Mentd.* *Williamson v. Gould* (1823), 1 Bing. 171; *Candle v. Seymour* (1841), 1 Q. B. 889; *R. v. Casement*, [1917] 1 K. B. 98.

2351. Compromise between parties—Whether sanctioned by court.]—(1) The ct. will not sanction applications for criminal information in cases of alleged libel if resorted to for the purpose of extorting an apology.

(2) To repeat a malignant scandal floating about society, although with no intent to injure any person in particular, is sufficient to support a criminal information.

(3) A libel of a serious character being brought before the ct., it will not sanction a compromise between the parties, but the prosecution once

instituted must take its course; the object of such a proceeding being not the vindication of character, but the repression of scandalous libels.

(4) In future, the ct. will lay down a stringent rule that in such cases the counsel who applies for a criminal information shall give an undertaking on the part of the prosecutor to proceed with the prosecution in order to ensure its being carried to its legitimate conclusion.—*R. v. "THE WORLD"* (1876), 13 Cox, C. C. 305.

2352. — — —.]—A person of property was found with his throat cut & dead in his house; his housekeeper, a married woman, having lived some years in his service, & being left a large legatee. A coroner's inquest was held, & a verdict of suicide was found. About six months afterwards a newspaper published an article suggesting a doubt whether there had not been a murder, & pointing at the housekeeper's conduct as suspicious. The proprietor of the newspaper did not show that any fresh evidence had been discovered, & produced no affidavit from the writer as to the grounds of his suggestion of murder:—*Held*: a rule for a criminal information must be made absolute, notwithstanding terms of apology & payment of costs were offered.—*Ex p. THORNTON* (1877), 41 J. P. 342.

2353. Civil & criminal remedies—Whether concurrent.]—*R. v. HOLBROOK*, No. 1135, *ante*.

SUB-SECT. 2.—PRELIMINARY SUMMONS BEFORE
MAGISTRATE.

See, generally, CRIMINAL LAW, Vol. XIV., pp. 191 *et seq.*

2354. Grounds for remanding.]—A magistrate cannot judicially consider, as ground for adjourning a summons for libel, pending civil proceedings between different parties for a different libel, though arising out of the same matters.—*R. v. EVANS* (1890), 62 L. T. 570; 54 J. P. 471; 6 T. L. R. 248; 17 Cox, C. C. 81, D. C.

Annotations:—*Consd.* *R. v. Bennett & Bond*, *Ex p. Bennet* (1908), 72 J. P. 362. *Refd.* *R. v. Southampton JJ.*, *Ex p. Lebern* (1907), 96 L. T. 697. *Mentd.* *R. v. Fox* (1908), 6 L. G. R. 1068; *R. v. Garrett*, *Ex p. De Dryver* (1917), 34 T. L. R. 13.

2355. — — —.]—A summons having been issued against one C. for publishing a false & defamatory libel concerning one L., C. appeared before the justices but was never in custody or detained as a prisoner. After discussion C. agreed to sign an apology & to pay L.'s costs, & the summons was adjourned for this purpose. On the adjourned hearing C. stated he was willing to sign the apology, but said he was unable to pay the costs on the ground of poverty, & the justices being of opinion that the only obstacle to a settlement was the question of costs, & that C. would pay them if he were given time, adjourned the summons for three months:—*Held*: the ct. under the circumstances would not interfere with the discretion of the justices in adjourning the summons.—*R. v. SOUTHAMPTON JJ.*, *Ex p. LEBERN* (1907), 96 L. T. 697; 71 J. P. 332; 21 Cox, C. C. 431, D. C.

2356. Warrant of commitment—Validity.]—*R. v. WILKES* (1763), 2 Wils. 151; 19 State Tr. 982; 95 E. R. 737; *subsequent proceedings*, *sub nom. WILKES v. R.* (1770), 4 Bro. Parl. Cas. 360.

Annotations:—*Refd.* *Entick v. Carrington* (1765), 2 Wils. 275; *R. v. Platt* (1777), 1 Leach, 157; *R. v. Despard* (1798), 7 Term Rep. 736; *Crowley's Case* (1818), 2 Swan. 1; *Butt v. Conant* (1820), 1 Brod. & Bing. 548; *Haylock v. Sparke* (1853), 1 E. & B. 471.

2357. Non-appearance of prosecutor—Issue of fresh summons—Discretion of magistrate.]—An

Sect. 2.—Prosecution: Sub-sects. 2 & 3, A. & B.
(a), (b) & (c) i.]

application was made to a magistrate on behalf of a man named Bennet to issue a warrant against a man named Bond for an alleged false & defamatory libel said to have been published by Bond concerning Bennet. The magistrate granted a warrant for Bond's arrest, & Bond was arrested & brought before the magistrate two days later. Neither the prosecutor nor any one on his behalf appeared on the case being called, & the magistrate having satisfied himself by inquiry that the prosecution had full knowledge of the time of the proceedings, discharged Bond from custody. Five days later an application was made to the magistrate on behalf of Bennet to grant him a summons against Bond upon the same matter, it being stated that the absence of the prosecution on the previous occasion was due to the fact that it was understood from the police that their attendance would be unnecessary, that a remand would be asked for, & that the case would be fully heard upon the remand date. The police officer in the case, however, informed the magistrate that no such statement was made by him to the prosecutor or his solr. The magistrate was of opinion that the police had no right to assure any prosecutor that his attendance was unnecessary, & that a solr. had no right to accept such an assurance, even if it was given, & he therefore refused to grant the summons, & stated that as appct. had applied for & obtained a warrant, but had not chosen to appear in support of the charge, he would exercise his discretion, & refuse appct. any further process for the purpose of reopening the matter. Further, he pointed out that appct. had a civil remedy, & this strengthened the magistrate in the view that he would not be justified in granting to appct. any further criminal process in the matter:—*Held*: the magistrate had taken into consideration matters which he could not properly consider in exercising his discretion; he had, therefore, not exercised a judicial discretion, & a *mandamus* must issue to the magistrate to hear & determine the application for a summons according to law.—*R. v. BENNETT & BOND, Ex p. BENNET* (1908), 72 J. P. 362; 24 T. L. R. 681; 52 Sol. Jo. 583, D. C.

2358. Jurisdiction to entertain—After civil proceedings.]—Proceedings were taken in the High Ct. in which L. claimed an injunction restraining E. from publishing certain defamatory statements. An *interim* injunction was granted & subsequently E. gave an undertaking not to publish any further defamatory statements in relation to L. E. having afterwards published further statements of the same character alleged to be libellous, L. laid an information before a metropolitan police magistrate charging E. with publishing a criminal libel. E. applied for a rule for a writ of prohibition directed to the magistrate on the ground that L., having chosen his civil remedy, was precluded from proceeding criminally in respect of the same subject matter:—*Held*: refusing a rule, the magistrate had jurisdiction to inquire whether E. had published a criminal libel.—*Ex p. EDGAR* (1913), 77 J. P. 283; 29 T. L. R. 278, D. C.

Where truth of libel pleaded as justification—Power of magistrate to inquire into truth.]—*See* Nos. 2486–2489, *post*.

SUB-SECT. 3.—BY INFORMATION.

A. At Instance of Attorney-General.

See, generally, CRIMINAL LAW, Vol. XIV., pp. 349–351, Nos. 3654–3681.

2359. When granted—Misdemeanour of grave nature—Corruption alleged against justices.]—*R. v. CATE & TARRY* (1887), Archbold's Criminal Pleading, 26th ed. p. 127.

2360. ——— Libel against Sovereign.]—*R. v. MYLIUS* (1911), *Times*, Feb. 2.

B. At Instance of Private Person.

(a) In General.

See, generally, CRIMINAL LAW, Vol. XIV., p. 351, Nos. 3682–3696.

2361. Issue discretionary.]—*Ex p. COLLIER* (1856), 26 L. T. O. S. 200.

2362. ———.]—*Ex p. LITTLE* (1865), 29 J. P. Jo. 742.

2363. ———.]—*Ex p. FREER* (1870), 34 J. P. Jo. 68.

2364. ———.]—*Ex p. CUTHBERT* (1875), 39 J. P. Jo. 356.

2365. ———.]—A criminal information does not lie against a party who has accused by letter a postmistress of opening letters, & tampering with them; there must be some special circumstances to entitle appct. to that extraordinary remedy. The proper remedy is by indictment.—*Ex p. LITTLETON, MIDDLESEX (POSTMISTRESS)* (1888), 52 J. P. 264.

2366. ———.]—Upon application for leave to file a criminal information in respect of a libel upon a deceased foreign nobleman made by his representative who was not resident in this country:—*Held*: (1) the ct., in the exercise of its discretion, must reject the application, for the rule to be collected from the modern decisions is that a criminal information for libel can only be granted at the suit of persons who are in some public office or position, & not at the suit of private persons; (2) the fact that the applicant does not reside in this country is a strong reason for rejecting such an application. *Semble*: an application for a criminal information for a libel upon a deceased person made by his representative will not be granted.

It must be, I think, some very unusual publication to justify an indictment or information for aspersing the character of the dead (LORD COLERIDGE, C.J.).—*R. v. LABOUCHERE* (1884), 12 Q. B. D. 320; 53 L. J. Q. B. 362; 50 L. T. 177; 48 J. P. 165; 32 W. R. 861; 15 Cox, C. C. 415.

Annotations:—*As to* (1) *Consd.* *R. v. Ensor* (1887), 3 T. L. R. 366. *Appld.* *R. v. Masters* (1889), 6 T. L. R. 44. *Reid.* *R. v. Yates* (1884), 1 T. L. R. 193; *Re Appln. for Attachment for Contempt of Court* (1886), 2 T. L. R. 351; *Wood v. Cox* (1888), 4 T. L. R. 652; *R. v. Russell, Ex p. Morris* (1905), 21 T. L. R. 749; *Ex p. Freeman-Mitford* (1914), 30 T. L. R. 693; *Weld-Blundell v. Stephens*, [1919] 1 K. B. 520.

2367. Extraordinary remedy—For aggravated cases.]—Justification of the truth not good to an information.

This is an application for an extraordinary remedy, & therefore the ct. will not grant it lightly, but they will do justice & will not withhold it if the nature of the case requires it (LORD MANSFIELD, C.J.).—*R. v. DENNISON* (1773), *Lofft*, 148; 98 E. R. 581.

PART XI. SECT. 2, SUB-SECT. 3.—A.

k. When granted—After nolle prosequi entered on indictment—For same libel.]
R. v. MITCHEL (1848), 3 Cox, C. C. 93.—*IR.*

PART XI. SECT. 2, SUB-SECT. 3.—B. (a).

l. Integrity of informer.]—A party seeking a criminal information against another must himself be free from

blame.—*R. v. WHELAN* (1863), 1 P. E. I. 223.—*CAN.*

m. General allegation.]—*R. v. BRENT* (circa 1871), *Mac.* 888.—*N.Z.*

2368. ———.]—Loss of life was occasioned by the collision of two steamboats. An inquest was afterwards held, & a person of the name of G., who was on board of one of the steamboats at the time of the accident, gave his evidence before the coroner. Deft., a publisher of a periodical, in giving an account of the accident & inquest, stated, "had requisite means been employed, the lives of the two children, as well as of the rest of the passengers might have been saved, in spite of the story of G., who swore through thick & thin, & who, although asleep at the moment of the accident, had yet sufficient time to dress himself & assist his wife"—*Held*: the language did not charge G. with perjury, & a criminal information refused.—*R. v. MARSHALL* (1838), 2 Jur. 254.

2369. ———.]—*Ex p.* LITTLE (1865), 29 J. P. Jo. 742.

2370. ———.]—*Ex p.* CUTHBERT (1875), 39 J. P. Jo. 356.

2371. ———.]—*R. v. HEADLEY* (1875), cited 12 Q. B. D. at p. 327.

Annotation:—*Consd. R. v. Labouchere* (1884), 12 Q. B. D. 320.

2372. ———.]—*Ex p.* LITTLETON, MIDDLESEX (POSTMISTRESS), No. 2365, *ante*.

2373. ———.]—*Other remedies insufficient.*—*R. v. RUSSELL, Ex p. MORRIS* (1905), 93 L. T. 407; 69 J. P. 450; 21 T. L. R. 749; 49 Sol. Jo. 735, D. C.

(b) What Person may Apply.

See, generally, CRIMINAL LAW, Vol. XIV., p. 351, Nos. 3691–3696.

2374. General rule—Only persons in public office or position.—To call a man a scoundrel, & to reflect upon him in the execution of his office, is matter of a libellous nature, & deserves to be punished by information.—*R. v. POWNELL* (1732), Kel. W. 58; 2 Barn. K. B. 102; 25 E. R. 488.

2375. ———.]—*Ex p.* SLEE (1852), 19 L. T. O. S. 208.

2376. ———.]—The T. newspaper contained an article relating to the musical critiques written in another newspaper by D., a musical critic, & instructed that D. was intimately associated with another person named J., who was paid a commission by artistes to puff them in the public press:—*Held*: as D. did not fill any official or judicial office, he was not entitled to a criminal information against the publisher of the T. newspaper, but must be left to his remedy by action or indictment.—*Ex p. DAVISON* (1878), 42 J. P. 726.

Annotation:—*Consd. R. v. Labouchere* (1884), 12 Q. B. D. 320.

2377. ———.]—*R. v. LABOUCHERE*, No. 2366, *ante*.

2378. ———.]—The ct. will not grant a rule nisi for a criminal information for libel on the application of a private person who does not hold a public office or position.—*Ex p. FREEMAN-MITFORD* (1914), 30 T. L. R. 693.

2379. Clerk to sessions.—Information granted for a libel, charging deft. with making false entries in the sessions books.—*R. v. ROBERTS* (1734), Cunn. 94; 94 E. R. 1084.

Annotation:—*Refd. R. v. Almon* (1765), Wilm. 243.

2380. Justice of peace.—Information granted for printing in a newspaper, that a justice of peace was "scandalously guilty of telling a lie in divers

companies."—*R. v. STAPLES* (1738), Andr. 228; 95 E. R. 374.

2381. ———.]—*R. v. STEEL* (1875), 39 J. P. Jo. 357.

2382. Corporation.—Leave granted to file a criminal information against newspaper proprietors for a libel on the corp. of C.—*CHICHESTER BOROUGH* (1838), 2 J. P. 84.

2383. Poor Law Commissioner.—*Re FERRAND, Ex p. LEWIS* (1846), 8 L. T. O. S. 89, 161.

(c) Grounds for Refusal.

i. In General.

See, generally, CRIMINAL LAW, Vol. XIV., pp. 351–352, Nos. 3697–3710.

2384. Vulgar abuse—Of constable on duty.—Information denied for affronting words spoken of a constable, though in the execution of his office.—*R. v. WHITFIELD* (1734), Cunn. 100; 94 E. R. 1088.

2385. Libel common & trivial.—*ANON.* (1774), Lofft, 462; 98 E. R. 748.

2386. Prejudice to pending civil cause.—*ANON.* (1774), Lofft, 462; 98 E. R. 748.

2387. False or ambiguous charge.—Ct. will not grant an information, where the charge is made under false or ambiguous colours, where the words spoken admit of a favourable interpretation; where the party complaining comes late.—*PRIDEAUX v. ARTHUR* (1774), Lofft, 393; 98 E. R. 711.

2388. Libel admitting of favourable interpretation.—*PRIDEAUX v. ARTHUR*, No. 2387, *ante*.

2389. Allegation made *bonâ fide*.—*R. v. BAILLIE* (1778), 21 State Tr. 1.

Annotations:—*Refd. Harrison v. Bush* (1855), 5 E. & B. 344; *R. v. Goodwin* (1857), 21 J. P. 742.

2390. — Without malice.—A criminal information does not lie against a ratepayer in a union who *bonâ fide* & without malice accuses, in a letter to the chairman of the board of guardians, one of the guardians of contracting to supply the poor within the union with articles, & also with supplying those articles of inferior quality, although the ratepayer has refused to substantiate his charges before a partial tribunal.—*R. v. GOODWIN* (1857), 21 J. P. 742.

2391. Refusal of prosecutor to deny charge on oath.—It is a general rule, that the ct. will not grant an information for a private libel, charging a particular offence, unless the prosecutor will deny the charge upon oath.—*R. v. MILES* (1779), 1 Doug. K. B. 284; 99 E. R. 185.

2392. Probable truth of libel.—*R. v. PURSORE* (1731), 2 Barn. K. B. 84; 94 E. R. 372.

Annotation:—*Apld. R. v. Hampden* (1844), 8 J. P. Jo. 120.

2393. ——*Semle*: although the truth of a publication is no justification, yet, if the ct. see, that it is true, or probably may be true, it may be good cause why the ct. should not interfere by granting a criminal information.—*R. v. DRAPER* (1806), 3 Smith, K. B. 390; 30 State Tr. 959.

Annotations:—*Refd. R. v. Burdett* (1821), 4 B. & Ald. 314; *R. v. Halpin* (1829), 4 Man. & Ry. K. B. 8.

2394. ——P. published a book, with a view to denounce & expose the practice of shipowners sending to sea overloaded ships, careless of the seamen's lives, their own interests being protected by insurance. P. alluded to N. as owner of one of such ships, & N. obtained a rule for a

PART XI. SECT. 2, SUB-SECT. 3.— B. (b).

2374 i. General rule—Only persons in public office or position.—The granting

of criminal informations for libel is confined to the case of persons occupying an official or judicial position, & filling some office which gives the public an interest in the speedy

vindication of their character, or to the case of a charge of a very grave or atrocious nature.—*R. v. WILSON* (1878), 43 U. C. R. 583.—CAN.

Sect. 2.—Prosecution: Sub-sect. 3, B. (c) v. & vi., (d) & (e); sub-sect. 4.]

4 B. & Ad. 867; 1 Nev. & M. K. B. 483; 2 L. J. K. B. 144; 110 E. R. 682.

2427. — Six months.]—R. v. MURRAY (1837), 1 Jur. 37.

2428. — Two years.]—The ct. refused to grant a rule *nisi* for a criminal information, where the libel complained of came to the knowledge of applt. two years ago.—*Ex p.* HOPPER (1854), 23 L. T. O. S. 164; 18 J. P. 378; 2 W. R. 517.

vi. *No Incitement to Breach of the Peace.*

2429. Imputation on morals or standard of behaviour.]—An imputation by one private person against another of a want of common honesty, & the absence of all principle & honour, is not alone sufficient to justify the ct. in granting a rule *nisi* for a criminal information.—R. v. HEMMING, *Ex p.* DIMSDALE (1846), 6 L. T. O. S. 376; 10 J. P. Jo. 104.

2430. Private letter.]—Rule *nisi* for a criminal information refused where the libel was contained in a private letter addressed to a private person, & did not purport to be sent for the object of exciting to the commission of a breach of the peace.—*Ex p.* DALE (1854), 2 C. L. R. 870; 23 L. T. O. S. 179; 18 J. P. 393; 2 W. R. 534.

2431. Speech on lawful occasion.]—*Ex p.* BATEMAN (1872), 36 J. P. Jo. 388.

2432. Applicant resident abroad.]—R. v. LABOUCHERE, No. 2366, *ante*.

(d) *Procedure.*

See C. O. R., 1906, rr. 36, 37; CRIMINAL LAW, Vol. XIV., pp. 355–357, Nos. 3753–3785.

Preliminary application to magistrate.]—See Nos. 2354, 2358, *ante*.

2433. Setting out the libel—Need not be set out in full.]—In an indictment or information for a libel it is not necessary to set it forth *in haec verba*.—BROWNE'S CASE (1677), Freem. K. B. 456, 524; 89 E. R. 341, 394.

2434. — Exact words to be set out.]—In an information, charging deft. with making a writing *secundum tenorem sequentem*, there the written libel, & that set forth in the information, must exactly agree; & if any omission makes a word of another signification it is fatal (HOLT, C.J.).—R. v. DRAKE (1706), Holt, K. B. 425; 11 Mod. Rep. 95; 3 Salk. 224; 90 E. R. 1134.

Annotations:—*Refd.* Wood v. Brown (1815), 1 Marsh. 522. *Mentd.* Anon. (1706), 11 Mod. Rep. 84; Paxton v. Sharpe (1729), 1 Barn. K. B. 317; Jackson v. Sharp (1744), Willes, 525; Anon. (1774), Loft, 785; R. v. Beach (1774), 1 Cowp. 229.

—.]—See, now, Law of Libel Amendment Act, 1888 (c. 64), s. 7.

2435. Affidavit—May be sworn abroad—Party abroad.]—*Semble*: an affidavit to found a criminal information for a libel published in England, upon a person being in parts beyond seas, may be sworn abroad.—R. v. SATIRIST (EDITOR) (1834), 3 Nev. & M. K. B. 532.

2436. — Effect of insufficiency.]—A rule had been obtained, calling on deft., who was proprietor of the *Manchester Guardian*, to show cause why a criminal information should not issue against him for a libel on Mr. R., who had prosecuted & convicted some persons of a robbery; the alleged libel suggesting that they were innocent, & that Mr. R. showed an undue zeal in supporting the

conviction, & insinuating that certain articles in the *Manchester Chronicle* emanated from him.

The ct. discharged the rule, on the ground of the insufficiency of prosecutor's affidavit.—R. v. TAYLOR (1837), 1 Jur. 53.

—.]—See, further, CRIMINAL LAW, Vol. XIV., pp. 355–356, Nos. 3757–3771.

2437. Identity of prosecutor as party libelled.]—Information for a libel: the ct. must see that the libellous matter is applicable to the party complaining.—R. v. BUTCHER (1729), Fitz.-G. 57; 94 E. R. 652.

2438. Withdrawal of plea of not guilty—Plea of guilty substituted—Apology & offer of costs.]—R. v. ALDRED (1845), 5 L. T. O. S. 58; 9 J. P. Jo. 264.

2439. When rule granted after first rule discharged—False affidavits.]—A rule *nisi* for a criminal information for a libel was discharged on an affidavit made by a person who swore to the truth of the libel. This person was indicted for perjury, the bill was found, & he absconded. It appeared from the affidavits of several persons, that the former affidavit was entirely untrue. The ct., under these circumstances, granted another rule *nisi* for a criminal information, & made it absolute.—R. v. EVE & PARLBY (1836), 5 Ad. & El. 780; 2 Har. & W. 450; 1 Nev. & P. K. B. 229; 111 E. R. 229.

Annotations:—*Refd.* *Ex p.* Munster (1869), 20 L. T. 612.

Mentd. Taylor v. Slingo (1836), 2 Har. & W. 327.

2440. Information against printer & publisher—Appearance of author—Rule discharged against printer & publisher.]—If a rule for an information be granted against the printer & publisher of a libel, & the author appears & avows himself, the ct. will discharge the rule against the printer & publisher, & direct it against the author.—R. v. WIATT (1723), 8 Mod. Rep. 123; 88 E. R. 96.

2441. Verdict of "printing & publishing only"—Bad.]—Verdict of guilty of printing & publishing only, on an information for a libel, bad.—R. v. WOODFALL (1770), 5 Burr. 2661; 20 State Tr. 895; 98 E. R. 398.

Annotations:—*Consd.* R. v. Shipley (1784), 4 Doug. K. B. 73. *Mentd.* R. v. Topham (1791), 4 Term Rep. 126; R. v. Philipps (1805), 6 East, 464; Monson v. Tussaud, Monson v. Tussaud (1894), 63 L. J. Q. B. 454; R. v. Morris (1907), 71 J. P. Jo. 520.

2442. Description of prosecutor—Sufficiency.]—(1) Information for libel alleged that a person unknown had committed a murder on G., & that H. had been charged with it: the information then set out the alleged libel, & charged that it imputed the murder to C. The libel, as set out, spoke of the murder of G., & stated that H. had been accused of it:—*Held*: the indictment was proved by evidence that a person had been murdered, that H. was charged with the murder, & that, on an inquest held upon the body, witnesses called the dead person by the name of G.; & this last fact might properly be proved by the coroner who held the inquest, & he might, for this purpose, use an instrument which he had drawn up as an inquisition, whether it was or was not a valid & formal inquisition.

(2) C. was described in the information as His Serene Highness Charles Frederick Augustus William, Duke of Brunswick & Luneburg. His name was Charles Frederick Augustus William D'Este, & although he had formerly been reigning Duke of Brunswick & Luneburg, & was still commonly called by that title, he had ceased to be

PART XI. SECT. 2, SUB-SECT. 3.—
B. (d).

2433 i. Setting out the libel—Need not

moving for a criminal information for a libel, swears that the libel was published of him, & his affidavits set the libel, which does not charge

him in express terms, nor is made to refer to him by innuendo, the ct. will grant a rule.—R. v. CROOKS (1840), 1 Ont. Dig. 1910.—CAN.

reigning duke *de facto*:—*Held*: the description was sufficient.—*R. v. GREGORY* (1846), 8 Q. B. 508; 2 New Sess. Cas. 229; 15 L. J. M. C. 38; 6 L. T. O. S. 367; 10 J. P. 262; 10 Jur. 387; 1 Cox, C. C. 263; 115 E. R. 966.

Annotation:—*As to* (1) *Consd.* *Bird v. Keep*, [1918] 2 K. B. 692.

2443. Change of defendants—Author substituted for publisher—After rule nisi against publisher.—*R. v. BURNS & LAMBERT* (1851), 18 L. T. O. S. 99; 15 J. P. 772.

2444. Undertaking by prosecutor's counsel—To proceed with prosecution.—*R. v. "THE WORLD,"* No. 2351, *ante*.

(e) *Effect of Apology.*

2445. Rule discharged—On payment of costs—Allegations withdrawn.—*R. v. LATIMER* (1851), 18 L. T. O. S. 110; 15 J. P. Jo. 800.

2446. ————*R. v. TALLIS* (1852), 20 L. T. O. S. 116; 17 J. P. Jo. 21.

2447. ————*R. v. POTTS* (1852), 20 L. T. O. S. 104; 16 J. P. Jo. 821.

2448. ————*Ex p. TRAVIS* (1868), 32 J. P. Jo. 772.

2449. ————*R. v. REYNOLDS & DIX* (1854), 23 L. T. O. S. 180.

2450. ————*On agreed terms.*—*R. v. RICHARDS* (1872), 36 J. P. Jo. 88.

2451. Rule made absolute.—*R. v. COURT JOURNAL PRINTER & PUBLISHER* (1845), 4 L. T. O. S. 354.

2452 ————*R. v. LENG* (1870), 34 J. P. Jo. 309.

SUB-SECT. 4.—BY INDICTMENT.

See, now, Indictments Act, 1915 (c. 90), s. 1; Indictment Rules, 1916 (Stat. R. & O. 1916, No. 282); &, generally, CRIMINAL LAW, Vol. XIV., pp. 202 et seq.

2453. Sufficiency of indictment—Setting out libel—Whether whole to be set out.—*BROWNE'S CASE*, No. 2433, *ante*.

2454. ————*The whole libel need not be set forth in indictment, but if any part qualifies the rest, it may be given in evidence.*

Upon indictments thus laid by way of *juxta tenorem & ad effectum sequen.*, the very words laid in the indictment, & not the substance & effect of them, must be proved as strictly as if laid to be *in haec verba* (*per CUR.*).—*R. v. BEAR (OR BEARE)* (1698), 2 Salk. 417; *Carth.* 407; *Holt*, K. B. 422; 1 *Ld. Raym.* 414; 3 Salk. 226; 91 E. R. 678.

Annotations:—*Consd.* *R. v. Shipley* (1784), 4 *Doug.* K. B. 73; *R. v. Burdett* (1820), 4 B. & Ald. 95. *Refd.* *R. v. Drake* (1706), 11 *Mod. Rep.* 84; *Entick v. Carrington* (1765), 19 *State Tr.* 1029; *R. v. Lovett* (1839), 9 C. & P. 462. *Mentd.* *R. v. Hutchinson* (1722), 8 *Mod. Rep.* 99.

2455. ————*Words actually used.*—*SACHEVERELL'S CASE* (1710), 15 *State Tr.* 1, 466.

Annotations:—*Apld.* *Cook v. Cox* (1814), 3 M. & S. 110. *Refd.* *R. v. Laver* (1722), 8 *Mod. Rep.* 82; *R. v. Duffy* (1849), 7 *State Tr. N. S.* 795; *Bradlaugh v. R.* (1878), 3 Q. B. D. 607. *Mentd.* *R. v. Holden* (1833), 5 B. & Ad. 347.

2456. ————*Indictment for words must specify what they were.*—*R. v. How* (1726), 2 *Stra.* 699; *Sess. Cas.* K. B. 134; 93 E. R. 793.

Annotations:—*Refd.* *A.-G. of New South Wales v. Macpherson* (1870), L. R. 3 P. C. 268. *Mentd.* *R. v. Cheere* (1825), 4 B. & C. 902.

See, now, Law of Libel Amendment Act, 1888 (c. 64), s. 7.

2457. ————*Identification of party libelled.*—An indictment for a libel must set forth who the person libelled was. An indictment for a libel upon persons to the jurors unknown is insufficient even after verdict.—*R. v. ORME & NUTT* (1699), 1 *Ld. Raym.* 486; 91 E. R. 1224; *sub nom.* *R. v. ALME & NUTT*, 3 Salk. 224.

Annotations:—*Consd.* *R. v. Williams* (1822), 1 *State Tr. N. S.* 1291. *Refd.* *R. v. Read* (1708), *Fortes. Rep.* 98; *R. v. Osborne* (1732), *Kel. W.* 230; *R. v. Griffin & Banyere* (1733), 2 *Barn. K. B.* 368.

2458. ————*"Of & concerning."*—Upon an information against deft. for a libel, for that he, etc., wickedly, maliciously & seditiously did write & publish, etc., a certain false, scandalous, & seditious libel "of & concerning H.M.'s Govt. & the employment of his troops" according to the tenor & effect following (setting forth the libel *verbatim*), the words "of & concerning" are a sufficient introduction of the matter contained in the libel, & a sufficient averment that it was written "of & concerning the King's Govt., & the employment of his troops."—*R. v. HORNE* (1778), 2 *Cowp.* 672; 20 *State Tr.* 651; 98 E. R. 1300; *sub nom.* *HORNE v. R.*, 4 *Bro. Parl. Cas.* 368, H. L.

Annotations:—*Consd.* *Hawkes v. Hawkey* (1807), 8 *East* 427; *R. v. Marsden* (1815), 4 M. & S. 164; *Churchil. v. Hunt* (1819), 1 *Chit.* 480. *Apld.* *R. v. Burdett* (1821), 4 B. & Ald. 314. *Distd.* *May v. Brown* (1824), 3 B. & C. 113; *Adams v. Meredew* (1828), 2 Y. & J. 417. *Consd.* *Bradlaugh v. R.* (1878), 3 Q. B. D. 607. *Refd.* *R. v. Topham* (1791), 4 *Term Rep.* 126; *R. v. Philipps* (1805), 6 *East*, 464; *R. v. Burdett* (1820), 4 B. & Ald. 95; *Goldstein v. Foss* (1828), 2 Y. & J. 146; *Tuam (Archbp.) v. Robeson* (1828), 5 *Bing.* 17; *Harvey v. French* (1832), 1 Cr. & M. 11; *Gompertz v. Levy* (1838), 9 *Ad. & El.* 282; *Jones v. Hulton*, [1909] 2 K. B. 444. *Mentd.* *R. v. Morley* (1827), 1 Y. & J. 221; *R. v. Virrier* (1840), 12 *Ad. & El.* 317; *R. v. Bidwell* (1847), 2 *Car. & Kir.* 564; *R. v. Duffy* (1849), 7 *State Tr. N. S.* 795; *White v. R.* (1876), 13 *Cox, C. C.* 318; *Davys v. Lloyd* (1901), 17 *T. L. R.* 678; *Clack v. Clack*, [1906] 1 K. B. 483.

2459. ————*In an indictment for a libel against S., omitting to allege that deft. published it "of & concerning S.":—Held: such omission was not supplied by its being alleged in the introductory part, "that deft. intended to vilify S., he having been mayor of, etc., & to cause it to be believed that as such mayor he had practised corruption, & been guilty of abuse, in respect to granting a license to one L. to retail beer," etc., & concluding "to the injury & disgrace of S." etc.; although the innuendos pointed the different parts of the libel to S., & to L., & to the granting the license.*—*R. v. MARSDEN* (1815), 4 M. & S. 164; 105 E. R. 796.

Annotations:—*Refd.* *Clement v. Fisher* (1827), 1 *Man. & Ry.* K. B. 281; *Jones v. Hulton*, [1909] 2 K. B. 444.

2460. ————*(1) Indictment for libel stated that deft., intending to defame B., a libel containing divers false & scandalous matters of & concerning the said B., that is to say: "No lady would admit to her society such a crack-brained scamp as B.," meaning the said B.:—Held: these averments showed sufficiently, without more formal introduction, that the libel was of & concerning B.*

(2) The following words: Why should T. be surprised at anything Mrs. W. does? if she chooses to entertain B., she does what very few will do; & she is of course at liberty to follow the bent of her own inclining, by inviting all the expatriated foreigners who crowd our streets, to her table, if she thinks fit:—Held: sufficient to maintain an indictment for libel.—*GREGORY v. R.* (1850), 15 Q. B. 957; 19 L. J. Q. B. 366; 16 L. T. O. S. 3; 15 *Jur.* 74; 5 *Cox, C. C.* 247; 117 E. R. 719, Ex. Ch.

PART XI. SECT. 2, SUB-SECT. 4.

a. *Libel shown to prosecutor before publication.*—*R. v. McELDERRY* (1860), 19 U. C. R. 168.—CAN.

Sect. 2.—Prosecution: Sub-sects. 4, 5 & 6.]

2461. — — — — —.]—Proof of words spoken to a person, will not support an indictment charging that deft. spoke them of such person.—*R. v. BERRY* (1791), 4 Term Rep. 217; 100 E. R. 982.

*Annotation:—*Refd. *Parkes v. Prescott* (1869), L. R. 4 Exch. 169.

2462. — — — **Joint indictment.]**—Two persons may be jointly indicted for speaking words, though a joint action of the case cannot be brought against two for words spoken by them both (*per CUR.*).—*WILLIAMS v. CUSTODES* (1650), Sty. 244; 82 E. R. 680.

2463. — — — **Averment of intent—To provoke breach of peace.]**—An indictment for a libel inflicting upon the prosecutor in his profession as a solr., & which has been sent to the prosecutor only, ought to be alleged to have been sent with intent to provoke & excite the prosecutor to a breach of the peace, & should not be alleged with intent to injure the prosecutor in his profession.—*R. v. WEGENER* (1817), 2 Stark. 245, N. P.

*Annotations:—*Refd. *R. v. Brooke* (1856), 7 Cox, C. C. 251.

Mentd. Wenman v. Ash (1853), 17 Jur. 579.

2464. — — — **Averment of unlawful publication—Without averment of malice.]**—An indictment charged deft. with “unlawfully” publishing a defamatory libel, but omitted to aver that it was published “maliciously”:—*Held*: Libel Act, 1843 (c. 96), s. 5, did not create or define an offence, but merely enjoined the punishment to be awarded to an existing common law offence; at common law an averment of malice was unnecessary & the indictment was therefore good. *Semble*: if an averment of malice had been necessary, the defect would have been cured by verdict as being an imperfect averment.—*R. v. MUNSLOW*, [1895] 1 Q. B. 758; 64 L. J. M. C. 138; 72 L. T. 301; 43 W. R. 495; 11 T. L. R. 213; 39 Sol. Jo. 264; 18 Cox, C. C. 112; 15 R. 192, C. C. R.

*Annotation:—*Refd. *Pratt v. British Medical Assocn.*, [1919] 1 K. B. 244.

2465. — — — **Want of innuendo.]**—An indictment which charged that the prisoner printed & published a libel of & concerning A., the prosecutor, according to the tenor & effect following, viz. “A. of B. (meaning the said A.), game & rabbit destroyer, & his wife (meaning C., the wife of the said A.) the seller of same in country & town”:—*Held*: bad, for want of innuendos, or averments showing that the words alleged to be defamatory charged an indictable offence, or had reference to the calling of the prosecutor.—*R. v. YATES* (1872), 12 Cox, C. C. 233.

2466. — — — **No averment that defamation an indictable offence.]**—*R. v. YATES*, No. 2465, *ante*.

2467. — — — **Charge withdrawn before justices—Added to indictment subsequently—Counts quashed.]**—B. was charged with blasphemous libels in newspapers. The summons before justices specified several dates of newspapers, but a date being added though not specified was objected to, & the prosecution withdrew that charge. After B. was committed the Central Criminal Ct. allowed the withdrawn charge to be added to the indictment:—*Held*: the counts containing the withdrawn charge must be quashed as contrary to the spirit of the Vexatious Indictments Acts.—*R. v. BRADLAUGH* (1882), 47 L. T. 477; 47 J. P. 71; 31 W. R. 229; 15 Cox, C. C. 156, D. C.; *subsequent proceedings* (1883), 15 Cox, C. C. 217.

2468. — — — **Obscene libel—“To manifest corruption of morals of His Majesty’s subjects.”]**—An indictment for publishing a libel, which was bad as a charge of publishing a defamatory libel

for not setting out the passages relied upon contained an averment that deft. “unlawfully . . . did . . . publish . . . a . . . libel . . . in the form of a document . . . which document . . . contains divers . . . obscene . . . matters & things.” The judge at the trial held that this amounted to an indictment for an obscene libel, & the prisoner was convicted:—*Held*: although it would have been better for the indictment to have followed the old forms, & to have averred that the tendency of the obscene matter was to corrupt the public morals, & that the libel had been published with that intent, the conviction might under the circumstances be upheld.

In order to avoid any difficulty it would be better that the indictment should contain the common averments that its publication was “to the manifest corruption of the morals of His Majesty’s subjects.” The question we have to consider is whether there was sufficient allegations to justify the case being tried as the publication of an obscene libel. The indictment alleges the publication was “malicious & unlawful,” & that it contained “lewd, wicked . . . to the evil example of all others in the like case offending.” I think, JELF, J., would have been wrong in not leaving it to the jury. It may be tested in this way: assuming it to be an indictment for an obscene libel & the words to be set out in the indictment, so that the judge & jury could see for themselves that the publication was to the manifest corruption of public morals, could the judge have withdrawn the case because there was no averment to that effect in the indictment? I am therefore of the opinion that embarrassing as this count was in one sense, it was impossible for the judge to stop the case (LORD ALVERSTONE, C.J.).—*R. v. BARRACLOUGH*, [1906] 1 K. B. 201; 75 L. J. K. B. 77; 94 L. T. 111; 70 J. P. 14; 54 W. R. 147; 22 T. L. R. 41; 50 Sol. Jo. 44; 21 Cox, C. C. 91, C. C. R.

2469. **Proof of alleged words—Necessity for—Proof of substance & effect insufficient.]**—*R. v. BEAR (OR BEARE)*, No. 2454, *ante*.

2470. **Verdict differing from offence charged—Charge of composing, printing & publishing—Conviction of composing & publishing.]**—Deft. is charged by a count in an indictment with having “composed, printed & published” a libel, if the evidence be, that he only composed & published it, he may be found guilty of the composing & publishing, & acquitted of the printing.—*R. v. WILLIAMS* (1811), 2 Camp. 646, N. P.

2471. — — — **Conviction of printing & publishing.]**—*R. v. HUNT*, No. 1798, *ante*.

2472. — — — **Charge of common law offence—Conviction under statute—Libel Act, 1843 (c. 96).]**—*R. v. GRAY*, No. 1920, *ante*.

2473. — — — **Charge of publishing defamatory libel—“Knowing same to be false”—Conviction of merely publishing defamatory libel.]**—On an indictment for publishing a defamatory libel “knowing same to be false,” deft. may be convicted of merely publishing a defamatory libel.—*BOALER v. R.* (1888), 21 Q. B. D. 284; 57 L. J. M. C. 85; 59 L. T. 554; 52 J. P. 791; 37 W. R. 29; 4 T. L. R. 565; 16 Cox, C. C. 488.

*Annotation:—*Refd. *R. v. Munslow* (1895), 11 T. L. R. 213.

— *See, generally, CRIMINAL LAW, Vol. XIV., p. 317, Nos. 3330 et seq.*

2474. **Libel on directors of company—Proof that prosecutors de jure directors—Status of acting directors admitted.]**—Upon the trial of an indictment for publishing a libel upon the directors of a co., it is not necessary to prove that the prosecutors

were the *de jure* directors of the co., & properly appointed as such, it being admitted that they were the acting directors, & the libel being published upon them as such acting directors, & the averment that they were directors is an immaterial averment.—*R. v. BOALER* (1892), 67 L. T. 354; 56 J. P. 792; 36 Sol. Jo. 753; 17 Cox, C. C. 569, D. C.

Annotation:—*Mentd. R. v. Central Criminal Court JJ., Ex p. L. C. C., [1925] 2 K. B. 43.*

SUB-SECT. 5.—PUBLICATION.

See Part V., Sect. 1, sub-sect. 1, B., *ante*.

SUB-SECT. 6.—JUSTIFICATION AS DEFENCE.

See Libel Act, 1843 (c. 96), s. 6.

2475. Whether valid.—*WANT'S CASE* (1602), Moore, K. B. 627; 72 E. R. 802.

Annotation:—*Refd. Harman v. Delany* (1731), 2 Stra. 898.

2476. —. —. —.]—*CASE DE LIBELLIS FAMOSIS*, No. 1167, *ante*.

2477. —. —. —.]—*R. v. BURDETT*, No. 1097, *ante*.

2478. —. —. —.]—*Semble*: deft. in an information for a libel may prove the truth of the matters alleged to be false & libellous.—*R. v. BRADLEY* (1828), 2 Man. & Ry. K. B. 152; 1 Man. & Ry. M. C. 387.

2479. —. —. —.]—Where a party was brought up for judgment, upon a conviction of publishing a libel imputing indictable offences to an individual:—*Held*: affidavits affirming the truth of the libel could not be read in mitigation.—*R. v. HALPIN* (1829), 9 B. & C. 65; 4 Man. & Ry. K. B. 8; 2 Man. & Ry. M. C. 63; 7 L. J. O. S. M. C. 75; 109 E. R. 25.

2480. —. —. —.]—*R. v. GRANT*, No. 2509, *post*.

2481. —. —. —.]—Upon the trial of a criminal information for libel, the judge does not misdirect the jury in telling them that they have nothing to do with the truth of the libel.—*R. v. WILSON* (1837), 1 J. P. 5, 346; 1 Jur. 796.

See, now, Libel Act, 1843 (c. 96), s. 6.

2482. —. —. —.]—*R. v. WARNSBOROUGH* (1888), 4 T. L. R. 520.

2483. —. —. —.]—*In seditious libel.*—*R. v. DUFFY*, No. 1218, *ante*.

2484. —. —. —.]—*R. v. ALDRED*, No. 2328, *ante*.

2485. —. —. —.]—*Blasphemous libel.*—The provision in Libel Act, 1843 (c. 96), s. 7, as to allowing exculpatory evidence in answer to a *prima facie* case of liability for publication, being quite general in its terms:—*Held*: to apply to a prosecution for the publication of a blasphemous libel.—*R. v. BRADLAUGH* (1883), 15 Cox, C. C. 217.

Annotations:—*Mentd. R. v. Allison* (1888), 59 L. T. 933; *R. v. Kinghorn*, [1908] 2 K. B. 949; *Re Bowman, Secular Soc. v. Bowman*, [1915] 2 Ch. 447.

2486. Summons before magistrate—Power to inquire into truth of libel.—On the hearing of a charge before justices of maliciously publishing

a defamatory libel, the justices proceeded under Libel Act, 1843 (c. 96), s. 6, to hear evidence of the falsehood & also of the truth of the libel:—*Held*: on an indictment for perjury, they had no jurisdiction to hear this evidence, & what present deft. then swore as to the falsehood of the libel, & on which he was now indicted for perjury, was immaterial to the issue before the justices, & the evidence ought not to have been given.—*R. v. TOWNSEND* (1866), 4 F. & F. 1089; 10 Cox, C. C. 356.

Annotation:—*Apprvd. & Apld. R. v. Carden* (1879), 5 Q. B. D. 1.

2487. —. —. —.]—*Ex p. ELLISSEN* (1868), cited in 5 Q. B. D. at p. 3; *sub nom. LONDON (LORD MAYOR) v. ELLISSEN*, cited in 41 L. T. at p. 506; *sub nom. R. v. ELLISSON*, cited in 44 J. P. at p. 120; *sub nom. R. v. LONDON (LORD MAYOR)*, 32 J. P. Jo. 772.

Annotations:—*Expld. & Distd. R. v. Carden* (1879), 5 Q. B. D. 1. *Refd. Ex p. Bottomley*, [1909] 2 K. B. 14.

2488. —. —. —.]—Upon an information for maliciously publishing a defamatory libel under Libel Act, 1843 (c. 96), s. 5, the magistrate has no jurisdiction to receive evidence of the truth of the libel, inasmuch as his function is merely to determine whether there is such a case against the accused as ought to be sent for trial, & a defence based upon the truth of the libel under sect. 6 of the Act can only be inquired into at the trial upon a special plea framed in accordance with the terms of that sect. The province of a magistrate upon a preliminary inquiry into a charge of an indictable offence discussed.—*R. v. CARDEN* (1879), 5 Q. B. D. 1; 49 L. J. M. C. 1; 41 L. T. 504; 44 J. P. 137; 28 W. R. 133; 14 Cox, C. C. 359; *sub nom. R. v. LABOUCHERE*, 43 J. P. Jo. 764, D. C.

Annotations:—*Consd. Ex p. Bottomley*, [1909] 2 K. B. 14. *Refd. R. v. Flowers* (1879), 44 J. P. 377; *Ex p. O'Brien* (1883), 15 Cox, C. C. 180.

2489. —. —. —.]—L., proprietor of a newspaper published comments on a ball given by S. who professed that it was for the friends of the dramatic profession, whereas L. stated that it was attended by prostitutes, & was an attempt to sully the fame of the stage. L. being charged with libel before a magistrate proposed to give evidence that loose characters were present, & that the facts were true & proper to be commented on in a newspaper:—*Held*: the magistrate rightly rejected this evidence, as it was only proper to be received at the trial before a jury.—*R. v. FLOWERS* (1879), 44 J. P. 377, D. C.

2490. Plea of justification—Sufficiency of plea.]

—*R. v. GRIFFIN* (1849), 13 J. P. Jo. 36.

2491. —. —. —.]—*Evidence of same charges in other publication—No steps by prosecutor in respect thereof.*—Where to a criminal information for a libel, deft. has justified under Libel Act, 1843 (c. 96), s. 6, asserting the truth of the imputations contained in the alleged libel, it is not competent to him to prove, in support of the plea, that the same charges were previously published in another publication, & that prosecutor had taken no steps against such other publication.—*R. v.*

PART XI. SECT. 2, SUB-SECT. 6.

2475 i. Whether valid.—The special plea of justification given by 6 & 7 Vict. c. 96, s. 6, cannot be pleaded to an indictment for a seditious libel. Such plea can only be pleaded in justification of a private or personal libel.—*R. v. DUFFY* (1846), 2 Cox, C. C. 45.—*IR.*

2475 ii. —. —. —.]—*R. v. REA* (1863), 9 Cox, C. C. 401.—*IR.*

2475 iii. —. —. —.]—Upon an application for a criminal information against the

proprietor of a newspaper for publishing a seditious libel, evidence was tendered of the truth of the libel:—*Held*: no such matters could be given in evidence.—*Ex p. O'BRIEN* (1883), 15 Cox, C. C. 180.—*IR.*

2475 iv. —. —. —.]—To an information for seditious libel, it is not open to deft. to plead justification under Lord Campbell's Act, 1843 (c. 96), s. 6.—*R. v. M'HUGH*, [1901] 2 I. R. 569.—*IR.*

2490 i. Plea of justification—Suffi-

ciency of plea.—A plea to an information for libel must allege the truth of all the matters charged.—*R. v. MOYLAN* (1860), 19 U. C. R. 521.—*CAN.*

2490 ii. —. —. —.]—A libel contained several distinct charges, all of which were justified by a general plea of their truth:—*Held*: the jury were rightly directed that unless all the charges which were libellous were justified, they should convict.—*R. v. PATTERSON* (1874), 36 U. C. R. 127.—*CAN.*

Sect. 2.—Prosecution: Sub-sects. 6, 7, 8, 9 & 10.
Sect. 3.]

NEWMAN (1852), 1 E. & B. 208; Dears C. C. 85; 22 L. J. Q. B. 156; 20 L. T. O. S. 94; 17 J. P. 5; 17 Jur. 617; 118 E. R. 437; *previous proceedings*, 3 Car. & Kir. 252; *subsequent proceedings* (1853), 1 E. & B. 558.

Annotation:—Mentd. R. v. Labouchere, Vallombrosa's Case (1884), 50 L. T. 177.

2492. — One plea to four counts.]—Deft. was indicted for having written & published a false & defamatory libel, & to this indictment he entered a plea of justification. The indictment contained four counts, the libels charged in each count being of much the same nature. The plea of justification dealt in one plea with the libels contained in all the four counts.—R. v. DE LA PORTE (1895), 59 J. P. 617.

Annotation:—Mentd. R. v. Seham Yousry (1914), 84 L. J. K. B. 1272.

2493. — To be specially pleaded—According to terms of statute.]—R. v. CARDEN, No. 2488, *ante*.

2494. — Whole plea must be proved.]—If justification is pleaded to an indictment for libel, the whole of the plea must be proved.—R. v. STUDDS (1909), 3 Cr. App. Rep. 207, C. C. A.; *subsequent proceedings* (1911), 75 J. P. 248.

2495. — Failure to traverse—Defendant not entitled to acquittal.]—Prisoner, who was charged with publishing a defamatory libel, pleaded (*inter alia*) justification. A replication to the plea was filed during the course of the trial:—*Held*: prisoner was not entitled to be acquitted on the ground that the plea of justification had not been traversed, & must therefore be taken to be a good plea.—R. v. SEHAM YOUSRY (1914), 84 L. J. K. B. 1272; 112 L. T. 311; 31 T. L. R. 27; 24 Cox, C. C. 523; 11 Cr. App. Rep. 13; 78 J. P. Jo. 521, C. C. A.

Annotation:—Mentd. R. v. Gibbins & Proctor (1918), 82 J. P. 287.

— Effect in apportionment of punishment.]—
 —See No. 1293, *ante*.

Justification generally.]—See Part VII., Sect. 2, *ante*.

SUB-SECT. 7.—INTENT.

2496. General rule—Natural consequence of act intended.]—(1) If a man publish a statement which he does not know to be true or not, or has no means of judging whether it be true or not, it is false, & he has been guilty of a criminal untruth, & the matter is a libel.

(2) It is a general rule, that a man shall be presumed to have intended that which is the natural consequence of the act done by him, & the jury may infer that a statement was maliciously published, if it be untrue & will necessarily produce a mischievous effect.

(3) The judge directed the jury that to write & publish falsely of any person that he is insane is a crime; that even if it could avail defts. to show that the assertion was made "from authority," it would not be enough for this purpose to show that it was founded on general rumour believed by defts.; that it was for the jury to say whether the apparently respectful language used did not convey covert irony & sarcasm; but that in his own position the article was criminal libel.

Qu.: a publication libellous against an individual & also mischievous to the public may be criminal

without averment or proof of malice.—R. v. HARVEY & CHAPMAN (1823), 2 B. & C. 257; 2 State Tr. N. S. 1; 3 Dow. & Ry. K. B. 464; 2 L. J. O. S. K. B. 4; 107 E. R. 379.

Annotations:—As to (2) *Consd.* R. v. Munslow, [1895] 1 Q. B. 758. *Refd.* R. v. Grant, Ranken & Hamilton (1848), 7 State Tr. N. S. 507; White v. Tyrrell (1856), 27 L. T. O. S. 334; Nevill v. Fine Arts & General Insc., [1895] 2 Q. B. 156. *Generally, Mentd.* Gummoe v. Howes (1857), 23 Beav. 184.

2497. — — —.]—R. v. LOVETT, No. 1100, *ante*.

2498. Criminal intent question for jury.]—In an information for a libel the jury are to consider whether deft. published it with a criminal intent or not.—R. v. REEVES (1796), Peake, Add. Cas. 84, N. P.

2499. — — —.]—R. v. HARVEY & CHAPMAN, No. 2496, *ante*.

2500. — — —.]—R. v. COBBETT (1831), 2 State Tr. N. S. 789.

Annotations:—Mentd. R. v. Charlesworth (1861), 1 B. & S. 460; R. v. Winsor (1866), 10 Cox, C. C. 276.

2501. Malice—Presumption of—Until rebutted.]—
 —R. v. HARVEY & CHAPMAN, No. 2496, *ante*.

2502. — Necessity for averment & proof—Printing & publishing seditious libel.]—R. v. CLERK (1728), 1 Barn. K. B. 304; 94 E. R. 207.

2503. — — —.]—R. v. HARVEY & CHAPMAN, No. 2496, *ante*.

2504. Innocence of motive—Cannot be pleaded—Seditious libel.]—R. v. ALDRED, No. 2328, *ante*.

SUB-SECT. 8.—EVIDENCE.

Evidence generally, *see* EVIDENCE, Vol. XXII.

2505. What evidence admissible—Evidence of similar publication—By other persons—Without prosecution.]—A *Gazette* is evidence of all acts of State; & therefore a *Gazette*, in which it was stated that certain addresses had been presented to the King from different bodies of subjects, expressing their loyalty, etc. was admitted in evidence to prove an averment in an information for a libel, "that divers addresses, etc., had been presented to His Majesty by divers of his loving subjects, etc." It is not competent to a deft., charged with having published a libel, to prove that a paper similar to that for the publication of which he is prosecuted was published on a former occasion by other persons who have never been prosecuted for it.—R. v. HOLT (1793), 5 Term Rep. 436; 2 Leach. 593; 22 State Tr. 1189; 101 E. R. 245.

Annotations:—Refd. R. v. Wallace (1866), 14 W. R. 462. *Mentd.* R. v. Teal (1809), 11 East, 307; Anon. (1832), 1 L. J. Ex. 116; Weston v. Foster (1836), 5 L. J. C. P. 242; Thomas v. Jones (1838), 1 Horn & H. 204; It. v. Duffy (1849), 7 State Tr. N. S. 795; Pritchard v. Pritchard (1884), 14 Q. B. D. 55.

2506. — Extracts from same paper—Disjoined from libellous part by extraneous matter.]—
 R. v. LAMBERT & PERRY, No. 891, *ante*.

2507. — Affidavit by prosecutor in aggravation—After conviction & before judgment—Repetition of libel.]—Where deft. is brought up to receive judgment after conviction, an affidavit by prosecutor in aggravation, stating that a third person, who refused to join in the affidavit, had informed him that deft., after the trial, had repeated in his hearing the libellous matter for which he was indicted, is not admissible; at least not without swearing that such third person was under the control or influence of deft.—R. v. PINKERTON (1802), 2 East, 357; 102 E. R. 405.

PART XI. SECT. 2, SUB-SECT. 7.

*consequence of act intended.]—*The intent of the publisher is to be inferred from the natural consequences of his act.—R. v. SULLIVAN, R. v. PIGOTT (1868), 11 Cox, C. C. 44.—*IR.*

2508. — Evidence that libel within right of free discussion—By proof of truth of surrounding circumstances.]—A libel stated, that there was a riot at C., & that a person fired a pistol at an assemblage of persons, & upon this imputed neglect of duty to the magistrates :—*Held* : on the trial of a criminal information for this libel on the magistrates, deft.'s counsel, with a view of a showing that the libel did not exceed the bounds of free discussion, could not go into evidence to prove that there was in fact a riot, & that a pistol was in fact fired at the people.—*R. v. BRIGSTOCK* (1833), 6 C. & P. 184; 2 Nev. & M. M. C. 170, N. P.

2509. — Evidence of mistake—As to matters on which prosecution founded.]—(1) Where an information for libel states that certain transactions took place, & that the libel was published of & concerning them, & then sets out the libel as referring to them, & prosecutor, at the trial, gives general proof of such transactions, to support the introductory part of his pleading, deft. is not thereby authorised to give evidence of the particular history of those transactions, so as to bring into issue the truth or falsehood of the libel.

(2) But if such evidence be adduced, *bonâ fide*, to show that the transactions referred to in the alleged libel are not the same with those which the information supposes it to have had in view, & the judge is informed that the evidence is offered for that purpose, it is admissible. Affidavits are not receivable to show that a judge is mistaken in his report of a cause tried before him.—*R. v. GRANT* (1834), 5 B. & Ad. 1081; 3 Nev. & M. K. B. 106; 110 E. R. 1092.

Truth of libel.]—See Sub-sect. 6, *ante*.

SUB-SECT. 9.—PUNISHMENT.

Punishment generally.]—See CRIMINAL LAW, Vol. XIV., pp. 467 *et seq.*

2510. Imprisonment—Security for good behaviour for further period.]—*R. v. HART & WHITE* (1809), 30 State Tr. 1131, H. L.

Annotations :—*Apld.* *Dunn v. R.* (1848), 12 Q. B. 1031. *Refd.* *Finnerty v. Tipper* (1809), 2 Camp. 72; *Haylock v. Sparke* (1853), 1 E. & B. 471; *R. v. Trueman* (1913), 82 L. J. K. B. 916. *Mentd.* *Lewis v. Levy* (1858), 27 L. J. Q. B. 282.

2511. — Further imprisonment in default of security.]—Where a person is convicted of maliciously publishing a defamatory libel under Libel Act, 1843 (c. 96), s. 5, the ct. may as part of its sentence in addition to ordering deft. to be imprisoned for the maximum term allowed by that sect., order him upon the expiration of that term to enter into recognisances & find sureties to keep the peace for a reasonable time named in the order & in default of his so doing to be further imprisoned until the expiration of the period during which he is so required to keep the peace.—*R. v. TRUEMAN*, [1913] 3 K. B. 164; 82 L. J. K. B. 916; 109 L. T. 413; 77 J. P. 428; 29 T. L. R. 599; 23 Cox, C. C. 550; 9 Cr. App. Rep. 45, C. C. A.

Annotation :—*Mentd.* *R. v. Syme* (1914), 112 L. T. 136.

2512. — Consecutive terms for separate counts—Effect of acquittal on intermediate count—Interruption of consecutive terms.]—A criminal information for libel contained several counts. Deft. being convicted, the judgment was, that for the offences in the first count he should be imprisoned two months, for the offences in the second count, two months, to be computed from & after the expiration of the imprisonment on the

first count; & so on. The third count was bad :—*Held* : the judgment on that count must be reversed; & the imprisonment on the fourth count would commence from the expiration of the imprisonment on the second.—*GREGORY v. R.* (1850), 15 Q. B. 974; 19 L. J. Q. B. 366; 16 L. T. O. S. 3; 15 Jur. 79; 5 Cox, C. C. 252; 117 E. R. 726, Ex. Ch.

Annotation :—*Refd.* *R. v. Castro* (1880), 5 Q. B. D. 490.

2513. Recognisance to appear & receive judgment—When called upon—Affidavit by prosecutor that libel repeated after trial.]—(1) Indictment for libel, deft. pleaded guilty & entered into his own recognisance to appear & receive judgment when called upon to do so, & not to be called upon at all, if he discontinued to publish libels on the prosecutor. The ct. refused to pass judgment, unless the prosecutor produced an affidavit, stating that deft. had since the trial published libels respecting him.

(2) Where cause which was expected to last the whole day was postponed & an indictment for libel which stood next in the paper was tried out of its turn, & defts. were found guilty, the ct. refused a new trial on the ground of surprise.—*R. v. RICHARDSON* (1840), 8 Dowl. 511; 4 Jur. 104.

2514. Recognisance to keep the peace.]—*R. v. BENNETT* (1867), 31 J. P. Jo. 292.

2515. Fine.]—T. published a newspaper which contained a leading article suggesting that one W., who had been found dead in his house, had met with foul play, & indirectly pointing to his house-keeper, & chief legatee, as probably concerned. A jury having found T. guilty of libel, & the writer of the article having made an affidavit that he had made some slight inquiry before writing the article, & formed the best judgment he could on the facts then known :—*Held* : the excuse slightly mitigated the offence, but the inquiry being insufficient, & the libel reckless, a fine of £250 was imposed.—*R. v. TANFIELD* (1878), 42 J. P. 423.

2516. Aggravation or mitigation of guilt—Effect of plea of justification—Part proof of plea.]—*R. v. NEWMAN*, No. 1293, *ante*.

SUB-SECT. 10.—COSTS.

See Libel Act, 1843 (c. 96), s. 8, & now, Costs in Criminal Cases Act, 1908 (c. 15), & generally, CRIMINAL LAW, Vol. XV., pp. 614 *et seq.*

2517. Recovery of costs on indictment—Action.]—An action lies to recover the costs on an indictment for libel given by Libel Act, 1843 (c. 96), s. 8.—*RICHARDSON v. WILLIS* (1873), 42 L. J. Ex. 68; 28 L. T. 71; 12 Cox, C. C. 351.

Annotation :—*Refd.* *Re Hayson*, *Booth v. Traill* (1883), 49 L. T. 471.

Information.]—See CRIMINAL LAW, Vol. XV., p. 615, Nos. 6438–6441.

SECT. 3.—STATUTES APPLICABLE TO CRIMINAL PROCEEDINGS.

See Libel Act, 1792 (c. 60); Libel Act, 1843 (c. 96), s. 6.

2518. Libel Act, 1792 (c. 60)—Not applicable to civil actions.]—*THOMAS v. WILLIAMS*, No. 2611, *post*.

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*r. Indictment—Taxation of costs.]—**NICHOL v. POOLEY* (1902), 9 B. C. R. 21.—CAN.

Sect. 3.—Statutes applicable to criminal proceedings.

Sect. 4. Part XII. Sect. 1.]

2519. — Function of judge & jury.]—
CAPITAL & COUNTIES BANK *v.* HENTY, No. 121,
ante.

Libel Act, 1843 (c. 96)—Plea of justification.]—
See Sect. 2, sub-sect. 6, ante.

Law of Libel Amendment Act, 1888 (c. 64)—
Indecent publications.]—*See Sect. 1, sub-sect. 3,*
ante.

SECT. 4.—PROCEEDINGS AGAINST NEWSPAPERS.

See Newspaper Libel & Registration Act, 1881
(c. 60), Law of Libel Amendment Act, 1888 (c. 64).

2520. Commencement of prosecution—Fiat of
Public Prosecutor—Former practice.]—The Public
Prosecutor is not bound under Newspaper Libel
& Registration Act, 1881 (c. 60), to issue his fiat
for a prosecution for libel.—*Ex p.* HURTER (1883),
47 J. P. 724; *sub nom.* *Ex p.* HUBERT & Co., 15
Cox, C. C. 166, D. C.

2521. — — — — —.]—Newspaper Libel &
Registration Act, 1881 (c. 60), s. 3, which enacts
that no criminal prosecution shall be commenced
against any proprietor, publisher, or editor, or any
person responsible for the publication of a news-
paper, for any libel published therein, without the
written fiat or allowance of the Director of Public
Prosecutions in England, or Her Majesty's A.-G.
in Ireland, being first had & obtained, does not
apply to a criminal information for libel filed by
order of the ct.—YATES *v.* R. (1885), 14 Q. B. D.
648; 54 L. J. Q. B. 258; 52 L. T. 305; 49 J. P.
436; 33 W. R. 482; 15 Cox, C. C. 686; *sub nom.*
R. *v.* YATES, 1 T. L. R. 193, C. A.

*Annotations:—***Reid.** R. *v.* Labouchere (1884), 12 Q. B. D.
320; *Re* R. *v.* Perryman, *Ex p.* Perryman (1891), 8
T. L. R. 72. **Mentd.** *Re* Simmons (1885), 15 Q. B. D. 348;
Ex p. Pulbrook (1891), 66 L. T. 159; Thorpe *v.* Priestnall,
[1897] 1 Q. B. 159; Cowling *v.* Taylor's Drug Co.
(1901), 66 J. P. 11; Beardsley *v.* Giddings (1904), 2
L. G. R. 719; *Re* Boaler, *Re* Vexatious Actions Act,
1896, [1914] 1 K. B. 122.

2522. — — — — —.]—In order to support an
indictment for unlawfully writing & publishing
a libel in a newspaper, it is necessary that the fiat
of the Public Prosecutor, required by Newspaper
Libel & Registration Act, 1881 (c. 60), s. 3, should
mention by name every person against whom the
prosecution is authorised to be instituted sufficiently
to identify him.

Where, therefore, the editor & manager of a
newspaper, certain of the signatories to the articles
of association of an association in which the
proprietorship of the paper was vested, & the

directors of a limited co. incorporated under
Companies Acts, which co. merely printed the
paper, had been convicted of unlawfully writing
& publishing a libel in such paper; & the fiat
of the Public Prosecutor omitted to mention the
names of any of defts., merely authorising the
prosecution of the "publisher, editor or printer"
of the paper:—*Held*: (1) the fiat ought to have
mentioned the name of every person against whom
the prosecution was intended to have been allowed;
& it is the duty of the Public Prosecutor to ascer-
tain the persons whom it is intended to prosecute
before granting his fiat; (2) Newspaper Libel &
Registration Act, 1881 (c. 60), s. 3, does not
authorise the granting of a fiat by the Public
Prosecutor in respect of the printer of a paper;
& as there was no evidence that the directors of the
co. who printed the paper, assuming a prosecution
could lie against them in any case, sold or delivered
anything but the bulk of each issue of the paper
to the proprietors, or knew of or saw the contents
of the paper which contained the libel either before
or after its publication, their conviction could not
be supported.

(3) *Semble*: it is the duty of the Public Pro-
secutor, under Newspaper Libel & Registration
Act, 1881 (c. 60), s. 3, to a certain extent to
determine whether a prosecution shall be instituted
against particular persons, as well as to determine
upon the character of the libel.—R. *v.* ALLISON
(1888), 59 L. T. 933; 53 J. P. 215; 5 T. L. R.
104; 16 Cox, C. C. 559; *sub nom.* R. *v.* JUDD,
37 W. R. 143, C. C. R.

See, now, Law of Libel Amendment Act, 1888
(c. 64), s. 8.

2523. — Order of judge in chambers—No
appeal from order.]—Where a judge in chambers
was applied to & gave leave to proceed criminally
for libel against P., & P. appealed to the Div. Ct.:
—*Held*: this was a criminal matter, & no appeal
lay.—*Re* R. *v.* PERRYMAN, *Ex p.* PERRYMAN
(1891), 8 T. L. R. 72; 55 J. P. Jo. 772, D. C.

2524. — — — — —.]—An appeal does not lie
from an order made by a judge at chambers, under
Law of Libel Amendment Act, 1888 (c. 64), s. 8,
allowing a criminal prosecution to be commenced
against the proprietors, etc., of a newspaper for a
libel published therein.—*Ex p.* PULBROOK, [1892]
1 Q. B. 86; 61 L. J. M. C. 91; 66 L. T. 159; 56
J. P. 293; 40 W. R. 175; 36 Sol. Jo. 79; 17
Cox, C. C. 464, D. C.

*Annotations:—***Expld.** R. *v.* Manchester Local Profiteering
Committee, *Ex p.* L. & Y. Ry. (1920), 89 L. J. K. B.
1089. **Reid.** Provincial Cinematograph Theatres *v.*
Newcastle-upon-Tyne Profiteering Committee (1921), 125
L. T. 651.

See, now, Supreme Court of Judicature (Con-
solidation) Act, 1925 (c. 49), s. 31.

PART XI. SECT. 4.

t. Notice under Libel Act, s. 5.]—
A notice under above sect. addressed
to "The Winnipeg Telegram Printing

Co., Ltd.," instead of "The Telegram
Printing Co., Ltd.," is a sufficient com-
pliance with the Act if it in fact
reaches the latter co., & it is given
thereby the opportunity to apologise,

which it is the purpose of the statute
to secure.—**KNOTT** *v.* TELEGRAM
PRINTING CO., LTD., [1917] 3 W. W. R.
335.—**CAN.**

Part XII.—Slander of Title.

SECT. 1.—IN

2525. Nature of action.]—Pltf. averred in the declaration, that he was possessed of shares in a certain mine, which were worked to his great profit, & that deft. published a libel, in which it was alleged that certain legal proceedings had been taken in Chancery against pltf., & that persons, duly authorised by the Ct. of Ch., had arrived on the workings of the mine, by means whereof his shares became much depreciated in value, & pltf. had been prevented from disposing of his shares, & from deriving profits which would otherwise have accrued to him:—*Held*: (1) in such an action, pltf. must allege & prove special damage; (2) the declaration did not contain a sufficient allegation of special damage; & (3) the publication was not a libel on pltf. in his business, but a mere slander of his title to the shares.

An action for slander of title is not properly an action for words spoken or for libel written & published but an action on the case for special damage sustained by reason of the speaking or publication of the slander of pltf.'s title (*TINDAL, C.J.*).

(4) The circumstances of the slander of title being conveyed in a letter or other publication appears to us to make no other difference than that it is more widely & permanently disseminated & the damages in consequence more likely to be serious than where the slander of title is by words only; but that it makes no difference whatever in the legal ground of action (*TINDAL, C.J.*).—*MALACHY v. SOPER* (1836), 3 Bing. N. C. 371; 2 Hodg. 217; 3 Scott, 723; 6 L. J. C. P. 32; 132 E. R. 453.

Annotations:—*As to* (3) *Refd.* *British Ry. Traffic & Electric Co. v. C. R. C. Co. & L. C. C.*, [1922] 2 K. B. 260. *As to* (4) *Refd.* *Western Counties Manure Co. v. Lawes Chemical Manure Co.* (1874), L. R. 9 Exch. 218; *Ratcliffe v. Evans*, [1892] 2 Q. B. 524. *Generally, Mentd.* *Hodsoll v. Stallebrass* (1840), 11 Ad. & El. 301; *Bathishill v. Reed* (1856), 25 L. J. C. P. 290.

2526. Action maintainable.]—*BLISS v. STAFFORD* (1573), Owen, 37; 74 E. R. 882.

2527. —.]—*WILLIAMS & LINFORD'S CASE* (1588), 2 Leon. 111; 3 Leon. 177; 74 E. R. 401, 616.

2528. —.]—No action lies against one for saying, that he himself has title or estate in lands, etc., although it be false. But here the words in the declaration, as they are spoken, being in the third person, be not intendable of himself, but of some other, & import a slander to pltf.'s title; & then his justification afterwards shall not take away that action which before was given to pltf. for the slandering of his title (*per CUR.*).—*PENNYMAN v. RABANKS* (1595), Cro. Eliz. 427; Moore, K. B. 410; 78 E. R. 668.

Annotations:—*Refd.* *Smith v. Spooner* (1810), 3 Taunt. 246; *British Ry. Traffic & Electric Co. v. C. R. C. Co. & L. C. C.*, [1922] 2 K. B. 260.

2529. —.]—(1) If one man, knowing another to be in communication for selling his estate,

assert that a lease is subsisting of it, without mentioning his own title to such lease, an action of slander will lie.

(2) In slander of title, to hinder a bargain for the sale of the estate, if it be alleged that deft. knowing thereof spoke the words, it shall be intended, that the communication continued.

(3) In slander of title, if the words import that the estate had been conveyed to A., deft. cannot justify by pleading that A. assigned to him, & that he spoke in maintenance of his own title.—*NORTHUMBERLAND (EARL) v. BYRT* (1607), Cro. Jac. 163; 79 E. R. 143.

Annotations:—*As to* (3) *Refd.* *Smith v. Spooner* (1810), 3 Taunt. 246; *Wren v. Weild* (1869), 10 B. & S. 51. *Generally, Mentd.* *Mulgrave v. Mounson* (1676), 2 Freem. Ch. 17.

2530. —.]—*NEWMAN v. ZACHARY* (1646), Aleyn, 3; 82 E. R. 883.

Annotations:—*Mentd.* *Lumley v. Gye* (1853), 2 E. & B. 216; *Moon v. Towers* (1860), 8 C. B. N. S. 611; *Lynch v. Knight* (1861), 5 L. T. 291.

2531. Death of plaintiff—Survival of right of action.]—Pltf. in the action claimed damages from defts. in respect of an alleged false & malicious libel published by them of him in his character of wine merchant & wine importer. He alleged in his statement of claim that he was a wine merchant & importer, & the registered proprietor of a trade mark which consisted of the words "The Delmonico" & figure of a woman, & was a dealer in a brand of champagne introduced by him & known as "The Delmonico" champagne; that defts. falsely & maliciously published statements to the effect that the champagne bearing the "Delmonico" brand was not the wine it was represented to be, unless it bore the name of a particular French firm of dealers & importers, who, if such wine were shipped from France, would take proceedings to vindicate their rights in England, meaning thereby that pltf. had no right to use his registered trade mark; that in using such trade mark he was acting fraudulently; that the wine imported & sold by pltf. was not genuine wine; & that no person other than deft., M., had the right to use the word "Delmonico" as a trade mark. Pltf. alleged damage to his credit & reputation & trade & business of wine merchant. After the statement of claim was delivered pltf. died, but an order was made that his widow & extrix. should carry on the action. At the trial, after counsel for pltf. had opened his case, the learned judge directed a verdict of nonsuit & judgment for defts. on the ground that the cause of action died with pltf. Pltf. moved for a new trial, on the ground of misdirection:—*Held*: the causes of action in the statement of claim were separable, & that which was based on the alleged libel as affecting the personal reputation of pltf. as a trader & wine importer died with him, & so far the nonsuit was right; but that which was based on the statement that pltf. had no right to use his trade mark or brand was in the nature of slander

PART XII. SECT. 1.

25251. Nature of action.]—An action for words written & published relating to articles of pitfs.' manufacture & the rights of pitfs. under certain letters patent, by virtue of which they claimed a monopoly of the manufacture & sale of the articles, is not an action of defamation properly so called, but an action on the case for maliciously

acting in such a way as to inflict loss upon pitfs., & does not come within Jud. Act, 1895, s. 109, so as to be triable only by a jury, unless by consent.—*DICKERSON v. RADCLIFFE* (1897), 17 P. R. 418.—CAN.

a. *What amounts to.]*—*COUSINS v. MERRILL* (1865), 16 C. P. 114.—CAN.

b. *Filing of a lis pendens.]*—The

filing of a *lis pendens* against land, notwithstanding that the person filing it afterwards discontinues the action, & that the person against whose lands it is filed is prevented from selling them, does not *per se* constitute a cause of action.—*COWAN v. MACAULAY* (1897), 5 B. C. R. 495.—CAN.

c. *Slander bona fide—In assertion of right.]*—An action for slander of

Sect. 1.—In general. Sects. 2, 3 & 4: Sub-sect. 1, A. & B.; sub-sect. 2.]

of title, & survived to his personal representative, & consequently to that extent the nonsuit was erroneous, & there ought to be a new trial in respect of the damage done to his estate by reason of such statement.—*HATCHARD v. MÈGE* (1887), 18 Q. B. D. 771; 56 L. J. Q. B. 397; 56 L. T. 662; 51 J. P. 277; 35 W. R. 576; 3 T. L. R. 546, D. C.

Annotations:—*Refd.* *Quirk v. Thomas*, [1916] 1 K. B. 516; *British Ry. Traffic & Electric Co. v. C. R. C. Co. & L. C. Co.*, [1922] 2 K. B. 260. *Mentd.* *London v. London Road Car Co.* (1888), 4 T. L. R. 418.

SECT. 2.—PUBLICATION.

2532. To whom published—Intending purchaser or stranger.—There is no difference, whether the words be spoken to the party, or unto a stranger, for in both cases the title of pltf. is slandered, so as he cannot make sale of his lands (*WRAY, J.*).—*WILLIAMS & LINFORD'S CASE* (1588), 2 Leon. 111; 3 Leon. 177; 74 E. R. 401, 616.

2533. Mode of publication—Written or oral.—*MALACHY v. SOPER*, No. 2525, *ante*.

2534. ———.]—*RATCLIFFE v. EVANS*, No. 2086, *ante*.

SECT. 3.—TITLE OF PLAINTIFF TO PROPERTY.

2535. Title need not be present.—Slanderous words tending to the disherison of the person of whom they are spoken are actionable although he has no present title.—*VAUGHAN v. ELLIS* (1608), Cro. Jac. 213; 79 E. R. 185.

Annotation:—*Refd.* *Elborow v. Allen* (1622), Palm. 299.

2536. ———.]—*BAKER v. PIPER*, No. 2570, *post*.

2537. Title may be legal or equitable.—(1) An injunction will lie at the instance of legal or equitable owners of letters patent to restrain the publication of a libel or slander of title, if the defamation is in fact a libel or slander of title, where no damage has actually accrued, provided that damage is imminent & is the natural & direct result likely to follow.

(2) As to the second action it was said that the C. Co. were only the equitable & not the legal owners & that therefore they could not bring the action. If they could not, no one could. The equitable owners were alone injured. I do not think it matters whether the title is legal or equitable. If the libel was injurious pltf. could bring this action (*WALTON, J.*).—*DUNLOP PNEUMATIC TYRE CO., LTD. v. MAISON TALBOT, SHREWSBURY & TALBOT (EARL) & WEIGEL, CLIPPER PNEUMATIC TYRE CO. v. SAME* (1903), 52 W. R. 254; 20 T. L. R. 88; 48 Sol. Jo. 156; *revsd.* on other grounds (1904), 20 T. L. R. 579, C. A.

Annotation:—*Mentd.* *British Ry. Traffic & Electric Co. v. C. R. C. Co. & L. C. Co.*, [1922] 2 K. B. 260.

2538. Property may be real or personal.—*WREN v. WEILD*, No. 2585, *post*.

2539. Title to realty—Allegation of bastardy.—

——— *v. CRASSE* (1613), 2 Bulst. 89; Cro. Jac. 2. R. 276.

Annotation:—*Mentd.* *Harrison v. Cage* (1698), 1 Ld. Raym. 386.

title will not lie when the alleged slander is spoken *bond fide* & in assertion of right.—*BOULTON v. SHIELDS* (1846), 3 U. C. R. 21.—*CAN.*

PART XII. SECT. 3.

d. *Title to realty.*—*MAIR v. CULLY* (1855), 12 U. C. R. 71.—*CAN.*

e. ———.]—*JERRITT v. SCOTT* (1890), 7 Nfld. L. R. 431.—*NFLD.*

PART XII. SECT. 4, SUB-SECT. 1.—A.

2543 i. Necessity for.—To maintain an action of slander of title, the words must be followed as a natural & legal consequence by a pecuniary damage

2540. ———.]—To say of a man who is in possession of an estate by descent, that "he is but a bastard," is actionable, without showing any colloquium concerning his estate.—*ELBOROW v. ALLEN* (1622), Cro. Jac. 642; Palm. 299; 79 E. R. 553.

2541. ———.]—An action will lie for saying of an heir "thou art a bastard," without proving special damage.—*HUMPHRYS v. STANFIELD* (1637), Cro. Car. 469; 79 E. R. 1005.

2542. ———.]—The law gives an action for but a possibility of damage as an action for calling an heir apparent, bastard (*WYLD, J.*).—*TURNER v. STERLING* (1671), 2 Vent. 25; 1 Freem. K. B. 15; 86 E. R. 287; *on appeal, sub nom.* *STERLING v. TURNER* (1672), 1 Vent. 206.

Annotations:—*Mentd.* *Ashby v. White* (1703), 1 Salk. 19; *Phillips v. Smith* (1718), 1 Com. 279; *Lewis v. Lewis* (1730), Fitz-G. 173; *Tewkesbury v. Diston* (1805), 2 Smith, K. B. 508; *Ferguson v. Kinnoull* (1842), 4 State Tr. N. S. 786; *Hampden v. Macmullen* (1843), 3 Notes of Cases, Supp. i.

SECT. 4.—WHAT MUST BE PROVED.

SUB-SECT. 1.—SPECIAL DAMAGE.

A. In General.

Special damage generally, see Part VIII., Sect. 1, sub-sect. 4, *ante*.

2543. Necessity for.—*BOLD v. BACON* (1594), Cro. Eliz. 346; 78 E. R. 594.

Annotation:—*Mentd.* *King v. Dilliston* (1688), 1 Show. 83.

2544. ———.]—*GRESHAM v. GRINSLEY* (1607), Yelv. 88; 80 E. R. 60.

Annotation:—*Refd.* *Swcad v. Badley* (1615), 1 Roll. Rep. 244.

2545. ———.]—*HARWOOD v. LOWE* (1628), Palm. 529; 81 E. R. 1205; *sub nom.* *LAW v. HARWOOD*, Cro. Car. 140; *sub nom.* *LOWE v. HAREWOOD*, W. Jo. 196.

Annotations:—*Refd.* *Cane v. Golding* (1649), Sty. 176; *Iveson v. Moore* (1699), 1 Salk. 15; *Turner v. Horton* (1743), Willes, 438; *Malachy v. Soper* (1836), 3 Bing. N. C. 371; *Ratcliffe v. Evans*, [1892] 2 Q. B. 524. *Mentd.* *Crosse v. Gardner* (1688), Comb. 142; *Brown v. Gibbons* (1702), 2 Ld. Raym. 831; *Perry v. Perry* (1732), Kel. W. 71; *Carter v. Fish* (1825), 1 Stra. 645; *Bathshill v. Reed* (1856), 25 L. J. C. P. 290.

2546. ———.]—*CANE v. GOLDING* (1649), Sty. 169, 176; 82 E. R. 619, 625.

Annotations:—*Refd.* *Malachy v. Soper* (1836), 3 Bing. N. C. 371; *Ratcliffe v. Evans*, [1892] 2 Q. B. 524.

2547. ———.]—*MALACHY v. SOPER*, No. 2525, *ante*.

2548. ———.]—*PATER v. BAKER*, No. 2576, *post*.

2549. ———.]—*BROOK v. RAWL*, No. 2577, *post*.

2550. ———.]—D. published a pattern for wool work exhibiting the figures in Millais' picture "The Huguenot" with different background & colours. The design seemed to have been taken, not from the original picture, but from an engraving of which B. owned the copyright. B. issued a circular warning people not to sell copies of the subject "The Huguenot" without his stamp, as such copies were unlawfully made. D. brought an action for slander of title, & B. counterclaimed to restrain the sale of the pattern, & penalties for infringement of his copyright:—*Held*: the circular, as it appeared to claim a right to the design, was

to pltf., which must be specially alleged & proved; there must also be an express allegation of some particular damage resulting to pltf. from such slander.—*GORDON v. MCGIBBON* (1875), 10 N. B. R. (3 Pug.) 49.—*CAN.*

2543 ii. ———.]—*ASHFORD v. CHOATE* (1870), 20 C. P. 471.—*CAN.*

a trade libel on D., for which an action would lie, if appreciable injury to D.'s trade resulting from the circular were proved.—*DICKS v. BROOKS* (1880), 15 Ch. D. 22; 49 L. J. Ch. 812; 43 L. T. 71; 29 W. R. 87, C. A.

Annotations:—*Distd.* *Halsey v. Brotherhood* (1881), 19 Ch. D. 386. *Refd.* *Burnett v. Tak* (1882), 45 L. T. 743; *Household & Roshor v. Fairburn & Hall* (1884), 51 L. T. 498. *Mentd.* *Hanfstaengl v. Empire Palace*, [1894] 2 Ch. 1; *Hanfstaengl v. Empire Palace*, *Hanfstaengl v. Newnes*, [1894] 3 Ch. 109; *Boosey v. Whight*, [1899] 1 Ch. 836; *Hanfstaengl v. Smith*, [1905] 1 Ch. 519.

2551. —.]—In 1897 two trade marks, registered by the R. co. of New York, were expunged from the Register of Trade Marks by the order of the ct., at the instance of W., C. & co. Both trade marks were labels containing prominently the words "Royal Baking Powder." Shortly afterwards W., C. & co. issued a circular referring to the said order, which circular, & the statements of travellers & agents of W., C. & co. were alleged by the R. co. to be an intimation that the R. co. were not entitled to sell baking powder as "Royal Baking Powder," & that W., C. & co. intended to proceed against persons using the labels to stop the use of those words. The R. co. commenced an action to restrain W., C. & co. from representing that pltf's. were not entitled to sell their "Royal Baking Powder" in the United Kingdom, & from maliciously threatening the customers of pltf's. with legal proceedings in respect of their sales of pltf's. said baking powder:—*Held*: pltf's. had failed to prove either malice or any special damage resulting from the circular.—*ROYAL BAKING POWDER CO. v. WRIGHT, CROSSLEY & CO.* (1900), 18 R. P. C. 95, H. L.

Annotations:—*Consd.* *Dunlop Pneumatic Tyre Co. v. Maison Talbot, Shrewsbury & Talbot & Weigel, Clipper Pneumatic Tyre Co. v. Maison Talbot, Shrewsbury & Talbot & Weigel* (1904), 20 T. L. R. 579; *British Ry. Traffic & Electric Co. v. C. R. Co. & L. C. Co.*, [1922] 2 K. B. 260. *Mentd.* *Shapiro v. La Morta* (1923), 130 L. T. 622.

2552. —.]—P. & C., Ltd., were the registered proprietors of a trade mark registered for goods which included chocolates & comprising the words "Banquet Brand," but with a disclaimer of the right to the exclusive use of those words. Their solrs., authorised by them, wrote letters to S. & Sons complaining of the sale by them of "Banquet" chocolates, alleging that that was an infringement of the trade mark. It appeared that the chocolates so sold were the manufacture of G., Ltd., & that co. after further correspondence, brought an action against P. & C., Ltd., claiming damages for libel & damages for false & malicious words causing actual damage, & an injunction. *BRAY, J.*, in his summing up to the jury directed the jury that pltf's. had got to prove that the claim by defts. that they had a registered trade mark which would prevent use by any one else of the term "Banquet" was false; that it was actuated by malice; & that special damage followed as a reasonable consequence, & that if the officer of the co. who had charge of the matter knew that defts. had no right, he would be actuated by malice, but if he had acted *bond fide*, fairly believing, though wrongly, that defts. had the right to the protection of the name "Banquet," & it was for pltf's. to prove the contrary, then he did not see what evidence of malice there was. The jury found malice & awarded £300 damages:—*Held*: there was evidence on which the jury could find that the statement was made maliciously in the sense of being made with some indirect or dishonest motive.

Pltf. must prove that the words complained of are false, that they caused him special damage,

& that the words were used maliciously (*BANKES, L.J.*).—*GREERS, LTD. v. PEARMAN & CORDER, LTD.* (1922), 39 R. P. C. 406, C. A.

— Allegation of bastardy.]—See Sect. 3, ante.

B. What Amounts to Special Damage.

2553. Loss of sale—Sale in actual treaty.]—*GRESHAM v. GRINSLEY* (1607), Yelv. 88; 80 E. R. 60.

Annotation:—*Refd.* *Swead v. Badley* (1615), 1 Roll. Rep. 244.

2554. —.]—In an action for slander of title, it must be averred that pltf. was in actual treaty for the sale of the estate, & that he received special damage.—*TASBURGH v. DAY* (1618), Cro. Jac. 484; 79 E. R. 413.

Annotations:—*Refd.* *Malachy v. Soper* (1836), 3 Bing. N. C. 371; *Ratcliffe v. Evans*, [1892] 2 Q. B. 524.

2555. — Intention to sell.]—*SMEAD v. BADLEY* (1616), Cro. Jac. 397; 79 E. R. 339; *sub nom.* *SWEAD v. BADLEY*, 1 Roll. Rep. 244.

Annotations:—*Refd.* *Malachy v. Soper* (1836), 3 Bing. N. C. 371. *Mentd.* *Bathishill v. Reed* (1856), 25 L. J. C. P. 290.

2556. —.]—*MANNING v. AVERY* (1673), 1 Freem. K. B. 274; 3 Keb. 153; 89 E. R. 196.

Annotation:—*Refd.* *Malachy v. Soper* (1836), 3 Bing. N. C. 371.

2557. — Chance of sale.]—*HARWOOD v. LOWE* (1628), Palm. 529; 81 E. R. 1205; *sub nom.* *LAW v. HARWOOD*, Cro. Car. 140; *sub nom.* *LOWE v. HAREWOOD*, W. Jo. 196.

Annotations:—*Refd.* *Cane v. Golding* (1649), Sty. 176; *Turner v. Horton* (1743), Willes, 438; *Malachy v. Soper* (1836), 3 Bing. N. C. 371; *Ratcliffe v. Evans*, [1892] 2 Q. B. 524. *Mentd.* *Crosse v. Gardner* (1688), Comb. 142.

2558. —.]—*MALACHY v. SOPER*, No. 2525, ante.

2559. Plaintiff under bond to jointure wife.]—*GRESHAM v. GRINSLEY* (1607), Yelv. 88; 80 E. R. 60.

Annotation:—*Refd.* *Swead v. Badley* (1615), 1 Roll. Rep. 244.

SUB-SECT. 2.—UNTRUTH OF STATEMENT.

2560. How far material.]—Where the declaration stated that pltf. was lawfully possessed of mines & ore gotten & to be gotten from them, & was in treaty for the sale of the ore, & that deft. published a malicious, injurious, & unlawful advertisement cautioning persons against purchasing the ore, etc. *per quod* he was prevented from selling; to which deft. pleaded in justification that the adventurers of, or persons having an interest or shares in the mines, thought it their duty to caution persons against purchasing the ore, etc., pursuing the words of the advertisement:—*Held*: (1) plea ill because it did not disclose the names of the adventurers, or who they were; & because it did not show that deft., in publishing the advertisement, acted under the direction of the adventurers; (2) the allegation by pltf. that he was lawfully possessed of the mines & ore, seems a sufficient allegation of title, unless specially demurred to; (3) the allegation that deft. published a malicious, injurious, & unlawful advertisement, seems good without the word false.—*ROWE v. ROACH* (1813), 1 M. & S. 304; 105 E. R. 114.

Annotation:—As to (1) *Folld. Williams v. Miles* (1849), 18 L. J. Ex. 295.

2561. —.]—*PATER v. BAKER*, No. 2576, post.

2562. —.]—*BROOK v. RAWL*, No. 2577, post.

2563. —.]—*GREERS, LTD. v. PEARMAN & CORDER, LTD.*, No. 2552, ante.

2564. Onus of proof on plaintiff.]—*BURNETT v. TAK*, No. 2591, post

Sect. 4.—What must be proved: Sub-sect. 3, A. & B.
(a) & (b).]

SUB-SECT. 3.—MALICE.

A. In General.

Malice, generally, see Part VII., ante.

2565. Necessity for.]—There must be motive to ground an action of slander of title.—**HARGRAVE v. LE BRETON** (1769), 4 Burr. 2422; 98 E. R. 269.

Annotations:—**Consd.** Robertson v. M'Dougall (1828), 4 Bing. 670. **Distd.** Blackham v. Pugh (1846), 2 C. B. 611. **Refd.** Smith v. Spooner (1810), 3 Taunt. 246; Bromage v. Prosser (1825), 4 B. & C. 247; Gutsole v. Mathers (1836), Tyr. & Gr. 694; Ratcliffe v. Evans, [1892] 2 Q. B. 524.

2566. —.]—(1) In an action for slander of title it is necessary for pltf. to prove malice in deft.

A lease, in which was a proviso for re-entry if the rent were arrear twenty-eight days, being exposed to sale by the assignee, & rent being then in arrear, the lessor announced at the sale that the vendors could not make a title, in consequence of which, bidders, who came to buy, went away. He afterwards offered £100 for the lease, but subsequently recovered the premises in ejectment:—**Held:** no action for slander of title lay against him.

(2) In an action for slander of title deft. may give evidence on the general issue, that he spoke the words claiming title in himself.—**SMITH v. SPOONER** (1810), 3 Taunt. 246; 128 E. R. 98.

Annotations:—As to (1) **Refd.** Steward v. Young (1870), L. R. 5 C. P. 122. **Generally, Refd.** Gutsole v. Mathers (1836), 1 M. & W. 495; Blackham v. Pugh (1846), 2 C. B. 611.

2567. —.]—If the surveyor to a society which publishes an account of the different classes of ships, for the information of merchants, underwriters, etc., is requested by a ship owner to survey his ship, & does so in consequence, & makes a report to the society, who class the vessel according to his report, such shipowner cannot maintain an action against the members of the society for a libel in misdescribing the ship; nor against the surveyor, unless he made a false report:—**Qu.**: whether such an action is maintainable at all without evidence of express malice.—**KERR v. SHEDDEN** (1831), 4 C. & P. 528, N. P.

2568. —.]—**PATER v. BAKER**, No. 2576, post.

2569. —.]—**BROOK v. RAWL**, No. 2577, post.

2570. —.]—(1) In an action of slander of title to goods pltf. must in every case show malice on the part of deft.

(2) The rule on this point laid down in **Wren v. Weild**, No. 2585, post, applies equally where the alleged slander consists in a claim to goods put forward *bonâ fide* by a reversioner who has no present right of action in respect of the goods.—**BAKER v. PIPER** (1886), 2 T. L. R. 733.

2571. —.]—An injunction will not be granted restraining deft. from making a statement alleged to be for the purpose of injuring pltf. in his trade when such statement though not literally true is true in substance & in fact; it is always necessary for pltf. to prove express malice on the part of deft. when such statement is made in defence of deft.'s property.—**INCANDESCENT GAS LIGHT CO., LTD. v. NEW INCANDESCENT (SUNLIGHT PATENT) GAS LIGHTING CO., LTD.** (1897), 76 L. T. 47.

2572. —.]—**BRITISH RAILWAY TRAFFIC & ELECTRIC CO. v. C. R. C. CO. & LONDON COUNTY COUNCIL**, No. 2269, ante.

2573. —.]—**GREERS, LTD. v. PEARMAN & CORDER, LTD.**, No. 2552, ante.

B. What Amounts to Malice.

(a) In General.

Express malice, see Part VII., ante.

2574. Statement made with bonâ fide belief in its truth.]—In an action for slander of title conveyed in a letter, to a person about to purchase the estate of pltf., imputing insanity to Y., from whom pltf. purchased it, & that the title would therefore be disputed, *per quod* the person refused to complete the purchase:—**Held:** deft., who had married the sister of Y., who was heir at law to her brother, in the event of his dying without issue, was not to be considered as a mere stranger; & the question for the jury was not whether they were satisfied as men of good sense & good understanding that Y. was insane, or that deft. entertained a persuasion that he was insane, upon such grounds as would have persuaded a man of sound sense & knowledge of business; but whether he acted *bonâ fide* in the communication which he made, believing it to be true, as he judged according to his own understanding, & under such impressions as his situation & character were likely to beget.

I cannot help thinking that the point which was peculiarly for the consideration of the jury . . . was not left to them correctly; . . . & that point is this, whether deft. made the statement *bonâ fide*, & under an honest impression of its being the truth, or whether he made it maliciously, & for the purpose of slandering the title of the person that was about to convey his estate (**LORD ELLENBOROUGH, C.J.**).—**PITT v. DONOVAN** (1813), 1 M. & S. 639; 105 E. R. 238.

Annotations:—**Apld.** Pater v. Baker (1847), 3 C. B. 831.

Consd. Steward v. Young (1870), L. R. 5 C. P. 122; Incandescent Gas Light Co. v. New Incandescent (Sunlight Patent) Gas Lighting Co. (1897), 76 L. T. 47; British Ry. Traffic & Electric Co. v. C. R. C. Co. & L. C. Co., [1922] 2 K. B. 260. **Refd.** Blackham v. Pugh (1846), 2 C. B. 611; Wren v. Weild (1869), L. R. 4 Q. B. 730; Allen v. Flood, [1898] A. C. 1; Shapiro v. La Motta (1923), 130 L. T. 622.

2575. —.]—In an action for slander of title deft. having issued an advertisement offering a reward for the production of a will of a deceased person whose property pltf. was about to sell as administrator after having been told by the attorney of the deceased that there was no will:—**Held:** the question was whether, after this, he had an honest & reasonable belief that there was a will.—**ATKINS v. PERRIN** (1862), 3 F. & F. 179.

2576. Statement founded on incorrect view of duty or legal right.]—(1) In case against a surveyor of highways, appointed under 7 & 8 Vict. c. 84, for the following words alleged to have been spoken by him at a public auction, in reference to certain unfinished houses at a place called Agar Town, which pltf. had put up for sale: "My object in attending this sale is, to inform purchasers, if there be any here present, that I shall not allow purchasers, meaning persons who then might be disposed to purchase at the said sale the said house of pltf., so exposed for sale as aforesaid, to be finished or occupied, until the roads are made good in Agar Town. I have no power to compel any one to make the roads; but I have power to stop the buildings until the roads are made. If there shall be any purchasers, they will have to keep the carcasses in their unfinished state until the roads are made"; the judge at the trial allowed the declaration to be amended, under Civil Procedure Act, 1833 (c. 42), s. 23, by substituting for the words in italic, the words "the houses":—**Held:** such amendment was properly allowed.

In such a case, malice is not to be inferred from the circumstance of deft. having acted upon an incorrect view of his duty, founded upon an erroneous construction of the statute.

(2) Unless he shows falsehood & malice & an injury to himself pltf. shows no case to go to the jury (MAULE, J.).—PATER v. BAKER (1847), 3 C. B. 831; 16 L. J. C. P. 124; 8 L. T. O. S. 449; 11 Jur. 370; 136 E. R. 333.

Annotations:—As to (2) *Appld.* Steward v. Young (1870), L. R. 5 C. P. 122. *Consd.* British Ry. Traffic & Electric Co. v. C. R. C. Co. & L. C. C., [1922] 2 K. B. 260. *Refd.* Wren v. Weild (1869), L. R. 4 Q. B. 730; Shapiro v. La Motta (1923), 130 L. T. 622.

2577. —.]—In an action for slander of title, by saying at the sale of a lease & assignment of premises, whereof deft. was the original lessor, the false & malicious words viz. that "the whole of the covenants of this lease are broken, & I have served notice of ejectment; the premises will cost £70 to put them in repair"; by reason of which false & malicious words the property fetched less than it otherwise would have done; the true question for the jury is, whether the words are false & malicious, & whether the special damage arose therefrom.

In order to maintain an action of this kind there must be malice & falsehood & special damage must ensue therefrom (PARKE, B.).—BROOK v. RAWL (1849), 4 Exch. 521; 19 L. J. Ex. 114; 14 L. T. O. S. 205; 154 E. R. 1320.

Annotation:—*Consd.* Shapiro v. La Motta (1923), 130 L. T. 622.

2578. —.]—A. died possessed of furniture in a beer shop. His widow, without taking out administration, continued in possession of the beer shop for three or four years, & then died, having whilst so in possession conveyed all the furniture by bill of sale to her landlords by way of security for a debt she had contracted with them. After the widow's death, pltf. took out letters of administration to the estate of A., & informed deft., the landlords' agent, that the bill of sale was invalid, as the widow had no title to the furniture. Subsequently pltf. was about to sell the furniture by auction, when deft. interposed to forbid the sale, & said that he claimed the goods for his principals under a bill of sale. On proof of these facts, in an action for slander of title, pltf. was nonsuited:—*Held*: the mere fact of deft.'s having been told before the sale that the bill of sale was invalid, was no evidence of malice to be left to the jury, & pltf. was therefore properly nonsuited.—STEWART v. YOUNG (1870), L. R. 5 C. P. 122; 39 L. J. C. P. 85; 22 L. T. 168; 18 W. R. 492.

Annotation:—*Refd.* British Ry. Traffic & Electric Co. v. C. R. C. Co. & L. C. C., [1922] 2 K. B. 260.

2579. Statements without reasonable & probable cause.—The holder of a patent, the validity of which is not impeached who issues notices against purchasing certain articles alleging that they are infringements of his patent & threatening legal proceedings against those who purchase them, is not liable to an action for damages by the vendor of those articles for the injury done to the vendor's trade by his issuing them, provided they are issued *bonâ fide* in the belief that the articles complained of are infringements of his patent. Nor is he liable to be restrained by injunction from continuing to issue them until it is proved that they are untrue, so that this further issuing them would not be *bonâ fide*.

An action for slander of title will not lie unless the statements made by deft. were not only untrue but were made without what is ordinarily expressed as reasonable & probable cause, & this rule applies not only to actions for slander of title strictly &

properly so called with reference to real estate, but also to cases relating to personalty, or personal rights or privileges (BAGGLEY, L.J.).—HALSEY v. BROTHERHOOD (1881), 19 Ch. D. 386; 51 L. J. Ch. 233; 45 L. T. 640; 30 W. R. 279, C. A.

Annotations:—*Appld.* Anderson v. Liebig's Extract of Meat Co. (1881), 45 L. T. 757; Burnett v. Tak (1882), 45 L. T. 743. *Consd.* Household & Rosher v. Fairburn & Hall (1884), 51 L. T. 498. *Appld.* Incandescent Gas Light Co. v. New Incandescent (Sunlight Patent) Gas Lighting Co. (1897), 76 L. T. 47. *Refd.* Baker v. Piper (1886), 2 T. L. R. 733; Challender v. Royle (1887), 36 Ch. D. 425; Skinner v. Shew, [1893] 1 Ch. 413; Hirschler v. Hertz & Collingwood (1895), 11 T. L. R. 466; White v. Mellin (1895), 43 W. R. 353; Ripley v. Arthur (1901), 45 Sol. Jo. 165; St. Mungo Manufacturing Co. v. Hutchison, Main (1908), 25 R. P. C. 356; British Ry. Traffic & Electric Co. v. C. R. C. Co. & L. C. C., [1922] 2 K. B. 260. *Mentd.* Walker v. Clarke (1887), 56 L. J. Ch. 239; Barrett v. Day, Day v. Foster (1890), 43 Ch. D. 435.

2580. —.]—Defts. issued a circular to their customers stating that they were unable to supply a particular electric bell, for which pltf. had obtained protection, as it had "been proved to be an infringement" of another patented bell. Up to the date of the issue of the circular no action or proceeding had been commenced by any one against pltf. in respect of his bell. An action was afterwards commenced & then abandoned:—*Held*: as the alleged infringement had not been proved by any proper proceedings before the ct., there was no reasonable & probable cause for the statement in the circular, & pltf. was entitled to damages.—CRAMPTON v. SWETE & MAIN (1888), 58 L. T. 516.

2581. Statement made with indirect or dishonest motive.—GREERS, LTD. v. PEARMAN & CORDER, LTD., No. 2552, *ante*.

(b) Claim of Right by Defendant.

2582. Not actionable.—BANISTER v. BANISTER (1583), cited 4 Co. Rep. at p. 17 a; 76 E. R. 899.

Annotations:—*Refd.* Gerard v. Dickenson (1590), 4 Co. Rep. 18 a; Davis v. Gardiner (1593), 4 Co. Rep. 16 b; Sneade v. Badley (1615), 3 Bulst. 74; Nelson v. Staff (1617), Cro. Jac. 422; Humphrys v. Stanfeld (1637), Cro. Car. 469.

2583. — Though no right in fact—Unless claim made malâ fide.—In an action for slander of title pltf. declared that he was in treaty with S. for a lease of the manor of A. at so much rent & that deft. knowing of the treaty published these words, "I have a lease of the manor of A. for ninety-nine years" & published a lease for 90 years supposed to be made by one seised of the same manor before pltf. purchase thereof to her late husband E. & offered to sell it, whereas in truth deft. knew it to be forged by reason whereof the said S. did not proceed in the treaty for a lease. Deft. by her plea traversed that she knew the lease to be a forgery. Upon demurrer:—*Held*: (1) if deft. had said she herself had title though it were false, no action would lie & though it appeared by deft.'s bar that she had no title yet that would not make a count insufficient to maintain the action good; (2) but the action lay because it was alleged that deft. knew of the treaty for a lease with S. & the lease which she published as a good lease was a counterfeit one by which the treaty was broken off.—GERARD v. DICKENSON (1590), 4 Co. Rep. 18 a; Cro. Eliz. 196; 76 E. R. 903.

Annotations:—As to (1) *Dbtd.* Nurse v. Pounford (1629), Het. 161. *Refd.* Smith v. Spooner (1810), 3 Taunt. 246; Pitt v. Donovan (1813), 1 M. & S. 639; Blackham v. Pugh (1846), 2 C. B. 611; Bathishill v. Reed (1856), 25 L. J. C. P. 290; Wren v. Weild (1869), L. R. 4 Q. B. 730; Incandescent Gas Light Co. v. New Incandescent (Sunlight Patent) Gas Lighting Co. (1897), 76 L. T. 47. As to (2) *Consd.* Wren v. Weild (1869), L. R. 4 Q. B. 730. *Refd.* British Ry. Traffic & Electric Co. v. C. R. C. Co. & L. C. C., [1922] 2 K. B. 260. *Generally, Mentd.* Cropper v. Matthews (1658), 2 Sid. 127; Green v. Button (1835), 2 Cr. M. & R. 707; Malachy v. Soper (1836), 3 Bing. N. C. 371.

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<i>Bankers</i> . . .	„ BANKERS.	<i>Mortgagees</i> . . .	„ MORTGAGE.
<i>Brokers</i> . . .	„ AGENCY; INSURANCE; SALE OF GOODS; STOCK EXCHANGE.	<i>Sale of Land</i> . . .	„ SALE OF LAND.
<i>Builders</i> . . .	„ BUILDING CONTRACTS.	<i>Solicitors</i> . . .	„ SOLICITORS.
<i>Carriers</i> . . .	„ CARRIERS.	<i>Stockbrokers</i> . . .	„ STOCK EXCHANGE.
<i>Companies</i> . . .	„ COMPANIES.	<i>Stoppage in transitu</i> . . .	„ SALE OF GOODS.
<i>Factors</i> . . .	„ AGENCY; SALE OF GOODS.	<i>Suretyship</i> . . .	„ GUARANTEE.
<i>Innkeepers</i> . . .	„ INNS AND INNKEEPERS.	<i>Trustees</i> . . .	„ TRUSTS AND TRUSTEES.
		<i>Vendors of Goods</i> . . .	„ SALE OF GOODS.
		<i>Work and Labour</i> . . .	„ WORK AND LABOUR.

Part I.—In General.

1. **Lien in equity—Same meaning as at law.]**—In an issue out of Chancery to try a question of lien, the term is to be understood in its legal sense, which imports an authority either to possess or to retain.—*Re HOLMES, Ex p. HEYWOOD* (1815), 2 Rose, 355; *sub nom. HOLLAND'S & HUMBLE'S ASSIGNEES v. —*, 1 Stark. 143, N. P. *Annotations:—Reid. Malcolm v. Scott* (1843), 3 Hare, 39. *Mentd. Frith v. Forbes* (1862), 31 L. J. Ch. 793.

2. **— Governed by same rules as at law.]**—Construction of clause in a charterparty, whereby the parties “mutually bound themselves, especially the owners the ship & tackle, & the freighter the goods to be taken on board,” in a penal sum, “to the true & punctual performance of every article therein contained,” not to give to the ship-owners any lien in equity, on the goods brought

home, either for dead freight, or demurrage:—*Held*: only one construction of the clause, at law & in equity.

As to liens on the goods of one man in the possession of another, I know of no difference between the rules of decision in cts. of law, & in cts. of equity. . . . Lien, in its proper sense, is a right which the law gives. But it is usual to speak of lien by contract, though that be more in the nature of an agreement for a pledge (*GRANT, M.R.*).—*GLADSTONE v. BIRLEY* (1817), 2 Mer. 401; 35 E. R. 993; *previous proceedings, sub nom. BIRLEY v. GLADSTONE* (1814), 3 M. & S. 205.

Annotations:—Reid. Giles v. Grover (1832), 2 Moo. & S. 197; *McLean & Hope v. Fleming* (1871), L. R. 2 Sc. & Div. 128.

Equitable lien.]—See Part V., post.

Part II.—Legal or Possessory Lien Generally.

SECT. 1.—DEFINITION AND NATURE.

SUB-SECT. 1.—DEFINITION.

3. **Right to possess or retain goods of another—Till claim satisfied.]**—It is a contradiction in terms to say a man has a lien upon his own goods, or a right to stop his own goods *in transitu*. If the goods be his, he has a right to the possession of them whether they be *in transitu* or not; he has a right to sell or dispose of them as he pleases, without the option of any other person; but he who has a lien only on goods has no right so to do; he can only retain them till the original price be paid. . . . Liens at law exist only in cases where the party entitled to them has the possession of the goods; & if he once part with the possession after the lien attaches, the lien is gone (*BULLER, J.*).—*LICKBARROW v. MASON* (1793), as reported in 6 East, 20, n.; 102 E. R. 1191, H. L.

Annotations:—Reid. Walley v. Montgomery (1803), 3 East, 585; *Giles v. Grover* (1832), 9 Bing. 128; *Re Knight, Ex p. Golding, Davis* (1880), 42 L. T. 270. *Mentd. Salomons v. Nissen* (1788), 2 Term Rep. 674; *Slubey v. Heyward* (1795), 2 Hy. Bl. 504; *Bird v. Appleton* (1800), 1 East, 111; *Coxe v. Harden* (1803), 4 East, 211; *Newsom v. Thornton* (1805), 6 East, 17; *Christy v. Row* (1808), 1 Taunt. 300; *Martini v. Coles* (1813), 1 M. & S. 140; *Patten v. Thompson* (1816), 5 M. & S. 350; *Birkett v. Willan* (1819), 1 Chit. 633; *Morison v. Gray* (1824),

9 Moore, C. P. 484; *Bloxam v. Sanders* (1825), 4 B. & C. 941; *Re Westzynthius* (1833), 2 Nev. & M. K. B. 644; *Saunders v. Smith* (1838), 7 L. J. Ch. 227; *Gibson v. Carruthers* (1841), 8 M. & W. 321; *Brown v. Clarke* (1843), 7 Jur. 1043; *Thompson v. Dominy* (1845), 14 M. & W. 403; *Grant v. Norway* (1851), 10 C. B. 665; *Gurney v. Behrend* (1854), 3 E. & B. 622; *Griffiths v. Perry* (1859), 1 E. & E. 680; *Re North British Australasian Co., Ex p. Swan* (1859), 7 C. B. N. S. 400; *Taylor v. Great Indian Peninsular Ry.* (1859), 28 L. J. Ch. 285; *Swan v. North British Australasian Co.* (1863), 2 H. & C. 175; *The Tigress* (1863), Brown & Lush. 38; *The Marie Joseph* (1866), Brown. & Lush. 449; *The Figlia Maggiore* (1868), L. R. 2 A. & E. 106; *Rodger v. Comptoir D'Escompte de Paris* (1869), L. R. 2 P. C. 393; *The Freedom* (1871), L. R. 3 P. C. 594; *Chartered Bank of India, Australia & China v. Henderson* (1874), L. R. 5 P. C. 501; *Goodwin v. Roberts* (1875), L. R. 10 Exch. 337; *Arnold v. Cheque Bank, Arnold v. City Bank* (1876), 1 C. P. D. 578; *Leask v. Scott* (1877), 2 Q. B. D. 376; *Re Cock, Ex p. Rosevear China Clay Co.* (1879), 11 Ch. D. 560; *Glyn, Mills, Currie v. East & West India Dock Co.* (1882), 7 App. Cas. 591; *Cassaboglou v. Gibb* (1883), 11 Q. B. D. 797; *Sewell v. Burdick* (1884), 10 App. Cas. 74; *Nähmaschinen Fabrik Act. v. Pickford & Lee & Harris* (1888), 4 T. L. R. 617; *Bank of England v. Vagliano*, [1891] A. C. 107; *Bristol & West of England Bank v. Mid. Ry.* (1891), 65 L. T. 234; *Nash v. De Freville*, [1900] 2 Q. B. 72; *Farquharson v. King*, [1902] A. C. 325; *Rimmer v. Webster*, [1902] 2 Ch. 163; *Booth S.S. Co. v. Cargo Fleet Iron Co.*, [1916] 2 K. B. 570; *London Joint Stock Bank v. Macmillan & Arthur*, [1918] A. C. 777; *Diamond Alkali Export Corp'n. v. Bourgeois*, [1921] 3 K. B. 443; *McDonald v. Nash*, [1924] A. C. 625; *Commonwealth Trust v. Akotey* (1925), 94 L. J. P. C. 167.

PART I.

a. **Lien on goods of Sovereign.]**—The goods of the Sovereign cannot be detained under a claim for lien.—*R. v. FRASER* (1877), 11 N. S. R. (2 R. & C.), 431.—CAN.

Sect. 1.—Definition and nature: Sub-sect. 2. Sects. 2 & 3: Sub-sect. 1, A. & B. (a).]

or even if no day of payment be named he may, upon waiting a reasonable time & taking the proper steps, realise his debt in like manner (MELLOR, J.).—DONALD v. SUCKLING (1866), L. R. 1 Q. B. 585; 7 B. & S. 783; 35 L. J. Q. B. 232; 14 L. T. 772; 30 J. P. 565; 12 Jur. N. S. 795; 15 W. R. 13.

Annotations:—Reid. Halliday v. Holgate (1868), L. R. 3 Exch. 299; Webb v. Whinney (1868), 18 L. T. 523; Mulliner v. Florence (1878), 3 Q. B. D. 484; Burdick v. Sewell (1883), 10 Q. B. D. 363; The Odessa, The Woolston, [1916] 1 A. C. 145; Whiteley v. Hilt, [1918] 2 K. B. 808. **Mentd.** Cox v. Liddell (1895), 2 Mans. 212; Deverges v. Sandeman, Clark, [1902] 1 Ch. 579; Ponsford, Baker v. Union of London & Smiths Bank (1906), 75 L. J. Ch. 724.

27. —.—[HALLIDAY v. HOLGATE, No. 23, ante.

28. —.—[The difference between pledge & lien is that in lien no property passes (LORD ESHER, M.R.).—YUNGMAUN v. BRIESEMANN (1892), 67 L. T. 642; 41 W. R. 148; 4 R. 119, C. A.

Annotation:—Consd. Lord's Trustee v. G. E. Ry., [1908] 2 K. B. 54.

29. —.—[A pledge] creates no *jus in re* in favour of the pledgee; it gives him no more than a *jus in rem* such as a lienholder possesses, but with the added incident, that he can sell the property *motu proprio* & without any assistance from the ct. (LORD MERSEY).—THE ODESSA, THE WOOLSTON, [1916] 1 A. C. 145; 85 L. J. P. C. 49; 114 L. T. 10; 32 T. L. R. 103; 60 Sol. Jo. 292; 13 Asp. M. L. C. 215, P. C.; affg. S. C. sub nom. THE ODESSA, THE CAPE CORSO, [1915] P. 52.

Annotations:—Mentd. The Clan Grant (Part Cargo Ex.) (1915), 31 T. L. R. 321; The Eumaeus (1915), 85 L. J. P. 130; The Linaria (Part Cargo Ex.) (1915), 31 T. L. R. 396; The Sorfareren (1915), 85 L. J. P. 121; The Zamora, [1916] 2 A. C. 77; The Derflinger (No. 2) (1918), 87 L. J. P. C. 195; The Lützow, [1918] A. C. 435; The Parchim, [1918] A. C. 157; The Dirigo, The Hallingdal, etc., [1919] P. 204; The Palm Branch, [1919] A. C. 272; The Hilding, etc. (Part Cargoes Ex.) (1920), 37 T. L. R. 199; The Orteric, [1920] A. C. 724; The Urna, [1920] A. C. 899; The Kronprinsessan Margareta, The Parana, etc., [1921] 1 A. C. 486.

See, generally, PAWNS & PLEDGES.

See, also, No. 2, ante.

Lien created by agreement—Whether registration necessary as bill of sale.]—See BILLS OF SALE, Vol. VII., pp. 18, 19.

SECT. 2.—HOW AND WHEN ARISING.

General lien.]—See Part III., Sect. 2, post.

Particular lien.]—See Part IV., Sects. 2, 3, post.

Extension of particular to general lien.]—See Part III., Sect. 4, post.

SECT. 3.—ESSENTIAL INCIDENTS.

SUB-SECT. 1.—POSSESSION.

A. In General.

30. General rule.]—A factor has no lien on goods for a general balance, unless they come into his actual possession; & if, in consideration of goods being consigned to him, he accept bills drawn by the consignor, & pay part of the freight after they arrive, & become insolvent before the bills are due, & before the goods get into his actual possession, the consignor may stop them in tran-

situ.—KINLOCH v. CRAIG (1789), 3 Term Rep. 119; 100 E. R. 487; subsequent proceedings (1790), 3 Term Rep. 783; 4 Bro. Parl. Cas. 47, H. L.

Annotations:—Consd. Sweet v. Pym (1800), 1 East, 4. **Expld.** Feise v. Wray (1802), 3 East, 93. **Distd.** Hammonds v. Barclay (1802), 2 East, 227. **Apld.** Patten v. Thompson (1816), 5 M. & S. 350; Nichols v. Clent (1817), 3 Price, 547. **Distd.** Bryans v. Nix (1839), 4 M. & W. 775. **Refd.** M'Combie v. Davies (1805), 7 East, 5.

31. —.—[An issue out of Chancery, on the question whether S. had at a particular time any lien on certain goods or their produce, must be found in the negative, if S. was not in possession of the goods or their produce, whatever equitable interest he might have in them.—HEYWOOD v. WARING (1815), 4 Camp. 291, N. P.

Annotation:—Refd. Giles v. Grover (1832), 9 Bing. 128.

32. —.—[The owner of a vessel has no lien for the hire stipulated by charterparty for the voyage, on the goods shipped by the charterer; because the latter is the owner of the ship for the voyage, & the first owner has no possession of the ship or goods, without which there can be no lien.—HUTTON v. BRAGG (1816), 7 Taunt. 14; 2 Marsh. 339; 129 E. R. 6.

Annotations:—Distd. Tate v. Meek (1818), 2 Moore, C. P. 278; Saville v. Campion (1819), 2 B. & Ald. 503; Faith v. East India Co. (1821), 4 B. & Ald. 630. **Dbtd.** Christie v. Lewis (1821), 2 Brod. & Bing. 410. **Consd.** Belcher v. Capper (1842), 4 Man. & G. 502. **Apld.** The Alan Ker, How v. Kirchner (1857), 30 L. T. O. S. 296. **Refd.** Crawshaw v. Homfray (1820), 4 B. & Ald. 50; Dean v. Hogg (1834), 10 Bing. 345; Thompson v. Small (1845), 1 C. B. 328; The Great Eastern (1868), L. R. 2 A. & E. 88.

33. —.—[As to lien, it is an exception to the general rule of law in favour of certain trades, & it is always coupled with the possession of the party who has a right to detain. He has no right to take clothes in wear. In the case put in argument, of a basket or bundle in debtor's hand, I am of opinion the innkeeper would have no right to detain it (LORD ABINGER, C. B.).—SUNBOLF v. ALFORD (1838), 3 M. & W. 248; 1 Horn & H. 13; 2 J. P. 136; 2 Jur. 110; 150 E. R. 1135; sub nom. TUNBOLF v. ALFORD, 7 L. J. Ex. 60.

Annotations:—Refd. Broadwood v. Granara (1854), 19 J. P. 39. **Mentd.** Spitzer v. Chaffers (1863), 14 C. B. N. S. 686.

34. —.—[ORCHARD v. RACKSTRAW, No. 389, post.

35. —.—[There can be no lien upon any property unless it is in the possession of the party who claims the lien (LORD CHELMSFORD, C.).—SHAW v. NEALE (1858), 6 H. L. Cas. 581; 27 L. J. Ch. 444; 31 L. T. O. S. 190; 4 Jur. N. S. 695; 6 W. R. 635; 10 E. R. 1422, H. L.; varying (1855), 20 Beav. 157.

Annotations:—Refd. Turner v. Letts (1855), 20 Beav. 185; North v. Stewart (1890), 15 App. Cas. 452; Briscoe v. Briscoe, [1892] 3 Ch. 543; Re Knight, Knight v. Gardner, [1892] 2 Ch. 368; Meguerditchian v. Lightbound, [1917] 2 K. B. 298. **Mentd.** Beavan v. Oxford (1855), 6 De G. M. & G. 492; Hopkinson v. Rolt (1861), 9 H. L. Cas. 514; Monzies v. Lightfoot (1871), L. R. 11 Eq. 459.

See, further, AGENCY, Vol. I., p. 551; SHIPPING.

36. What constitutes possession—Goods brought on to premises by contractor.]—In trover by the assignees of S. against the London Dock Co., to recover certain engines, machinery, implements, & materials, the cause having been referred by order of *Nisi Prius*, the arbitrator found that a contract had been entered into between S. & the bkpt., & the London Dock Co., to execute certain works required for the formation of an entrance to the Docks, & to provide the materials for the

PART II. SECT. 3, SUB-SECT. 1.—A.

30 i. General rule.]—There can be no lien without possession.—ENGLISH v. CLARK (1862), 12 C. P. 451.—CAN.

30 ii. —.]—MCKENZIE v. MAT-

TINSON, MATTINSON v. MCKENZIE (1902), 40 N. S. R. 346.—CAN.

30 iii. —.]—PIPER v. ROBERTS (1910), 14 W. L. R. 445.—CAN.

30 iv. —.]—To constitute a lien on

any property the property must be in the possession of the party who claims the lien.—*Re* DADIA BIBER, DEBNARAIN BOSE v. LEISK (1863), 2 Hyde, 267.—IND.

purpose, in consideration of £52,200 & of being allowed to appropriate certain materials to his own use. The engineer of the co. was to be the sole judge of the works, & to have the power of rejecting any materials or work not in his own opinion conformable to the plans & specifications, & to provide other materials in lieu of those rejected, & to employ competent persons to perform the work, if S. failed to do so; in which case the costs or amount thereof was to be deducted from the sum to become due to him under that contract. The directors were to be at liberty to alter the plans, & thereby add to or diminish any part of the works, in which case a proportionate addition or deduction was to be made to or from the sum to be paid to S. according to the schedule of prices contained in the specification. S. commenced the works & placed on the premises steam engines, rail roads, materials & implements, necessary for carrying on the works. The co.'s engineer superintended the works & examined the materials brought upon the premises by S., & rejected such as he thought were not proper for the purpose. The whole of the premises where the works were carried on & upon which the machinery & materials were placed, belonged to the co. During the progress of the works, advances were made by the co. to S. on application, beyond the sum he was entitled to receive; he referring them by letter to the engines, rail roads, implements & materials lying on the premises, & stating the particulars of which they consisted, as their security for those advances, & agreeing that all the engines, implements & materials upon the premises should be a security for such advances. S. became bkpt. before the works were completed, upon which the dock co. erased S.'s name from the implements, etc., & took possession of the engines, materials, implements, etc., then on their premises. The co. were always in advance to S. to an amount exceeding the value of the property on the premises.—*Held*: defts. were entitled to insist on the lien given to them on the engines, materials, etc., as a security for their advances, & there was a sufficient possession by defts. to support the lien; & pl'ts. were not entitled to recover such engines materials, etc., but they were entitled to recover for such of the materials as were brought upon deft.'s premises after the bkpcy.—*CROWFOOT v. LONDON DOCK CO.* (1834), 2 Cr. & M. 637; 4 Tyr. 967; 4 L. J. Ex. 267; 149 E. R. 915.

Annotations:—*Refd.* Hawthorn v. Newcastle-upon-Tyne & N. Shields Ry. (1840), 2 Ry. & Can. Cas. 288. *Mentd.* Lunn v. Thornton (1844), 14 L. J. C. P. 161.

Lien on building materials generally, *see* BUILDING CONTRACTS, Vol. VII., pp. 414 *et seq.*

37. — Goods stored on land leased by claimant—*Effect of agreement.*—A railway co. by a "ledger agreement" opened a credit account with a coal merchant for the carriage of his coal, the co. to have a continual lien upon the coal conveyed on their lines or being at any time on ground rented of the co. for all charges due to them, & to be at liberty to sell & dispose of any of the coal to satisfy the lien, with the right to close the account by giving one day's notice. By separate agreements the co. let to the merchant allotments within the railway yard for the purpose only of stacking & dealing with the coal. The co. had the keys of the yard gates & kept them locked at certain times. The payments being in arrear, the co. closed the account, locked the gates, & detained the coal:—*Held*: the inference of fact from the circumstances was that both parties intended the co.'s right of detainer to be preserved & if necessary enforced against the coal while

in the railway yard; the ledger agreement conferred no licence to take possession of personal chattels or charge or equity thereon & was not a bill of sale within Bills of Sale Act, 1878 (c. 31), & the trustee in the merchant's bkpcy. had no claim against the co. in respect of the detainer.

I cannot perceive any necessary dependency between the occupation of a piece of land & the exclusive possession of chattels which lie on it (*LORD LOREBURN, C.*).—*GREAT EASTERN RY. CO. v. LORD'S TRUSTEE*, [1909] A. C. 109; 78 L. J. K. B. 160; 100 L. T. 130; 25 T. L. R. 176; 16 Mans. 1, H. L.; *revsq. S. C. sub nom. LORD (TRUSTEE OF) v. GREAT EASTERN RY. CO.*, [1908] 2 K. B. 54; C. A.

Annotation:—*Mentd.* Tilley v. Bowman, [1910] 1 K. B. 745.

For necessity for possession in maritime liens, *see* SHIPPING.

Effect of parting with possession.—*See* Sect. 9, sub-sect. 2, *post*.

B. Nature of Possession.

(a) Possession Must be Rightful.

38. *General rule.*—An assignment of goods at sea as a collateral security for a debt, & a subsequent indorsement of a bill of lading, are good as against the assignees of the assignor, who committed an act of bkpcy. between the assignment of the goods & the indorsement of the bill of lading. Goods delivered to a person claiming them wrongfully, who pays freight & other charges, cannot be detained for those expenses against the rightful owner.—*LEMPRIERE v. PASLEY* (1788), 2 Term Rep. 485; 100 E. R. 262.

Annotations:—*Apld.* Nichols v. Clent (1817), 3 Price, 547. *Refd.* Walley v. Montgomery (1803), 3 East, 585; Lucas v. Dorrien (1817), 7 Taunt. 278; Belcher v. Copper (1842), 4 Man. & G. 502; Peruvian Guano Co. v. Dreyfus (1887), [1892] A. C. 170, n. *Mentd.* *Re* Severn, *Ex p.* Tennyson (1832), Mont. & B. 67; Burn v. Carvalho (1834), 1 Ad. & El. 883; Belcher v. Oldfield (1839), 6 Bing. N. C. 102.

39. —.]—*GRIFFITHS v. HYDE* (1809), 2 Selwyn's N. P., 13th ed. 1320.

40. —.]—(1) Where several goods, belonging to one owner, are carried the same voyage, a delivery of part does not defeat the lien upon the remainder for the whole freight. But if there be two contracts to carry, with different *termini* to the voyage in each contract, no lien attaches for freight under the one contract, upon goods shipped under the other & improperly detained on board by the carrier.

(2) Goods are divested of a lien by complete delivery. It is for the jury to say whether there has been a complete delivery.

(3) If the goods were originally improperly carried on, no lien would attach, for no lien can be obtained by a wrongful possession (*BOLLAND, B.*).—*BERNAL v. PIM* (1835), 1 Gale, 17.

41. —.]—Upon an indictment for larceny, it appeared that the prisoner had been entrusted by the wife of the prosecutor to repair an umbrella. After the repairs were finished, & it had been returned to the prosecutor's wife, a dispute arose as to the bargain made. The prisoner thereupon carried away the umbrella as a security for the amount alleged by him to be due for repairing it:—*Held*: if the jury were of opinion that the taking by prisoner was an honest assertion of his right, they were to find him not guilty, but if it was only a colourable pretence to obtain possession, then to convict him.—*R. v. WADE* (1869), 11 Cox, C. C. 549.

Sect. 3.—Essential incidents: Sub-sect. 1, B. (a), (b) & (c).]

42. Wrongful possession—Obtained by misrepresentation.]—If a man gets possession of a thing by misrepresentation, he cannot retain it, as having a lien upon it, although under the circumstances, he might have done so, had he come by it fairly. *Semble*: if A. is under acceptance to B. he may retain money of B.'s in his hands to discharge it, either until the bill is delivered up to him, or until he receives a bond of indemnity against being sued upon it.—**MADDEN v. KEMPSTER** (1807), 1 Camp. 12, N. P.

43. ——— Obtained by agent after bankruptcy of principal—Through act of principal.]—An actual possession given to a factor by a carrier by order of the shipper, after his, the shipper's, bkpcy., is not such a possession as will give him a lien against the assignees although the goods were shipped on account of the factor, & bills had been accepted by him on the faith of it. Such an order rather operates to defeat his claim of lien, as being an act of ownership exercised by bkpt. Nor is a delivery to a master of a vessel, where the consignor has written to the consignee apprising him that he has consigned to him & requesting him on the faith of such consignment to accept bills, which he accordingly accepts & pays, such a constructive delivery to a consignee as will give him a lien against the assignees—it is not within the principle of the cases which decide that an equitable right will supply the deficiency of an actual delivery, in support of a well-founded lien not perfected by possession. Letters advising of a consignment of goods to a party who has accepted bills on the faith of such consignment are not equivalent in effect to bills of lading endorsed.—**NICHOLS v. CLENT** (1817), 3 Price, 547; 146 E. R. 348.

Annotation:—**Distd.** *Bryans v. Nix* (1839), 4 M. & W. 775.

44. ——— Through act of agent.]—Defts., on Oct. 15, as brokers of M., purchased, by his advice, & on his account, goods of D. & Co., & agreed with them that the goods should remain on the premises of the latter for one month rent free; & that M., after that time, should pay for the room they should occupy, until their removal. The invoice was made out to M. From Nov. 7 to Nov. 11, defts. shipped part of the goods by order of M., who directed that the residue should be left on the premises of D. & Co. till further orders from him. Defts. soon afterwards were requested by D. & Co. to remove the residue of the goods, but defts. did not then comply with that request. A docket was struck against M. on Dec. 6; & on Dec. 9 & 10, defts., without any order from M., removed part of the residue to their own premises. On Dec. 10, a commission of bkpcy. issued against M.:—*Held*: defts. had no possession on which to found their claim, as brokers, to a lien on the goods so purchased.—**TAYLOR v. ROBINSON** (1818), 8 Taunt. 648; 2 Moore, C. P. 730; 129 E. R. 536.

45. ——— Obtained in an assumed character.]—A person can have no right of lien over property which he acquires in an assumed character, or by tortious means (**LORD LYNDHURST, C.**).—**WICKENS v. TOWNSHEND** (1830), 1 Russ. & M. 361; 39 E. R. 140, L. C.

Annotations:—**Refd.** *Re Birt, Birt v. Burt* (1883), 22 Ch. D. 604; *Mackenzie v. Mackintosh* (1891), 64 L. T. 318.

PART II. SECT. 3, SUB-SECT. 1.—
B. (a).

42 i. Wrongful possession—Obtained by misrepresentation.]—**POCOCK v. NOVITZ** (1912), 21 W. L. R. 418; 5 Sask.

L. R. 339; 4 D. L. R. 105.—**CAN.**

PART II. SECT. 3, SUB-SECT. 1.—
B. (c).

49 i. General rule.]—A lien implies

46. ——— Obtained by tortious means.]—**WICKENS v. TOWNSHEND**, No. 45, *ante*.

47. ——— Obtained through wrongful act of third party.]—A. under colour of a legal proceeding, having wrongfully seized the horse of B., took it to an inn where it was kept for several days. C., the landlord, refused to deliver up the horse to B. upon a demand made soon after the delivery to him, but a few days afterwards offered to give up the horse to B. on being paid the sum of 10s. for the keep:—*Held*: C. had a lien upon the horse for the keep, unless he knew that A. was a wrong-doer in seizing the horse.—**JOHNSON v. HILL** (1822), 3 Stark. 172, N. P.

Annotations:—**Appld.** *Broadwood v. Granara* (1854), 10 Exch. 417. **Refd.** *Turrill v. Crawley* (1849), 13 Q. B. 197.

48. ———.]—A person has no right to keep the property of another, & charge for the standing of it, unless there was a previous bargain between him & the owner of the property, or between him & some agent authorised by the owner.

A. put a phaeton into the possession of M. for him to paint it, & paid M. beforehand for the painting. M. never painted it, but placed it on the premises of B., where it stood three months:—*Held*: B. had no lien on the phaeton for his charge for the standing of it, unless the jury were satisfied that M. placed it there by the authority of A.—**BUXTON v. BAUGHAN** (1834), 6 C. & P. 674, N. P.

Annotations:—**Distd.** *Keene v. Thomas*, [1905] 1 K. B. 130. **Consd.** *Cassils & Sassoon v. Holden Wood Bleaching Co.* (1914), 84 L. J. K. B. 834; *Pennington v. Reliance Motor Works*, [1923] 1 K. B. 127.

Deed deposited with bank—In breach of trust.]—See **BANKERS**, Vol. III., p. 290, Nos. 900 & 901.

Estoppel of bailee from setting up title adverse to bailor.]—See **BAILMENT**, Vol. III., pp. 100 *et seq.*

(b) *Possession for Particular Purpose.*

See Sect. 8, sub-sect. 2, *post*.

(c) *Possession Must be Continuous.*

49. General rule.]—A., having repaired a carriage for B., allows him to take it away from time to time; he cannot afterwards detain it for the amount of the repairs; neither can he detain it upon a claim for standage, without an express contract to pay for standage or unless the owner leaves it upon the premises beyond a reasonable time after notice.—**HARTLEY v. HITCHCOCK** (1816), 1 Stark. 408, N. P.

Annotation:—**Refd.** *British Empire Shipping Co. v. Somes* (1858), E. B. & E. 353.

50. ———.]—**JACKSON v. CUMMINS**, No. 328, *post*.

51. ———.]—The labour & skill employed on a racehorse by a trainer are a good foundation for a lien; but, if by usage or contract the owner may send the horse to run at any race he chooses, & may select the jockey, the trainer has no continuing right of possession, & consequently, no lien.

It is a well established principle that, without the right of continuing possession, there can be no right of lien (**COLERIDGE, J.**).—**FORTH v. SIMPSON** (1849), 13 Q. B. 680; 18 L. J. Q. B. 263; 13 L. T. O. S. 187; 13 Jur. 1024; 116 E. R. 1423.

Annotations:—**Refd.** *Lord's Trustee v. G.E. Ry.*, [1908] 2 K. B. 64; *Hatton v. Car Maintenance Co.* (1914), 30 T. L. R. 275.

the right of continuing possession, or the continuing right of possession.—**KATZMAN v. MANNIE** (1919), 46 O. L. R. 121; 17 O. W. N. 862.—**CAN.**

52. Effect of owner's right to remove chattel from time to time—Horse at livery—Effect of special agreement.]—A mare having been placed with a livery stable keeper, who advanced money to the owner; it was agreed that she should remain as a security for the repayment of the sum advanced, & for the expenses of her keep:—*Held*: the stable keeper had a lien on the mare.—*DONATTY v. CROWTHER* (1826), 11 Moore. C. P. 479; 4 L. J. O. S. C. P. 184.

53. ———.]—A livery stable keeper has a lien for the keep & exercise of a horse sent to him for the purpose of being trained.

In the case of a livery stable keeper there is no lien, because the horse is subject to the control of the owner, & may be taken out by him; & the first time it goes away, there is an end of the lien. But, a man who has a horse for training, has a lien for the keep & exercise of it. If a man buys property which is in the hands of a third person, who sets up an unfounded claim, & will not deliver unless that claim is paid, the purchaser is bound to give notice to the seller, & cannot, after several months, go & pay the demand; because he may, by his delay, deprive the seller of his evidence of the incorrectness of the claim. If a man has an article delivered to him, on the improvement of which he has to bestow trouble & expense, he has a right to detain it until his demand is paid (*BEST, C.J.*).—*BEVAN v. WATERS* (1828), 3 C. & P. 520; Mood. & M. 235, N. P.

Annotations:—*Appld.* Scarfe v. Morgan (1838), 4 M. & W. 270. *Consd.* Jackson v. Cummins (1839), 5 M. & W. 342. *Refd.* Judson v. Etheridge (1833), 3 Tyr. 954; Sanderson v. Bell (1834), 2 Cr. & M. 304. *Mentd.* Coates v. Birch (1841), 2 Q. B. 252; Dwyer v. Collins (1852), 7 Exch. 639; Roupell v. Haws (1863), 3 F. & F. 784.

54. ———.]—*ORCHARD v. RACKSTRAW*, No. 389, *post*.

55. ——— Horse for training.]—*JACOBS v. LATOUR*, No. 203, *post*.

56. ———.]—*BEVAN v. WATERS*, No. 53, *ante*.

57. ———.]—*JACKSON v. CUMMINS*, No. 328, *post*.

58. ———.]—*FORTH v. SIMPSON*, No. 51, *ante*.

59. ——— Innkeeper's lien on horse.]—A man goes to an inn, with two racehorses, & a groom, in the character of guest. They remain there for several months, taking the horses out every day for exercise & training, & being occasionally absent for several days together at races in different parts of the country, but always with the intention of returning to the inn:—*Held*: (1) in the absence of evidence of any alteration in the relation of the parties, that of innkeeper & guest must be presumed to continue; & the occasional absences did not destroy the innkeeper's lien upon the horses for his bill; (2) the fact of the innkeeper's having claimed a lien for the whole time, when in truth he was entitled for a part of it only, was not such an excess of claim as to dispense with a tender of that which was really due.—*ALLEN v. SMITH* (1863), 1 New Rep. 404; 9 Jur. N. S. 1284; 11 W. R. 440, Ex. Ch.

Annotations:—*As to* (1) *Appld.* Rumsey v. N. E. Ry. (1863), 14 C. B. N. S. 641. *As to* (2) *Refd.* Kinnaird v. Trollope (1889), 42 Ch. D. 610.

60. ——— Lien on wagons passing over railway.]—The P. co. took proceedings in the ct. of the

Railway & Canal Commission against the London & North-Western Ry. co., complaining of an undue preference in the rates charged to the P. co., & asking for return of the overcharges. In the course of this litigation, certain interlocutory applications were made to compel the railway co. to distinguish the component elements of certain rates in their books. These interlocutory applications were dismissed with costs. The P. co. appealed, & it was arranged that the original application should stand over until the appeals had been heard. In the meantime, negotiations for a settlement were entered into which ended in a compromise by which the railway co. reduced the amount of their claim for rates by the sum of £1,750. By a prior agreement the railway co. had a right, if their claim for rates were unsatisfied, at any time to detain any wagons of the P. co., by way of lien to secure the general balance owing to them, & also to sell such wagons, & apply the proceeds in payment of the debt due to them. The result of the litigation initiated in the ct. of the Railway & Canal Commission was, therefore, to reduce the lien of the railway co. by £1,750, & the wagons of the P. co. were, therefore, as a consequence of the litigation, made of more value to the P. co. by £1,750. The P. co. having gone into liquidation, their solrs. took out a summons asking for an order that they were entitled to a charge upon two hundred & seventy-three wagons, held by the railway co. as security for indebtedness of the P. co. to the railway co., such charge to rank after discharging such indebtedness, for their taxed costs, & for a sale of such wagons & application of the proceeds of sale in payment of such costs. The wagons were included in property assigned to a trustee for the first debenture holders of the P. co., & an action had been brought by Lloyd's Bank on behalf of themselves & all other holders of mtge. debentures of the P. co. against that co. & the trustees appointed. In that action a receiver had been appointed of the property of the P. co. subject to the debentures, & about the same time the co. went into liquidation. Upon the hearing of the summons, it was objected that it was impossible to identify the wagons to which it ought, if made, to attach:—*Held*: as the lien was actually effectual to the extent of the balance of the railway co.'s charges, amounting to £1,814, & as the whole of the wagons were passing from time to time in the regular course of work into the hands of the railway co. they could at any time have been detained & the lien made effectual. Therefore the whole of the rolling stock of that description belonging to the P. co. had been enhanced in value by the diminution of the lien to which they were all liable at any moment to be subjected in the necessary course of the P. co.'s business.—*Re PELSALL COAL & IRON CO. & LONDON & NORTH WESTERN RY. CO.* (1892), 8 T. L. R. 629; *sub nom.* PELSALL COAL & IRON CO. v. LONDON & NORTH WESTERN RY. CO. (No. 3), 8 Ry. & Can. Tr. Cas. 146.

61. ——— Car at garage.]—*HATTON v. CAR MAINTENANCE CO., LTD.*, No. 332, *post*.

Effects of temporary parting with possession—To party other than owner.]—*See* Nos. 153, 167, *post*.

Agisted cattle.]—*See* ANIMALS, Vol. II., p. 254, Nos. 356–359.

55 i. Effect of owner's right to remove chattel from time to time—Horse for training.]—In order to give a trainer of a racehorse a right of lien over the horse for services rendered in respect of training, he must have the right to

continuous & uninterrupted possession of the horse.—*MALONE v. IVEY* (1890), 16 V. L. R. 192.—*AUS.*

55 ii. ———.]—A continuing right of possession of the animal must

accompany the services rendered by a trainer for which he claims a lien on a horse which he has trained in order to render such lien valid.—*REILLY v. McILLMURRAY* (1899), 29 O. R. 167.—*CAN.*

Sect. 3.—Essential incidents: Sub-sects. 2, 3 & 4.]**SUB-SECT. 2.—DEBT MUST BE DUE, NOT ACCRUING.**

62. General rule.]—A lien is wholly inconsistent with a dealing on credit, & can only subsist where payment is to be made in ready money, or there is a bargain that security shall be given the moment the work is completed. There can be no lien without an immediate right of action for the debt, & that does not accrue till the period of credit has expired (**LORD ELLENBOROUGH, C.J.**).—**RAITT v. MITCHELL** (1815), 4 Camp. 146, N. P.

*Annotations:—***Appld.** *The Alan Ker, How v. Kirchner* (1857), 30 L. T. O. S. 296. **Refd.** *Re Westlake, Ex p. Willoughby* (1881), 16 Ch. D. 604.

63. —.]—(1) The wharfage, etc., due upon goods imported was, by the course of trade, paid by the importer at the Christmas following the importation, whether the goods were in the mean time removed or not. The goods were sold to A., & after Christmas, the merchant importer became bkpt.:—**Held**: there was no lien on the goods for the wharfage, etc., as against A.

(2) Unless the special agreement be inconsistent with the right of lien, it will not destroy it (**BEST, J.**).—**CRAWSHAY v. HOMFRAY** (1820), 4 B. & Ald. 50; 106 E. R. 856.

*Annotations:—***Distd.** *Christie v. Lewis* (1821), 2 Brod. & Bing. 410; *Fisher v. Smith* (1878), 4 App. Cas. 1. **Refd.** *Spartali v. Benecke* (1850), 10 C. B. 212.

64. Effect of contract for particular time or mode of payment.]—(1) A workman having bestowed his labour upon a chattel in consideration of a price fixed in amount by his agreement with the owner, may detain the chattel until the price be paid; & this, though the chattel be delivered to the workman in different parcels, & at different times, if the work to be done under the agreement be entire.

Present debts. have a right to detain the goods in question, for the money due to them for grinding all the wheat; because we consider the whole to have been done under one bargain, although the wheat was delivered in different parcels & at different times (**LORD ELLENBOROUGH, C.J.**).

(2) *Semble*: where the parties contract for a particular time or mode of payment, the workman has not a right to set up a claim to the possession inconsistent with the terms of the contract.—**CHASE v. WESTMORE** (1816), 5 M. & S. 180; 105 E. R. 1016.

*Annotations:—***As to** (1) **Consd.** *Sanderson v. Bell* (1834), 2 Cr. & M. 304. **Refd.** *Scarfe v. Morgan* (1838), 4 M. & W. 270. **As to** (2) **Refd.** *Crawshay v. Homfray* (1820), 4 B. & Ald. 50; *Pinnock v. Harrison* (1838), 3 M. & W. 532; *Spartali v. Benecke* (1850), 10 C. B. 212; *Re Taylor, Stileman & Underwood*, [1891] 1 Ch. 590.

Payment of freight.]—See SHIPPING.

SUB-SECT. 3.—AGREEMENT GIVING RISE TO LIEN MUST BE LEGAL.

65. General rule.]—Void condition makes the lien void, where it is part of it; otherwise where it is indorsed or underwritten.—**PULLERTON v. AGNEW** (1703), 1 Salk. 172; 91 E. R. 159.

*Annotation:—***Refd.** *Duvergier v. Fellows* (1828), 5 Bing.

66. —.]—**FERGUSON v. NORMAN**, No. 215, post.

67. —.]—**SAWYER v. LANGFORD** (1848), 2 Car. & Kir. 697.

*Annotation:—***Dbtd.** *Martin v. Gibbon* (1875), 24 W. R. 87.

68. Sunday Observance Act, 1677 (c. 7), s. 1—Contract performed on Sunday—Not in exercise of claimant's ordinary calling.]—**SCARFE v. MORGAN**, No. 180, post.

See, generally, TIME.

69. Pawnbroker's Act, 1799 (c. 99)—Advances within Act.]—**FERGUSON v. NORMAN**, No. 215, post.

See, generally, PAWNS & PLEDGES.

Work done by solicitor—Without certificate.]—**See SOLICITORS.**

SUB-SECT. 4.—PROPERTY IN GOODS.

70. Whether property in goods must be in debtor.]—If a man take in cattle to depasture on a contract at so much a head per week, he cannot detain them against the vendee of the owner for the value of the agistment, unless there is a special agreement to that effect.—**CHAPMAN v. ALLEN** (1832), Cro. Car. 271; 79 E. R. 836.

*Annotations:—***Consd.** *Jackson v. Cummins* (1839), 5 M. & W. 342. **Refd.** *Chase v. Westmore* (1816), 5 M. & S. 180; *Hutton v. Bragg* (1816), 2 Marsh. 339; *Judson v. Etheridge* (1833), 1 Cr. & M. 743.

71. —.]—A., of Newcastle, shipped goods for London to order of B.; before their arrival B. wrote to say that he was in failing circumstances, & would not apply for the goods on their arrival; to this A. returned a general answer, without making any mention of the goods, but immediately left Newcastle for London, & on his arrival applied at the wharf of C., where the goods had in the meantime arrived, & where goods shipped for B. usually were landed & kept till sent for by him, tendering the freight & charges paid for the goods, & requiring a delivery of them, which was refused unless upon payment of a general balance due from B. to C. for wharfage:—**Held**: the contract as between A. & B. having been rescinded previous to the arrival of the goods, C. had no right to retain against A. for a general balance due to him from B. *Semble*: the goods were no longer *in transitu* when arrived at the wharf of C., where the goods of A. were usually landed & kept.—**RICHARDSON v. GOSS** (1802), 3 Bos. & P. 119; 127 E. R. 65.

*Annotations:—***Refd.** *Scott v. Pettit* (1803), 3 Bos. & P. 469; *Rowe v. Pickford* (1817), 8 Taunt. 83; *Foster v. Frampton* (1826), 1 B. & C. 107; *Morley v. Hay* (1828), 3 Man. & Ry. K. B. 396; *Tucker v. Humphrey* (1828), 4 Bing. 516; *Hutchings v. Nunes* (1863), 9 L. T. 125.

72. —Deposit by factor.]—A factor cannot pledge the goods of his principal: therefore, where goods were consigned from abroad to a factor to be sold on account of the consignor, & a bill of lading was sent to deliver the goods to the factor or his assigns, & the factor afterwards indorsed & delivered the bill of lading, together with the goods, to debts. as brokers, with instructions to do the needful, & debts. made advances to him on the credit of those & other goods, without knowing that he was not the owner of them:—**Held**: debts. could not retain the goods against the consignor until payment of the debt due to them from the factor on account of these advances.

Debts. then having authority to sell the goods, if they had advanced money for any purposes connected with the sale, & for which brokers in the

PART II. SECT. 3, SUB-SECT. 4.

70 li. Whether property in goods must be in debtor.]—**CRANE v. HUTCHINSON** (1847), 5 N. B. R. (3 Kerr) 461.

—CAN.

70 li. —.]—There can be no appropriation by way of lien of chattels susceptible of delivery which will

prevail against other persons without a delivery good at common law.—**MALCOLM v. HARNISH** (1894), 27 N. S. R. 262.—CAN.

ordinary course of disposing of goods are accustomed to advance it, would have had a lien in respect of such advance; but no claim of that sort is preferred by them (LORD ELLENBOROUGH, C.J.).—*MARTINI v. COLES* (1813), 1 M. & S. 140; 105 E. R. 53.

Annotations:—*Folld. Mellish v. Cattley* (1826), 5 L. J. O. S. K. B. 74. *Mentd. Guichard v. Morgan* (1819), 4 Moore, C. P. 36; *Fielding v. Kymer* (1821), 2 Brod. & Bing. 639; *Gill v. Kymer* (1821), 5 Moore, C. P. 503; *Wilson v. Moore* (1834), 1 My. & K. 337.

73. ———.]—*MELLISH v. CATTLEY*, No. 272, *post*.

74. ——— **Deposit by hirer.**—The hirer of a piano, who sends it to an auctioneer to be sold, is guilty of a conversion; & so is the auctioneer who refuses to deliver it up unless the expense incurred be first paid.—*LOESCHMAN v. MACHIN* (1818), 2 Stark. 311.

Annotations:—*Apld. Cooper v. Willomatt* (1845), 1 C. B. 672. *Refd. Ferguson v. Cristall* (1829), 5 Bing. 305. *Mentd. Fenn v. Bittleston* (1851), 7 Exch. 152.

——— **Under hire-purchase agreement.**—*See BAILMENT*, Vol. III., p. 95, Nos. 254, 255.

75. ———.]—*BRANDAO v. BARNETT*, No. 111, *post*.

76. ——— **Deposit of deeds.**—A person can only give a lien on deeds as against himself & to the extent of his own interest.

A suit was instituted by persons entitled in remainder against the extrix., who was also the tenant for life, for the administration of the estate. The extrix. died pending the suit, & her solr. claimed a lien for his costs on deeds relating to leaseholds which had been placed in his hands by the extrix.:—*Held*: the solr.'s lien depended on whether the extrix. was or not indebted to the estate.—*TURNER v. LETTS* (1855), 20 Beav. 185; 7 De G. M. & G. 243; 3 Eq. Rep. 846; 24 L. J. Ch. 638; 25 L. T. O. S. 154; 1 Jur. N. S. 1057; 3 W. R. 494; 52 E. R. 573, L. JJ.

Annotations:—*Apld. Re Austin, Ex p. Yalden* (1876), 4 Ch. D. 129. *Refd. Belaney v. Ffrench* (1873), 8 Ch. App. 919, n.; *Re Dee Estates, Wright v. Dee Estates*, [1911] 2 Ch. 85.

77. ——— **Goods hired by third party from debtor.**—A railway co. entered into an agreement with A. for the delivery to them, during a certain period, of a certain quantity of coals, to be carried by them for hire, to be paid by A., & in A.'s waggons; the co. to have the right to detain any waggons of A. on certain defaults on his part. In order to complete this agreement A. agreed with B. to supply a portion of the quantity of coals to be sent to the line, in waggons which had been hired, for a term, from A. by B., but now relet for hire by him to A. for this purpose. A. having made default, the co. seized & detained the waggons then on the line as being A.'s, but they were in fact waggons sent on by B., under his agreement with A.:—*Held*: the co. could not retain them against B.—*NORTH v. GREAT NORTHERN Ry. Co.* (1859), 33 L. T. O. S. 94; 6 Jur. N. S. 98.

78. ——— **Deposit of deeds by member of partnership.**—M., the senior partner of M. & L., was the owner of certain railway shares, which he deposited with a bank where the firm had a joint account, & where he also had a separate account. The deposit was accompanied with a written memorandum, that the shares were to be held as a collateral security for a promissory note of his own which had been discounted by the bank, or for any other sum or sums of money in which he might thereafter become indebted to them; & he thereby empowered the bank to sell the shares

should the promissory note, or any other advance, not be regularly paid at maturity. The shares subsequently became the property of the firm. M. & L. became bkpt. On their bkpcy. there was a large sum due from them to the bank which was unsecured:—*Held*: the bank were not entitled to hold & retain the shares as security for the debt due from the bkpts. jointly.—*Re LAURENCE, Ex p. M'KENNA, CITY BANK CASE* (1861), 3 De G. F. & J. 629; 30 L. J. Bcy. 20; 9 W. R. 490; 45 E. R. 1022, C. A.; *sub nom. Re STREATFEILD, LAURENCE & Co., Ex p. MACKENNA, CITY BANK CASE*, 4 L. T. 164; *sub nom. Re MORTIMORE, Ex p. M'KENNA*, 7 Jur. N. S. 588; L. C. & L. JJ.

Annotation:—*Mentd. Re Bentham Mills Spinning Co.* (1879), 11 Ch. D. 900.

79. ——— **Goods of liquidator—Debt owing by company in liquidation.**—*WILTSHIRE IRON CO. v. GREAT WESTERN Ry. Co.*, No. 294, *post*.

80. ——— **Goods of receiver & manager for debenture-holders—Debt owing by company.**—By an order made in a debenture-holders' action pltf. A., was appointed receiver & manager of the business of Ind, Coope & co., Ltd., a brewery co., & carried on the business of the co. as before. By a letter signed "Ind Coope & co., Ltd., By A., receiver & manager," defts. were instructed to carry to Malta a quantity of beer consigned to the co. c/o the co.'s agents at Malta. Defts. carried the beer to Malta under a bill of lading which named the co. as the consignees & provided that the shipowner should have a lien on the goods shipped not only for the freight due thereon but also for any previously unsatisfied freight "due either from shippers or consignees to the shipowner." Defts. for many years had carried beer for the co. to Malta under bills of lading in this form, & they claimed a lien on the beer in question for certain unsatisfied freight due to them from the co. before pltf.'s appointment:—*Held*: (1) defts. were not entitled to a lien for arrears of freight, because in truth pltf. & not the co. was both shipper & consignee, & notice of this fact was conveyed to defts. by the form of the shipping instructions; (2) pltf. had no power, without the leave of the ct., to create such a lien.—*MOSS S.S. CO., LTD. v. WHINNEY*, [1912] A. C. 254; 81 L. J. K. B. 674; 105 L. T. 305; 27 T. L. R. 513; 55 Sol. Jo. 631; 12 Asp. M. L. C. 25; 16 Com. Cas. 247, H. L.; *affg. S. C. sub nom. WHINNEY v. MOSS S.S. CO., LTD.*, [1910] 2 K. B. 813.

Annotation:—*As to (1) Distd. Parsons v. Sovereign Bank of Canada*, [1913] A. C. 160.

See, further, Part III., Sect. 3, *post*.

81. ———.]—A horse dealer supplied a customer with a pair of horses, for which she paid £170, but finding the horses not according to warranty she returned them. Thereupon the dealer sent another pair no better than the former requesting the customer to keep them until he could furnish her with a better pair. This she did, until the dealer became bkpt. without having repaid the £170 when it was found that the horses did not belong to him but to an employer for whom he was agent to sell, but not to pledge, the horses:—*Held*: the horses were in the bkpt.'s order & disposition; & the customer could not enforce a lien on them as against the trustee in bkpcy.

He could not create a lien, because the horses were not his. He was not the owner (BACON, Chief Judge in Bkpcy.).—*Re SILENCE, Ex p. ROY* (1877), 7 Ch. D. 70; 47 L. J. Bcy. 36; 37 L. T. 508; 26 W. R. 82.

74 l. ——— **Deposit by hirer.**—*SMITH (D. A.), LTD. v. CAMPBELL* (1911), 17 W. L. R. 493; 16 B. C. R. 505.—CAN.

b. **Proof of ownership.**—*JEFFERSON v. McISAAC* (1903), 40 N. S. R. 469, n.—CAN.

Sect. 3.—Essential incidents: Sub-sect. 4. Sect. 4: Sub-sects. 1 & 2. Sects. 5, 6 & 7: Sub-sects. 1 & 2.]

82. — Debtor agent for undisclosed principal.]—MILDRED, GOYENECHÉ & Co. v. MASPONS Y HERMANO, No. 242, post.

83. — Separate goods of wife—Credit given to husband—Husband & wife staying together.]—Defts., husband & wife, stayed at pltf.'s hotel; the wife had with her a quantity of luggage, which was her separate property; credit was given to the husband, who made payment on account. The balance of pltf.'s bill not being paid, pltf. detained the wife's luggage in the alleged exercise of their right of lien:—*Held*: pltf. were entitled to a lien upon the goods notwithstanding that they were the separate property of the wife.—GORDON v. SILBER (1890), 25 Q. B. D. 491; 59 L. J. Q. B. 507; 63 L. T. 283; 55 J. P. 134; 39 W. R. 111; 6 T. L. R. 487, N. P.

Annotations:—**Consd.** Robins v. Gray, [1895] 2 Q. B. 501. **Refd.** Lamond v. Richard, [1897] 1 Q. B. 541; Wright v. Anderton (1908), 78 L. J. K. B. 165.

84. — Effect of change of ownership—Informal notice of change.]—BARRY v. LONGMORE, No. 188, post.

— **Debtor guest at inn.]—See INNS & INN-KEEPERS, Vol. XXIX., pp. 20, 21.**

85. Qualified ownership — Goods vested in receiver appointed in court.]—MOSS S.S. Co., LTD. v. WHINNEY, No. 80, ante.

— **Goods delivered by agent.]—See Part IV., Sect. 2, sub-sect. 1, B. (a), post.**

SECT. 4.—RIGHTS OF CREDITOR.

SUB-SECT. 1.—AGAINST DEBTOR.

Right to retain—Until claim settled.]—See Sect. 1, sub-sect. 2, ante.

General balance.]—See Part III., Sect. 1, post.

— **Work done or expenditure on particular chattel.]—See Part IV., Sect. 2, sub-sect. 1, post.**

Right to sell.]—See Sect. 7, post.

86. No right to use.]—RUST v. McNAUGHT (1917), 144 L. T. Jo. 76; on appeal (1918), 144 L. T. Jo. 440, C. A.

SUB-SECT. 2.—AGAINST THIRD PARTIES.

Whether goods liable to be taken in execution.]—See EXECUTION, Vol. XXI., pp. 502, 503.

Other creditors of bankrupt debtor—Whether a secured creditor.]—See Nos. 282-285, post.

Right to maintain trespass or trover.]—See, generally, BAILMENT, Vol. III., pp. 112 et seq.

SECT. 5.—OBLIGATIONS OF CREDITOR.

Duty to take care of chattel.]—See, generally, BAILMENT, Vol. III., pp. 98, 99; DISTRESS, Vol. XVIII., p. 446.

To return chattel—On tender or payment.]—See Sect. 9, sub-sect. 3, post.

PART II. SECT. 7, SUB-SECT. 1.

c. Lien on mineral claim — Necessity for free miner's certificate.]—CHASSEY v. MAY (1925), 35 B. C. R. 113; [1925] 2 W. W. R. 199.—CAN.

d. Registration — Lien on wool.]

—Registration is not essential to the validity of a lien on wool, except in cases of insolvency.—**STEVENSON v. LANDALE (1870), 1 V. R. (Law) 31.—AUS.**

e. — Proceeding to realise claim.]

SECT. 6.—EXTENT OF LIEN.

Over what property—Property temporarily out of possession.]—See Sect. 3, sub-sect. 1, B. (c), ante.

— **Railway wagons passing over system.]—See No. 60, ante.**

— **Possession obtained for particular purpose.]—See Sect. 8, sub-sect. 2, post.**

For what claims—General balance.]—See Part III., post.

— **Work done or expenditure on particular chattel.]—See Part IV., Sect. 2, sub-sect. 1, post.**

— **Retention charges.]—See Nos. 387-392, post.**

SECT. 7.—ENFORCEMENT OF LIEN.

SUB-SECT. 1.—IN GENERAL.

87. No power to sell.]—JONES v. THURLOE, No. 142, post.

88. —.]—LICKBARROW v. MASON, No. 3, ante.

89. —.]—Deft. claims more than a lien; he claims a right, if the principal, when called on to repay the advances, makes default in doing so, to sell the goods at such prices & times, as, in the exercise of a sound discretion, he thinks best for his principal. No case in any English ct. can be produced in support of his doctrine (WILDE, C.J.).—SMART v. SANDARS (1848), 5 C. B. 895; 17 L. J. C. P. 258; 11 L. T. O. S. 178; 12 Jur. 751; 136 E. R. 1132.

Annotations:—**Refd.** The Margaret Mitchell (1858), Sw. 382; Siebel v. Springfield (1863), 3 New Rep. 36; De Comas v. Prost (1865), 3 Moo. P. C. N. S. 158; Donald v. Suckling (1866), L. R. 1 Q. B. 585. **Mentd.** Yates v. Hoppe (1850), 14 Jur. 372; Taplin v. Florence (1851), 10 C. B. 744; Campanari v. Woodburn (1854), 15 C. B. 400; Clerk v. Laurie (1857), 2 H. & N. 199; Read v. Anderson (1882), 10 Q. B. D. 100; Frith v. Frith, [1906] A. C. 254.

90. — Retention involving expense.]—A common law lien does not, in general, authorise a sale. This rule is subject to certain exceptions; but they do not extend to give a right of sale in every case where the retaining of the chattel involves considerable expense.

In a case where a common law right of sale existed the mere fact that after the sale accounts might require adjustment by the ct. would not give jurisdiction to a Ct. of Equity to decree a sale.

A judge's order giving liberty to sign judgment, with a stay of execution in the event of certain conditions being performed, is not an agreement to perform those conditions; & even if the terms are ordered substantively to be performed the remedy for default is in the ct. where the order was made & not by a bill for specific performance.

Therefore, where shipbuilders had built a ship according to contract & retained her by virtue of their lien for the balance of price unpaid, & had in an action obtained by consent a judge's order for the amount, with a stay of execution in case defts. should pay half & give a mtge. on the ship for the remainder; to a bill alleging these facts, & that the retainer of the ship involved great expense & praying a sale, or specific performance

—**McNAMARA v. KIRKLAND (1891), 18 A. R. 271.—CAN.**

1. Registered lien-holders—Where no proceedings taken to realise.]—Persons who have registered liens, but have taken no proceedings to realise

of the conditions of the judge's order, a demurrer was allowed.

A passive lien is altogether different in character from what is termed a vendor's lien. There are many striking distinctions between them. The vendor's lien, for example, is independent of possession, & is not *ipso facto* vacated by the acceptance of another security (PAGE WOOD, V.-C.).—THAMES IRON WORKS CO. v. PATENT DERRICK CO. (1860), 1 John. & H. 93; 29 L. J. Ch. 714; 2 L. T. 208; 6 Jur. N. S. 1013; 8 W. R. 408; 70 E. R. 676.

Annotations:—**Mentd.** Llovesley v. Gilmore (1866), L. R. 1 C. P. 570; Aitken v. Bachelor (1893), 62 L. J. Q. B. 193.

Power of sale, express or implied.—See Sub-sect. 2, *post*.

91. Mere right of retainer.—A party depositing title deeds upon which a lien may accrue can only pledge the interest which he himself has in the property to which the deeds relate.

A. was an equitable mtgee. of lands, the legal estate being, at the time of the mtge., outstanding in a third person. The title deeds of the estate, subsequently to the equitable mtge., came into the custody of solrs. for carrying out a sale for the mtgor. of the property comprised in the equitable mtge., & who claimed a lien upon them for costs incurred by the mtgor. before & after the sale:—**Held**: there was no lien as against the equitable mtgee.

The lien of the solr. gave no interest in the land, but merely a right to retain the deeds until the debt was paid. No principle could sanction the conclusion that, in such case, he could do more than retain them as against the party who deposited them, & that only to the extent of his interest. The client gave a lien to the extent of his own legal interest (WIGRAM, V.-C.).—PELLEY v. WATHEN (1849), 7 Hare, 351; 18 L. J. Ch. 281; 13 L. T. O. S. 43; 14 Jur. 9; 68 E. R. 144; *affd.* (1851), 1 De G. M. & G. 16, L. J.

Annotations:—**Consd.** *Re* Llewellyn, [1891] 3 Ch. 145. **Refd.** *Re* Long, *Ex p.* Fuller (1881), 44 L. T. 63; Brunton v. Electrical Engineering Corp., [1892] 1 Ch. 434. **Mentd.** Knight v. Bowyer (1858), 2 De G. & J. 421; Hallett v. Furze (1885), 31 Ch. D. 312.

See, generally, Part II., Sect. 1, *ante*.

92. Right of retainer limited to extent of owner's interest.—HOLLIS v. CLARIDGE, No. 341, *post*.

93. —.—PELLEY v. WATHEN, No. 91, *ante*.

94. Whether actively enforceable—Particular lien.—(1) If a solr., whom his client has ceased to employ, by the production of a deed in his hands belonging to the client, & upon which he claims a lien as solr., enables the client to recover a fund in a suit, his lien over the fund so realised is confined to the costs of that suit, but is a lien which he is entitled actively to enforce.

(2) *Secus* as to his general lien upon his client's papers, which applies to all his bills of costs, but is merely a right to retain the papers, & cannot be actively enforced.—BOZON v. BOLLAND (1839), 4 My. & Cr. 354; 9 L. J. Ch. 123; 4 Jur. 763; 41 E. R. 138, L. C.

Annotations:—As to (1) **Refd.** Hall v. Laver (1842), 1 Hare, 571; Perkins v. Bradley (1842), 1 Hare, 219; Belaney v. French (1873), 8 Ch. App. 919, n.; *Re* Wadsworth, Rhodes v. Sugden (1886), 34 Ch. D. 155; Mackenzie v. Mackintosh (1891), 64 L. T. 706; Smith v. Betty, [1903] 2 K. B. 317. As to (2) **Refd.** *Re* Faithfull, *Re* L. B. & S. C. Ry. (1868), L. R. 6 Eq. 325.

them, cannot have the benefit of proceedings taken by other persons to enforce liens against the same lands, where the liens of such other persons are not enforceable.—*Re* SEAR & WOODS (1892-93), 23 O. R. 474.

—CAN.

g. Lien on property of patentee—Indebtedness must be recorded—In proper register.—*R. v. FAWCETT* (1900), 13 Man. L. R. 205; 20 C. L. T. 287. CAN.

95. — General lien.—BOZON v. BOLLAND, No. 94, *ante*.

SUB-SECT. 2.—POWER OF SALE, EXPRESS OR IMPLIED.

General rule—No power to sell.—See No. 90, *ante*, No. 142, *post*.

96. By trade custom—Tea trade.—Teas are sold to be paid for at appointed days, the sales being made according to the custom of the trade, whereby the goods, when sold, are left as a pledge for full payment with the vendor, who, in case of non-payment, is at liberty to resell & charge the loss to the original purchaser. The purchase money is not paid at the appointed time; the purchaser becomes bkpt.; & the vendor, having sold part of the teas before the flat, & the rest afterwards, gives the estate credit for the clear proceeds of the sales, tendering a proof for the residue of the original purchase-money:—**Held**: although there was no delivery of the goods, the original sale was a binding contract within Stat. Frauds, & the claim of the vendors constituted, not unliquidated damages, but a proveable debt.—*Re* TATE, *Ex p.* MOFFATT (1841), 2 Mont. D. & De G. 170, L. C.

97. By agreement — Agreement implied by notice to owner—Goods in possession of carrier as warehousemen.—Pltf. consigned certain goods to the H. station on deft.'s line to his own order. On their arrival at the station defts. intimated that if they remained there they would remain at his, pltf.'s, sole risk, & in the custody of defts. as warehousemen, & not as carriers, "subject to the co.'s ordinary wharfage & demurrage charges." The goods remained there for a period of about two years, when defts. sold them to defray their charges. It was in evidence that defts. sometimes insisted on, & sometimes waived, payment of such charges:—**Held**: defts. had power to sell the goods to defray their ordinary charges.—IVENS v. GREAT WESTERN RY. CO. (1889), 53 J. P. 148; 5 T. L. R. 193.

98. Restraint of sale by court—Grounds for.—Where specific chattels are necessary for carrying on a particular trade, & a right is asserted by those who have acquired a lien upon them to sell them, the ct. has jurisdiction to restrain, by injunction, a threatened sale, where an injury would ensue from such sale to the trader or other person whose right would be interrupted & whose position in life would be injured by a sale.

A. railway co. claimed a lien on certain coal waggons in their possession belonging to B., & threatened to sell them. B., thereupon, filed a bill to restrain the sale & detention of such waggons. By arrangement the co. agreed not to sell them, until after a specified day. Subsequently to that day, B. brought an action, of trover & detinue against the co., & in that action he recovered possession of the coal waggons from the co. No further proceedings had been taken in the suit instituted in equity. Upon a motion by B., the ct. ordered all proceedings in the suit in equity to be stayed, & the costs of such suit to be paid by the co.—NORTH v. GREAT NORTHERN RY. CO. (1860), 2 Giff. 64; 29 L. J. Ch. 301; 1 L. T. 510; 6 Jur. N. S. 244; 66 E. R. 28.

h. Action for enforcement of lien—Where several lien-holders—Appeal.—GABRIELE v. JACKSON MINES, LTD. (1906), 15 B. C. R. 373; 2 M. M. Cas. 399.—CAN.

Sect. 7.—Enforcement of lien: Sub-sect. 2. Sect. 8: Sub-sects. 1, 2 & 3.]

Carriers—Under Railway Clauses Consolidation Act, 1845 (c. 20), s. 97.]—See CARRIERS, Vol. VIII., p. 219, Nos. 1395–1397.

—Under private Act.]—See CARRIERS, Vol. VIII., p. 223, No. 1424.

—Acting as warehouseman.]—See CARRIERS, Vol. VIII., p. 221, No. 1415.

Dock companies.]—See Harbours, Docks & Piers Clauses Act, 1847 (c. 27); &, generally, WATERS & WATERCOURSES.

Innkeepers.]—See INNS & INNKEEPERS, Vol. XXIX., pp. 22, 23.

Shipowners.]—See SHIPPING.

Vendors of chattels.]—See SALE OF GOODS.

SECT. 8.—EXCLUSION OF LIEN.

SUB-SECT. 1.—IN GENERAL.

99. Possession under special agreement—Whether necessarily inconsistent with lien.]—CRAWSHAY v. HOMFRAY, No. 63, ante.

100. ———.]—JONES v. PEPPERCORNE, No. 264, post.

101. ——— Lien to arise on giving notice.] BYFORD v. RUSSELL, No. 666, post.

102. Original possession inconsistent with lien—Purported sale of goods—Sale held invalid.]—PARKER v. LYON (1888), 5 T. L. R. 10, C. A.

SUB-SECT. 2.—DEPOSIT FOR PARTICULAR PURPOSE.

103. General rule.]—Where deeds are delivered upon a special trust, the party cannot detain them.—LAWSON v. DICKENSON (1724), 8 Mod. Rep. 306; 88 E. R. 218.

Annotation:—Reid. Pelly v. Wathen (1849), 7 Hare, 351.

104. ———.]—If A. deposit goods with B. for sale, & B. promise to pay the proceeds to A. when sold; B. has no lien on them, if not sold, for the balance of his general account arising upon other articles.

It is a maxim as old as our law, *conventio vincit legem*. . . . The lien which a factor has on the goods . . . principal arises upon an agreement which the law imposes . . .

express stipulation to the contrary, it puts an end to the general rule of law (LORD KENYON, C.J.).

Here the goods were deposited in the hands of particular factors for a particular purpose; & this negatives the general rule respecting liens

or a special . . . sold & the brokerage had not commenced, & if so, there is no pretence to say that they have any lien on the cotton for the balance of their accounts . . . v. BIRCH (1795), 6

Bos. & P. 485.

105. ———.]—(1) One of several partners in a contract with government cannot pledge goods consigned to him by another partner for the pur-

PART II. SECT. 8, SUB-SECT. 1.

99 i. Possession under special agreement—Whether necessarily inconsistent with lien.]—When under the contract . . . there is no right of lien.

no subsequent default in payment of storage charges can create such right. —CANADA STEEL & WIRE CO. v. FERGUSON (1915), 25 Man. L. R. 320; 8 W. W. R. 416; 21 D. L. R. 771.—CAN

pose of performing the contract. The indorsing of the bill of lading by such consignor to the consignee does not constitute a lien in favour of the consignor.

by the shipper to be delivered into the government stores, & as he consigned it to [his partners] on those terms, it therefore must be taken to be accepted by them for that purpose; & if so, it could not . . .

(LORD MANSFIELD, . . . (1812), 4 Taunt. 684; 128 E. R. 499.

Annotation:—As to (1) Reid. Hellbut v. Nevill (1870), L. J. C. P. 245.

106. ———.]—A., previous to his bkpcy., deposited a bill of exchange with B., for the specific purpose of raising money thereon, & B. advanced money on the bill:—Held: the assignees of A. were entitled to recover from B. the amount of the bill in an action of trover they having tendered to B. the money advanced by him, though a general balance remained due from the bkpt. to B.; & this did not form a case of mutual credit within 5 Geo. 2, c. 30.—KEY v. FLINT (1817), 8 Taunt. 21; 1 Moore, C. P. 451; 129 E. R. 289; subsequent proceedings, sub nom. Re ROBINSON, Ex p. FLINT (1818), 1 Swan. 30, L. C.

Annotations:—Consd. Buchanan v. Findlay (1829), 9 B. & C. 738; Young v. Bank of Bengal (1836), 1 Deac. 622.

107. ———.]—A., shortly before his bkpcy., on being applied to by B., to whom he owed £47 to pay the debt, gave him a bill of exchange to get it discounted to pay his own debt & pay over the surplus. Before the bill was discounted A. became a bkpt.:—Held: B. could not retain the bill against the assignees.

If possession be given for a special object which not performed there is no right to detain . . . ALLAS, C.J.).—HUMPHRIES v. WILSON (1819), 2 Stark. 566, N. P.

108. ———.]—Where deeds are deposited for the purpose of obtaining credit, the person with whom they were deposited has no lien upon them for what is due to him in respect of moneys previously advanced.—MOUNTFORD v. SCOTT (1823), Turn. & R. 274; 37 E. R. 1105, L. C.

lothwell (1836), 1 (1834), 3 My. & K. 699; Perkins v. Bradley (1842), 1 Hare, 219; Fuller v. Bennett (1843), 2 Hare, 394; Re Smallman's Estate (1867), 16 W. R. 419; Bulpitt v. Sturges (1870), 22 L. T. 739.

109. ———.]—A. & co., merchants at Liverpool, remitted a bill to B. & co. in London, with directions to get it discounted, & apply the proceeds in a particular way. B. & co. did not get the bill discounted, but received the money when it became due. Before that time A. & co. had stopped payment, & desired to have the bill returned to them. A commission of bankrupt having been issued against them before the money was received on the bill by B. & co.:—Held: the latter were liable to be sued for the amount by the

use; & B. & co. . . . them from A. & co.

In the present case the bills were sent to debt. for a specific purpose; & as soon as debt. declined

k. . . . —Delivery to purchaser—Purchaser's cheque dishonoured.]—MANECKJI PESTONJI BHARUCHA v. WADILAL SARABHAI & Co. (1926), 53 L. R. Ind. App. 92.—IND.

to perform that purpose the right to retain the bills ceased (LORD TENTERDEN, C.J.).—**BUCHANAN v. FINDLAY** (1829), 9 B. & C. 738; 4 Man. & Ry. K. B. 593; 7 L. J. O. S. K. B. 314; 109 E. R. 274, *Annotations*:—**Consd.** *Thorpe v. Thorpe* (1832), 3 B. & Ad. 580. **Refd.** *Clarke v. Fell* (1833), 4 B. & Ad. 404; *Re Douglas, Ex p. Thompson, Hankey, Cheape & Pennell* (1838), 2 Jur. 734; *Groom v. West* (1838), 8 Ad. & El. 758; *Russell v. Bell* (1841), 8 M. & W. 277; *Muttyloll Seal v. Dent* (1853), 5 Moo. Ind. App. 328.

110. —.]—(1) A billbroker who receives bills from a customer, merely for the purpose of procuring them to be discounted, has no right to mix them with the bills of other customers, & to pledge the whole mass as a security for an advance of money; still less to deposit such bills as a security, or part security, for money previously due from him.

(2) A party who advances money on a deposit of bills by a billbroker, must exercise due caution; & if he knows, or has reason to believe, that the bills were delivered by the customer for the purpose of discount only, he has no lien as against that customer.—**HAYNES v. FOSTER** (1833), 2 Cr. & M. 237; 4 Tyr. 65; 3 L. J. Ex. 153; 149 E. R. 748.

Annotations:—**Expld.** *Foster v. Pearson* (1835), 1 Cr. M. & R. 849. **Refd.** *Muttyloll Seal v. Dent* (1853), 5 Moo. Ind. App. 328.

—.]—(1) A banker's lien does not arise on securities deposited with him for a special purpose, as where exchequer bills are placed in his hands to get interest on them, & to get them exchanged for new bills. Such a special purpose is inconsistent with the existence of a general lien.

(2) The right acquired by a general lien is an implied pledge, & where it would arise, supposing the securities to be the property of the apparent owner, I think it equally exists if the party claiming it has acted with good faith, although the subject of that lien should turn out to be the property of a stranger (LORD CAMPBELL).—**BRANDAO v. BARNETT** (1846), 3 C. B. 519; 12 Cl. & Fin. 787; 7 L. T. O. S. 525; 136 E. R. 207, H. L.; *revg.* S. C. *sub nom.* **BARNETT v. BRANDAO** (1843), 6 Man. & G. 630, Ex. Ch.

Annotations:—As to (1) **Consd.** *Jones v. Peppercorne* (1858), John. 430; *Frith v. Forbes* (1862), 31 L. J. Ch. 793; *Wylde v. Radford* (1863), 33 L. J. Ch. 51. **Expld.** *Jeffries v. Agra & Masterman's Bank* (1866), L. R. 2 Eq. 674. **Consd.** *Leese v. Martin* (1873), L. R. 17 Eq. 224. **Apprvd.** *London Chartered Bank of Australia v. White* (1879), 4 App. Cas. 413. **Refd.** *Foley v. Hill* (1848), 2 H. L. Cas. 28; *Bock v. Gorrisen* (1860), 2 De G. F. & J. 434; *Thayer v. Lister* (1861), 30 L. J. Ch. 427; *Webb v. Whinney* (1868), 18 L. T. 523; *Stumore v. Campbell*, [1892] 1 Q. B. 314; *Re London & Globe Finance Corp.*, [1902] 2 Ch. 416; *Hope v. Glendinning*, [1911] A. C. 419. **Generally, Mentd.** *Ireland v. Armstrong* (1843), 1 L. T. O. S. 12; *Cooper v. Shepherd* (1846), 7 L. T. O. S. 282; *Reynell v. Lewis*, *Wyld v. Hopkins* (1846), 4 Ry. & Can. Cas. 351; *Smart v. Sanders* (1846), 3 C. B. 380; *Bank of Australasia v. Breillat* (1847), 6 Moo. P. C. C. 152; *Gibson v. Small* (1853), 4 H. L. Cas. 353; *Hare v. Henty* (1861), 10 C. B. N. S. 65; *Brinsmead v. Harrison* (1871), L. R. 6 C. P. 584; *Crouch v. Credit Foncier of England* (1873), L. R. 8 Q. B. 374; *Goodwin v. Roberts* (1875), L. R. 10 Exch. 337; *Misa v. Currie* (1876), 1 App. Cas. 554; *Bechuanaland Exploration Co. v. London Trading Bank*, [1898] 2 Q. B. 658; *Biddell v. Clemens Horst Co.*, [1911] 1 K. B. 934.

PART II. SECT. 8, SUB-SECT. 2.

117 i. *Application of rule—Deposit of negotiable instrument.*—It is not competent for a bank to retain bills indorsed for the purpose of negotiation, on an allegation of a debt due by the drawer.—**MATHIESON v. ANDERSON**, 1 Sh. (Ct. of Sess.) 486.—**COT.**

1. *Secretary of company—Lien over minute-book.*—A person who had been secretary of a co. prior to its liquidation has no right of retention or lien over its minute-book for a debt due to him by the co.—**GLADSTONE v. M'CALLUM** (1896), 23 R. (Ct. of Sess.)

783; 33 Sc. L. R. 618; 4 S. L. T. 41. —**SCOT.**

PART II. SECT. 8, SUB-SECT. 3.

123 i. *General rule.*—Where a written contract for the manufacture of laths excludes any right of lien being exercised by the manufacturer, the fact that part of the laths was allowed to remain in the possession of the manufacturer after the non-payment of a promissory note for the balance of the money due under the contract does not raise a lien.—**Re BATHURST LUMBER CO. & NEPISQUIT LUMBER CO., LTD.** (1911), 11 E. L. R. 552; 41 N. B. R.

112. —.] — (1) Though bankers have a general lien upon the securities of a customer deposited with them to secure an overdraft, this lien does not attach to securities deposited by a customer & known to the bank to belong to some other person & to have been deposited for a special purpose.

(2) Where a customer draws a cheque for a sum in excess of the amount standing to the credit of his current account, it is in effect a request for a loan, & if the cheque is honoured the customer has borrowed money; but it does not follow that a transaction of this kind is a borrowing upon security not belonging to the customer & deposited for another purpose.—**CUTHBERT v. ROBERTS, LUBBOCK & Co.**, [1909] 2 Ch. 226; 78 L. J. Ch. 529; 100 L. T. 796; 25 T. L. R. 583; 53 Sol. Jo. 559, C. A.

113. *Application of rule—Deposit of deeds.*—**LAWSON v. DICKENSON**, No. 103, *ante*.

114. —.]—**MOUNTFORD v. SCOTT**, No. 108, *ante*.

With sol'd or.—*See SOLICITORS.*

115. — *Goods in hands of agent.*—**WALKER v. BIRCH**, No. 104, *ante*.

—.]—*See, also, AGENCY*, Vol. I., p. 551, Nos. 2013–2015.

116. — *Goods consigned to partner.*—**SNAITH v. BURRIDGE**, No. 105, *ante*.

117. — *Deposit of negotiable instrument.*—**KEY v. FLINT**, No. 106, *ante*.

118. —.]—**HUMPHRIES v. WILSON**, No. 107, *ante*.

119. —.]—**BUCHANAN v. FINDLAY**, No. 109, *ante*.

120. —.]—**HAYNES v. FOSTER**, No. 110, *ante*.

See, generally, BILLS OF EXCHANGE, Vol. VI., pp. 132 *et seq.*

121. — *Securities deposited with banker.*—**BRANDAO v. BARNETT**, No. 111, *ante*.

122. —.]—**CUTHBERT v. ROBERTS, LUBBOCK & Co.**, No. 112, *ante*.

See, generally, BANKERS, Vol. III., pp. 285 *et seq.*

— *Deposit with right to remove from time to time.*—*See* Sect. 3, sub-sect. 1, B. (c), *ante*.

Specific appropriation of funds—In hands of banker.—*See* **BANKERS**, Vol. III., pp. 248 *et seq.*

— *In possession of bankrupt.*—*See* **BANKRUPTCY**, Vol. V., pp. 703 *et seq.*, Nos. 6170 *et seq.*

In hands of drawee of bill of exchange.—*See* **BILLS OF EXCHANGE**, Vol. VI., pp. 297 *et seq.*

SUB-SECT. 3.—BY EXPRESS AGREEMENT.

123. *General rule.*—**WALKER v. BIRCH**, No. 104, *ante*.

124. *Admission that goods held for safe custody.*—(1) Foreign correspondents of a London

41.—**CAN.**

123 ii. —.]—A bank has a right to retain all negotiable instruments belonging to a customer & in its possession, for the purpose of securing a debtor balance on general account, but this right may be excluded by agreement express or implied.—**HORSBUGH (ROBERTSON'S TRUSTEE) v. ROYAL BANK OF SCOTLAND** (1890), 18 R. (Ct. of Sess.) 12; 28 Sc. L. R. 35.—**SCOT.**

m. *Mortgage on logs & timber—Collateral security for debt—Government lien for slide dues—Whether excluded.*—**MERCHANTS BANK OF CANADA v. R.**, *Cass. Dig.* 2nd ed. 636.—**CAN.**

Sect. 8.—Exclusion of lien: Sub-sects. 3, 4 & 5.
Sect. 9: Sub-sects. 1 & 2, A.]

firm directed the firm to purchase for them Mexican bonds to a specified amount, at a specified price, & to hold the bonds at the disposal of the correspondents. The London firm made & notified the purchase, & wrote to the correspondents that they would, until further order, retain the bonds for safe custody:—*Held*: the letters constituted a special contract sufficient to exclude a general lien on the part of the London firm if they would otherwise have been entitled to any.

(2) The law does not favour general liens, & a general lien can only be claimed as arising from dealings in a particular trade or line of business such as wharfingers, factors & bankers, in which the existence of a general lien has been judicially acknowledged or in other trades where there is express evidence of custom.—*BOCK v. GORRISSEN* (1860), 2 De G. F. & J. 434; 30 L. J. Ch. 39; 3 L. T. 424; 7 Jur. N. S. 81; 9 W. R. 209; 45 E. R. 689, L. C.

Annotation:—As to (1) *Distd. Frith v. Forbes* (1862), 31 L. J. Ch. 793.

125. Express instructions of consignor—Accepted by consignee.]—In a case where goods were consigned by merchants in India to merchants in England, & the bills of lading were accompanied by bills of exchange in favour of a third firm of merchants, the judge decided that the cargo was subject to the general lien which the merchants in England might have for any balance they had against the merchants in India, & that the realisation of the cargo by the consignees did not make them liable to pay the bills of exchange annexed to the bills of lading, unless by some act of their own they had made themselves liable:—*Held*: the general lien of a consignee upon goods consigned to him, could not be set up by him against positive directions given to him by the consignor; & if he accepted a consignment accompanied by such directions he was bound to apply it accordingly.—*FRITH v. FORBES* (1862), 4 De G. F. & J. 409; 32 L. J. Ch. 10; 7 L. T. 261; 8 Jur. N. S. 1115; 11 W. R. 4; 1 Mar. L. C. 253; 45 E. R. 1242, L. JJ.

Annotations:—*Distd. Robey's Perseverance Ironworks v. Ollier* (1872), 7 Ch. App. 695. The decision in *Frith v. Forbes* turned upon special circumstances, & can hardly be treated as governing any other case (*JAMES, L.J.*). *Expld. Re Entwistle, Ex p. Arbuthnot* (1876), 3 Ch. D. 477. *Distd. Ranken v. Alfaro* (1877), 5 Ch. D. 786. *Expld. Re Suse, Ex p. Dever* (1884), 13 Q. B. D. 766; *Brown, Shipley v. Kough* (1885), 29 Ch. D. 848. *Distd. Phelps, Stokes v. Comber* (1885), 29 Ch. D. 813.

126. Credit given to purchaser.]—*CRAWSHAY v. HOMFRAY*, No. 63, *ante*.

127. Particular mode of payment.]—*CHASE v. WESTMORE*, No. 64, *ante*.

Agreement providing other remedy.]—See Nos. 131–138, *post*.

Exclusion of solicitor's lien.]—See SOLICITORS.

Exclusion of broker's lien.]—See AGENCY, Vol. I., pp. 550, 551.

SUB-SECT. 4.—BY MODE OF DEALING.

128. General rule.]—*FISHER v. SMITH*, No. 137, *post*.

SUB-SECT. 5.—WHERE OTHER REMEDY PROVIDED.

129. Remedy provided by statute.]—By a private Act the St. Katherine's Dock Co. are empowered to receive for all goods, etc., deposited on their premises, rates not exceeding those usually paid in the port of London for wharfage, etc., of such goods, etc.; & in case default is made in payment of the said rates, or any part thereof, it shall be lawful to the collectors of the co. to retain & sell all or any part of such goods, etc., & out of the moneys thence arising to retain & pay the rates payable in respect of such goods, etc., returning the overplus, etc., to the party entitled; & in case such goods, etc., shall be removed before the rates payable in respect of the same shall be fully paid, it shall be lawful for the said co. to take & distrain or sell any goods, etc., of the owner, etc., thereof, in manner before mentioned.

Certain rates payable in respect of goods belonging to A. which had previously been removed from the premises of the co., being unpaid, the co. claimed to distrain certain other goods of A. then on the premises until payment of the rates due in respect of both those sets of goods. A. had applied to have the goods then on the premises delivered up to him, & was informed by the co. that no more goods would be delivered to his order until his debt was paid or reduced:—*Held*: the statute enabled the co. to distrain & sell any goods in their possession for the recovery of rates payable in respect of other goods of the same owner. *Qu.*: whether evidence to prove a customary right of general lien in the co. was inadmissible, by reason of the Act having conferred a specific remedy for the recovery of rates.—*GREEN v. ST. KATHERINE'S DOCK CO.* (1849), 19 L. J. Q. B. 53; 13 L. T. O. S. 465; 13 Jur. 1116.

Annotation:—*Mentd. Norwich Corpn. v. Norwich Ry.* (1855), 1 Jur. N. S. 344.

130. —.]—*DRESSER v. BOSANQUET*, No. 280, *post*.

131. Remedy provided by agreement.]—*COLLINS v. ONGLY* (1697), 2 Selwyn's N. P., 10th ed. 1377.

Annotation:—*Refd. Chase v. Westmore* (1816), 5 M. & S. 180.

132. —.]—If there be a special agreement, the general right of detaining a thing delivered is thereby waived.—*BRENAN v. CURRINT* (1755), Say. 224; 96 E. R. 860.

Annotation:—*Dbtd. Chase v. Westmore* (1816), 5 M. & S. 180.

133. —.]—(1) Where there is an express antecedent contract between the parties, a lien which grows out of an implied contract does not arise (*LORD ELLENBOROUGH, C.J.*).

(2) The right of suit & the right of lien are distinct rights, both arising out of implied contracts,

PART II. SECT. 8, SUB-SECT. 4.

1281. General rule.]—*CANADA STEEL & WIRE CO. v. FERGUSON* (1915), 25 Man. L. R. 320; 8 W. W. R. 416; 21 D. L. R. 771.—CAN.

n. Claims charged in current account.]—*BOYD v. MAITLAND* (1858), 16 U. C. R. 311.—CAN.

o. Payment by instalments.]—Where goods sold are delivered in instalments & separate payment is to be made for each instalment, as a general rule, & in the absence of

specific agreement, a lien cannot be claimed for a balance owing in respect of an instalment already delivered against instalments still to be delivered, even though the contract be an entire one.—*SNAGPROOF, LTD. v. BRODY*

p. Payment of contractor on architect's certificate—Certificate not given—Contract price paid into court—Lien of sub-contractor.]—*WILKS v. LEDUC* (1916), 35 W. L. R. 4; 11 W. W. R.

4.—CAN.

PART II. SECT. 8, SUB-SECT. 5.

1291. Remedy provided by statute.]—The persons referred to in Creditors' Trust Act, 1902, s. 3 (2), as execution creditors are those having processes upon which execution can be levied. Therefore an attaching order giving a person who had not yet obtained judgment a lien on moneys in ct., was set aside.—*WILLIAMSON v. WOOLLIAME & NAISMITH* (1911), 16 B. C. R. 346.—CAN.

& both subsisting at the same time (LORD ELLENBOROUGH, C.J.).—*STEVENSON v. BLAKELOCK* (1813), 1 M. & S. 535; 105 E. R. 200.

Annotations:—As to (1) *Consd.* *Kirchner v. Venus* (1859), 12 Moo. P. C. C. 361. *Refd.* *Horncastle v. Farran* (1819), 2 Stark. 590; *Crawshay v. Homfray* (1820), 4 B. & Ald. 50; *Gibson v. May* (1853), 4 De G. M. & G. 512; *Re Taylor, Stilleman & Underwood*, [1891] 1 Ch. 590. *Generally, Refd.* *The Alan Ker, How v. Kirchner* (1857), 30 L. T. O. S. 296.

134. — Express pledge.]—Goods pledged, expressly, to secure, by the produce of the sale, acceptors who have taken up & paid bills drawn on them by the owner, are released from further charge as to other bills so taken up & paid subsequently, if the amount of the original sum paid on account of the owner, have been repaid to them without resorting to a sale. If, while the goods remain in the possession of the acceptors, the owner become insolvent, & has committed acts of bkpcy., before the original pledge be entirely redeemed by repayment of the money secured by it, other advances be then made to him by them, it is not a case of mutual credit within the 5 Geo. 2, c. 30, s. 28, & the assignees of bkpt. may recover the goods in trover. But the assignees, under such circumstances, having elected to bring trover, cannot afterwards sue debt. to recover back the original sum for which the goods had been in the first instance pledged, although paid to them after the depositor had become bkpt.

When the sum was paid for which these goods had been specifically pledged, there was an end of that transaction, & the pledge was *functus officio*. The property in the goods then immediately reverted to bkpt., & on his bkpcy., in his assignees, discharged of any lien which debt. might have had on them (*WOOD, B.*).—*BIRDWOOD v. RAPHAEL* (1818), 5 Price. 593; 146 E. R. 704.

Annotation:—*Mentd.* *Lindon v. Sharp* (1843), 6 Man. & G. 895.

135. —.]—*HAMMOND v. M'CRIE*, No. 147, *post*.

136. — Express security.]—The right of a consignee of a West India estate gives him a lien on the plantation in respect of the balance due to him, & is an exception to the general rule which applies to principal & agent. Such lien not being the result of an express contract, but given by implication of law, if created by written contract, is excluded. Therefore, if a consignee takes an express security, such security being the stipulation & agreement of the parties, it excludes his general lien. So held where the party claiming a general lien as consignee was also mtgee. of certain estates, & had, by deed, stipulated for the consignment of their produce, as well as that of other plantations, subject to the rights & interests of existing mtgees. then subsisting thereon.—*Re LEITH'S ESTATE, CHAMBERS v. DAVIDSON* (1866), L. R. 1 P. C. 296; 4 Moo. P. C. C. N. S. 158; 36 L. J. P. C. 17; 12 Jur. N. S. 967; 15 W. R. 534; 16 E. R. 276, P. C.

137. —.]—(1) The lien of a broker upon policies of insurance which he has effected, & on which he has paid the premiums, may be superseded by a special arrangement or contract, or by his particular mode of dealing with the parties for whom he has effected them. But where he has merely agreed to state monthly accounts & to receive monthly payments, but has never delivered up the policies until after actual payment made to him, his general right of lien is not

superseded in any way by this special arrangement.

(2) This is so though he has effected the policies through an intermediary, whom he knew to be an intermediary & not the principal, & who has received payment from the principal, but who has not paid the broker.—*FISHER v. SMITH* (1878), 4 App. Cas. 1; 48 L. J. Q. B. 411; 39 L. T. 430; 27 W. R. 113; 4 Asp. M. L. C. 60, H. L.

Annotation:—As to (1) *Consd.* *Hope v. Glendinning*, [1911] A. C. 419.

138. — Express charge.]—Testator, who died in Oct. 1885, had three accounts at a bank, a private account, an estate account in the name of his agent, & an account for the purposes of a museum. He deposited a policy of assurance for £5,000 with the bank, giving at the same time a memorandum charging the policy with advances to him not exceeding £4,000 besides a commission & interest. Testator was at the time of his death, indebted upon his first & third accounts with the bank for a sum exceeding £4,000. The question was raised whether by virtue of their general lien the bankers were entitled to a charge upon the policy for all sums owing by testator to them or only for the £4,000:—*Held*: the bankers had no lien for more than £4,000 commission & interest, the right to a general lien being negatived by the express charge given by the memorandum.—*Re BOWES, STRATHMORE (EARL) v. VANE* (1886), 33 Ch. D. 586; 56 L. J. Ch. 143; 55 L. T. 260; 35 W. R. 166.

Annotations:—*Distd.* *Re London & Globe Finance Corpn.*, [1902] 2 Ch. 416. *Refd.* *Re Gregson, Christison v. Bolam* (1887), 57 L. J. Ch. 221.

139. Right of action.]—*STEVENSON v. BLAKELOCK*, No. 133, *ante*.

140. —.]—There is no principle of law which prevents a right of lien upon goods being super-added to a right of action of debt for the money which the lien secures (*per CUR.*).—*REDERIACT. SUPERIOR v. DEWAR & WEBB*, [1909] 2 K. B. 998; 78 L. J. K. B. 1100; 101 L. T. 371; 25 T. L. R. 821; 11 Asp. M. L. C. 295; 14 Com. Cas. 320, C. A.

Particular mode of payment.]—*See* No. 64, *ante*.

SECT. 9.—EXTINGUISHMENT OF LIEN.

SUB-SECT. 1.—IN GENERAL.

141. What court will consider.]—*HILL & SONS v. LONDON CENTRAL MARKETS COLD STORAGE CO., LTD.*, No. 149, *post*.

SUB-SECT. 2.—BY LOSS OF POSSESSION.

A. In General.

142. General rule.]—An innkeeper has a right to detain a horse for the expenses of his keep; but he cannot sell the horse & by that means pay himself; & if by suffering the horse to depart, or by any other means, he gives credit to the owner, he cannot afterwards detain him upon his coming again into his possession.—*JONES v. THURLOE* (1723), 8 Mod. Rep. 172; 88 E. R. 126; *sub nom.* *JONES v. PEARLE*, 1 Stra. 557.

Annotations:—*Refd.* *Snoad v. Watkins* (1856), 1 C. B. N. S. 267. *Mentd.* *Chase v. Westmore* (1816), 5 M. & S. 180.

143. —.]—A consignee parting with the goods consigned, parts with his lien on them.—*CRUGER v. WILCOX* (1755), 1 Dick. 269; 21 E. R.

PART II. SECT. 9, SUB-SECT. 2.—A.
142 i. *General rule.*—A lien is destroyed if the party entitled to it gives

up his right to the possession of the goods.—*RUMPLEY v. THE VERA M. & WESTERN MACHINE WORKS, LTD.*,

[1923] 2 D. L. R. 867; [1923] Exch. C. R. 36; 31 B. C. R. 472; [1923] 1 W. W. R. 253.—CAN.

Sect. 9.—Extinguishment of lien: Sub-sect. 2, A. & B.; sub-sects. 3 & 4, A.]

were entitled to a lien for costs:—*Held*: the lien of the firm was not destroyed by reason of the documents having gone out of their possession.

(2) The claim in respect of which the lien existed was barred by Stat. Limitations:—*Held*: the lien was not thereby affected.—*Re CARTER, CARTER v. CARTER* (1885), 55 L. J. Ch. 230; 53 L. T. 630; 34 W. R. 57.

Goods sold by factor—On instructions from principal.]—See AGENCY, Vol. I., p. 551, No. 2012.

B. Effect of Subsequent Recovery.

167. Delivery to agent of debtor — Carrier.]—One who has a lien on goods in his possession, if he afterwards deliver them to a ship carrier to be conveyed on account & at the risk of his principal, though unknown to the carrier, cannot recover his lien by stopping the goods *in transitu* & procuring them to be redelivered to him by virtue of a bill of lading signed by the carrier in the course of his voyage.—*SWEET v. PYM* (1800), 1 East, 4; 102 E. R. 2.

Annotation:—*Reid. M'Combie v. Davies* (1805), 7 East, 5.

168. Possession fraudulently obtained by debtor.]—A livery stable keeper may, by express agreement, have a lien for the keep of horses; where the owner of horses in the possession of a livery stable keeper who had such lien, fraudulently took them out of his possession:—*Held*: the livery stable keeper might, without force, retake the horses, & the lien would revive.—*WALLACE v. WOODGATE* (1824), 1 C. & P. 575; Ry. & M. 193, N. P.

Annotations:—*Reid. Bevan v. Waters* (1828), 3 C. & P. 520; *Judson v. Etheridge* (1833), 3 Tyr. 954; *Sanderson v. Bell* (1834), 2 Cr. & M. 304; *Castellain v. Thompson*, *Thompson v. Castellain* (1862), 13 C. B. N. S. 105.

169. Possession recovered under different title.]—*PENNINGTON v. RELIANCE MOTOR WORKS, LTD.*, No. 324, *post*.

170. Innkeeper's lien.]—JONES v. THURLOE, No. 142, *ante*.

171. Broker's lien—On insurance policy.]—If a broker, having a lien on a policy, part with it, his lien revives on repossession.

Pltf., resident abroad, ordered A., his correspondent here, to effect an insurance on his account. A. was in the habit of employing deft. as his broker, to effect insurances on his own account & for his correspondents abroad, & instructed him to effect this insurance, but did not mention pltf.'s name. Pltf. paid the amount of the premiums, £280, to A.; but that fact was not known to deft. at the time of effecting the insurance. A. was indebted

to deft. in £21,000, including the amount of the premiums, & in the course of the next year paid deft. £33,000, but incurred further debts, so as always, throughout the year, to leave a balance in favour of deft. to a greater amount than the sum due for the premiums. Deft. received £385 from the underwriters, on the loss, & passed the same to A.'s account:—*Held*: deft. had no general lien, & the particular lien was discharged, as deft. must be considered as having been paid the amount of the premiums.—*LEVY v. BARNARD* (1818), 8 Taunt. 149; 2 Moore, C. P. 34; 129 E. R. 340.

Where owner has right to remove—From time to time.]—See Sect. 3, sub-sect. 1, B. (c), ante.

SUB-SECT. 3.—BY PAYMENT OR TENDER OF AMOUNT CLAIMED.

172. General rule.]—WHITE v. GAINER, No. 5, *ante*.

173. —.]—Where A. had a lien upon a chattel belonging to B., who had tendered to him a sum in satisfaction of such lien, & demanded the chattel, but A. refused to deliver it up, upon the ground that a third party had indemnified him:—*Held*: in an action of trover, the above was sufficient evidence of a conversion.—*CAUNCE v. SPANTON* (1844), 7 Man. & G. 903; 135 E. R. 367; *sub nom. CANNEE v. SPANTON*, 8 Scott, N. R. 714; 14 L. J. C. P. 23; 8 Jur. 1008.

174. Sufficiency of tender—Tender less than amount claimed—No appropriation by debtor.]—To a count in detinue for a horse, there was a plea justifying the detention for non-payment of 10s. "being an expense which ought, according to certain conditions, to have been paid by pltf. before the horse was or should be taken away"; to which pltf. replied a tender of the sum of 10s. "for the trial & examination of his, pltf.'s horse," & the rejoinder traversed the tender. At the trial it appeared that deft. claimed £1 7s. of pltf., including the above 10s. & pltf. tendered 19s. 6d. & left it, without saying that he meant that sum to apply to any particular items:—*Held*: the tender was not proved as pleaded.

Deft.'s claim was for £1 7s. & pltf. should have stated to what part of the claim the 19s. 6d. was intended to apply. If a man has several claims, & a tender is made of less than sufficient to cover the whole, & the money left, as here, without specifying to what claims it is meant to be applied, the creditor has a right to appropriate it as he pleases. Here a tender of 19s. 6d. is made to a claim of £1 7s. & there it is left, without saying

of bulky article.]—FIDDES v. HENDERSON (1828), 1 N. B. R. (Chp.) 47.—CAN.

r. Removal of timber by owner—From claimant's mill—To other part of site—Whole site in possession of claimant.]—SMITH v. HAYWARD (1924), 51 N. B. R. 369.—CAN.

t. Lien retained through agent—Possession of agent lost.]—A lien which is retained through an agent may be extinguished by loss by the agent of physical possession.—*FOURIE v. Loxton Brothers*, [1922] C. P. D. 432.—S. AF.

a. Delivery of article to owner—By artificer.]—Ex p. LEVIN (1904), 21 S. C. 452.—S. AF.

b. Goods entrusted to agent.]—A lien is destroyed by entrusting the goods over which the lien is claimed to an agent, unless he is a gratuitous bailee.—*WHITEHEAD v. SUNLEY* (1878), Q. L. R. (Beor), pt. 3, 61.—AUS.

PART II. SECT. 9, SUB-SECT. 2.—B. c. Wagon sent by wagon-repairer to blacksmith—Returned to wagon-repairer after repairs—Wagon-repairer's lien restored.]—MILLBURN v. MILLBURN (1818), 4 U. C. R. 179.—CAN.

PART II. SECT. 9, SUB-SECT. 3.

172i. General rule.]—Deft. had in his possession as a poundkeeper timber belonging to H., who, while it was in deft.'s possession made a general assignment of his property by deed to pltf.:—*Held*: this was an assignment of the property in the timber, & pltf., after tendering the amount of deft.'s lien on the timber might maintain trover against him.—*JACK v. EAGLES* (1850), 7 N. B. R. (2 All.) 95.—CAN.

172ii. —.]—LAKE v. BIGGAR (1861), 11 C. P. 170.—CAN.

172iii. —.]—Pltf. sued for damages for the unlawful detention of certain lumber; deft. pleaded a lien

for wharfage & pltf. replied a tender of an amount sufficient to cover the deft.'s claim:—*Held*: the lien was discharged by the tender.—*DAVISON v. MULCAHY* (1886), 19 N. S. R. (7 P. & G.) 209; 7 C. L. T. 324.—CAN.

172iv. —.]—WILLIS v. SWEET (1888), 20 N. S. R. (8 R. & G.) 449; 9 C. L. T. 232.—CAN.

172v. —.]—MCFATRIDGE v. HOLSTEAD (1889), 21 N. S. R. 325.—CAN.

172vi. —.]—UNION LUMBER Co. v. PORTER (1908), 9 W. L. R. 325.—CAN.

d. Effect of refusal of tender.]—HARTNEY v. BOULTON (Sask.) (1914), 27 W. L. R. 613; 6 W. W. R. 260; 16 D. L. R. 521; 7 Sask. L. R. 97.—CAN.

e. — Lien claimed too large.]—KENDAL v. FITZGERALD (1862), 21 U. C. R. 585.—CAN.

f. Retention by municipality for

that it is meant for any particular items (WILDE, C.J.).

The plea is not a general lien for 10s. but it claims a lien for a sum for the expense of the trial of the horse specifically alleged. Suppose a plea of a debt for making a coat, would a tender of a sum of money for making a pair of boots be any satisfaction of such plea? (CRESWELL, J.).—HARDINGHAM v. ALLEN (1848), 5 C. B. 793; 17 L. J. C. P. 198; 11 L. T. O. S. 87; 12 Jur. 584; 136 E. R. 1091.

Claim of general lien.]—See Nos. 178–182, post.

—**See, generally, CONTRACT, Vol. XII., pp. 327 et seq.**

—**See, generally, CONTRACT, Vol. XII., pp. 321 et seq.**

Waiver of tender—By claim for excessive amount.]—See Nos. 179–182, 191, post.

175. — By denial of possession.]—JONES v. CLIFF, No. 219, post.

176. Effect of refusal of tender—Qualified refusal—No subsequent tender.]—A. & co. foreign agents for pltf., purchased, with their own money, & shipped in their own names, a cargo for him. They drew bills of exchange on him, which they sold, with the bills of lading annexed, to deft., & authorised him to sell the cargo if the bills of exchange were not paid at maturity. On the day when the bills became due pltf. tendered payment, but the bills having been mislaid, he was directed to wait until the following day, at which time he refused to take up the bill. In an action of trover for the cargo:—*Held*: defts. acquired a special property, which was not divested by the quasi-tender upon the day when the bills became due.—JENKYNs v. BROWN (1849), 14 Q. B. 496; 19 L. J. Q. B. 286; 14 L. T. O. S. 395; 14 Jur. 505; 117 E. R. 193.

Annotations:—**Refd.** Shepherd v. Harrison (1869), L. R. 4 Q. B. 196; Sewell v. Burdick (1884), 10 App. Cas. 74.

177. Payment to party other than creditor—Agent employing sub-agent.]—FISHER v. SMITH, No. 137, ante.

SUB-SECT. 4.—BY CLAIM OF CREDITOR TO RETAIN.

A. For Excessive Amount.

178. Claim of general lien.]—KNIGHT v. HARRISON (1823), cited 4 M. & W. at p. 272; 150 E. R. 1431.

Annotation:—**Refd.** Scarfe v. Morgan (1838), 4 M. & W. 270.

179. — Waiver of tender—For amount of particular lien.]—A. received from B., an insolvent, the pawnbroker's duplicate of a harp, which was an undue preference under 7 Geo. 4, c. 57, s. 32. A. took the harp out of pawn:—*Held*: as against the assignees, A. had no lien on the harp for the sum he paid to take it out of pawn. *Semble*: where a party claims to hold goods for his general balance, he cannot object that a smaller sum, for which he really has a lien, has not been tendered to him.—AYLING v. WILLIAMS (1832), 5 C. & P. 399, N. P.

Annotation:—**Refd.** Scarfe v. Morgan (1838), 4 M. & W. 270.

180. — — —.]—(1) Generally speaking if a chattel delivered to a party receive improve-

ment from his labour & skill, he has a specific lien upon it for his remuneration, whether the contract for it be express or implied; provided there be nothing in the nature of the contract inconsistent with the existence of a lien

The artificer to whom the goods are delivered for the purpose of being worked up into form; or the farrier by whose skill the animal is cured of a disease; or the horsebreaker by whose skill he is rendered manageable, have liens upon the chattels in respect of their charges (PARKE, B.).

(2) If a mare be delivered into the possession of a party to be covered by a stallion, which is his property, at a price agreed on, the bailee has a lien on the mare for that amount.

(3) If a party have a specific lien on the goods of another & when required to deliver them up, claim a lien upon them for a sum either greater or different from that for which he is entitled to hold them, his lien is gone; but if he claim to hold them both for the sum to which he is entitled & also for a further one to which he is not entitled, his lien in respect of the former remains, & the owner ought, on such refusal, to tender that claim.

(4) Sunday Observance Act, 1677 (c. 7), s. 1, only contemplates the case of persons exercising trades, etc., on Sunday; &, therefore, does not extend to the case of an agreement made by a farmer that in consideration of a certain sum, a mare belonging to another person shall be covered by a stallion which is his property.

This was not a contract within Sunday Observance Act, 1677 (c. 7), s. 1, it not being made in the exercise of deft.'s ordinary calling. The statute does not extend to any case where the consideration has been executed, & a property, either general or special, passed in the chattels which are the subject of it.—SCARFE v. MORGAN (1838), 4 M. & W. 270; 1 Horn & H. 292; 7 L. J. Ex. 324; 2 Jur. 569; 150 E. R. 1430

Annotations:—**As to (1) Distd.** Jackson v. Cummins (1839), 5 M. & W. 342. **Fold.** Rumsey v. N. E. Ry. (1863), 14 C. B. N. S. 641. **Refd.** Hatton v. Car Maintenance Co. (1914), 110 L. T. 765. **As to (3) Apld.** Kerford v. Mondel (1859), 28 L. J. Ex. 303. **Refd.** Dirks v. Richards (1842), 6 Jur. 562. **Generally, Refd.** Beaumont v. Brengeri (1847), 5 C. B. 301; Skinner v. Lambert (1850), 16 L. T. O. S. 244; Weeks v. Goode (1859), 6 C. B. N. S. 367. **Mentd.** Short v. Mercier (1851), 20 L. J. Ch. 289; Taylor v. Chester (1869), L. R. 4 Q. B. 309.

181. — — —.]—In trover by the owner of goods against a carrier who has detained the goods under a claim of lien, it is not necessary, in order to entitle pltf. to recover, that he should prove an actual tender of the carriage money, if it appear that he was ready to pay it, but that deft. refused to deliver the goods except on payment of an alleged old balance, which the jury find not to have been really due.—JONES v. TARLETON (1842), 9 M. & W. 675; 11 L. J. Ex. 267; 6 Jur. 348; 152 E. R. 285.

Annotations:—**Refd.** Kirchner v. Venus (1859), 12 Moo. P. C. C. 361; Weeks v. Goode (1859), 6 C. B. N. S. 367. **Mentd.** Yungmann v. Briesemann (1892), 67 L. T. 642.

182. — — — Separate claims distinguished.]—SCARFE v. MORGAN, No. 180, ante.

183. Claim of particular lien—For repairs to chattel—Some repairs not ordered by debtor.]—GREEN v. SHEWELL (circa 1837), cited in 4 M. & W. 277; 150 E. R. 1433.

Annotation:—**Refd.** Scarfe v. Morgan (1838), 4 M. & W. 270.

taxes—Necessity for payment to lienholder.]—Goods sold under lien are not exempt from business tax since the person taxed has an interest in & possession of the goods, but the municipality can retain possession of such goods when seized only by paying off the lien.—DEERE PLOW Co. v.

SCOTT (1914), 29 W. L. R. 542; 20 D. L. R. 543.—CAN.

g. Sufficiency of tender—Must be shown.]—Where in trover for bills of exchange, deft. pleaded a lien by agreement, & pltf. replied a tender, without averring that the sum tendered

was sufficient:—*Held*: the replication was bad.—CONGER v. HUTCHINSON (1843), 6 O. S. 641.—CAN.

h. Payment into court—Consent of plaintiff before discharge.]—WILKINS v. WILLIAMSON (Ont.) (1911), 4 Can. Dig. Supp. 1318.—CAN.

Sect. 9.—Extinguishment of lien: Sub-sect. 4, A., B. & C.; sub-sects. 5, 6 & 7, A.]

184. Claim for debt due from third party.]—A picture was placed by A. in the hands of B. for sale. B. deposited it with C. On its being demanded by A., C. claimed 5s. for warehouse room; but on a second demand being made, with an offer to pay any claim which C. might have for warehouse room, C. refused to give up the picture without being paid £8 due to him from B.:—*Held*: the demand of the £8 amounted to a waiver of the claim for warehouse room, & it rendered a specific tender in respect thereof unnecessary.—*DIRKS v. RICHARDS* (1842), 4 Man. & G. 574; 5 Scott, N. R. 534; 6 Jur. 562; 134 E. R. 236.

Annotation:—*Refd. Re Llewellyn*, [1891] 3 Ch. 145.

Tender not appropriated by debtor.]—See No. 174, *ante*.

B. On Other than Lien Grounds.

185. No mention of lien.]—If one having a lien upon goods, when they are demanded of him, claims to retain them upon a different ground, making no mention of the lien, trover may be maintained against him, without evidence of any tender having been made of the amount of his lien.—*BOARDMAN v. SILL* (1808), 1 Camp. 410, n.

Annotations:—*Consd.* *White v. Gainer* (1824), 2 Bing. 23; *Stow v. Crowley* (1825), M'Cle. & Yo. 129; *Scarfe v. Morgan* (1838), 4 M. & W. 270. *Folld. Weeks v. Goode* (1859), 6 C. B. N. S. 367. *Refd. Owen v. Knight* (1837), 4 Bing. N. C. 54; *Dirks v. Richards* (1842), 4 Man. & G. 574; *Gobind Chunder Sein v. Ryan* (1861), 9 Moo. Ind. App. 140; *Romsey v. N. E. Ry.* (1863), 2 New Rep. 360; *Yungmann v. Briesemann* (1892), 67 L. T. 642.

186. —.]—(1) Pltf. placed some cows with deft. to agist; a third person ordered deft. not to give them up; & deft., upon being asked for them by pltf., mentioned his orders, & said that he could not give them up:—*Held*: to be a conversion.

(2) No lien was at the time mentioned:—*Held*: deft. could not afterwards set up the lien to justify the refusal.—*SKINNER v. LAMBERT* (1850), 16 L. T. O. S. 244, N. P.

187. —.]—A lien may be waived by the party's setting up a claim to retain the chattel upon a different ground, & making no mention of the lien. In trover against A. & B. for a lease, the evidence of conversion was as follows: A demand having been made upon A., he declined to give up the lease until certain rent due to B. was paid; but he added that it was more B.'s business than his own, & as he was not in, he, A., would either send the lease in the course of the day, or would write pltf. a letter declining to return it. Pltf., receiving neither lease nor letter, issued his writ on the following morning:—*Held*: this amounted to an absolute refusal, notwithstanding defts. had at the time, though it was not mentioned, a lien upon the lease for a small sum due to them for business done by them as attorneys for pltf.—*WEEKS v. GOODE* (1859), 6 C. B. N. S. 367; 141 E. R. 499; *sub nom.* *WICKS v. GOOD*, 33 L. T. O. S. 93.

188. Formalities not complied with—Informal notice of change of title to goods.]—Where goods deposited at a wharf are sold by the owner, & he gives notice thereof to the wharfinger, paying all charges up to that time, the wharfinger cannot claim a lien against him for subsequent charges in respect of such goods on the ground that no delivery order was lodged, & the notice was merely oral.—*BARRY v. LONGMORE* (1840), 12 Ad. & El.

639; Arn. & H. 14; 4 Per. & Dav. 344; 113 E. R. 956.

See, also, No. 5, *ante*.

C. Other Cases.

189. Grounds of claim not stated.]—*WHITE v. GAINER*, No. 5, *ante*.

190. Claim to retain with other goods—No lien claimed on other goods.]—*WHITE v. GAINER*, No 5, *ante*.

191. Claim on double grounds—Failure to sustain either—Either claim amounting to waiver of tender.]—Where a party claims to detain goods upon two causes of lien, in such a way as to dispense with tender of either, he is guilty of conversion unless he can sustain both.—*KERFORD v. MONDEL* (1859), 28 L. J. Ex. 303; 33 L. T. O. S. 289.

Annotations:—*Distd.* *Watson v. Pearson* (1863), 11 W. R. 702. *Consd.* *The Norway* (1864), Brown. & Lush. 377. *Refd.* *Allen v. Smith* (1863), 11 W. R. 440.

SUB-SECT. 5.—BY TAKING SECURITY.

See Sub-sect. 7, B., *post*.

SUB-SECT. 6.—BY CONVERSION.

192. General rule.]—Pltf. agreed to buy of deft. a stack of hay for £86 to be paid for as taken away, & to be removed by May 31. Part of the hay was removed & paid for by pltf. before May 31, & in Aug. the remainder was cut up & used by deft.:—*Held*: as deft.'s lien on the hay was determined by the act of conversion, pltf. was entitled to the possession of the hay, & might maintain an action of trover.

A lien is a mere right of possession; but as soon as a party uses the goods in a manner inconsistent with his claim of lien, from that moment his lien ceases, & the right of possession of the other party revives (*PARKE, B.*).—*GURR v. CUTHBERT* (1843), 12 L. J. Ex. 309.

193. —.]—The sale of a chattel by the holder waives the lien on it, although the retention of it would put him to expense.—*MULLINER v. FLORENCE* (1878), 3 Q. B. D. 484; 47 L. J. Q. B. 700; 38 L. T. 167; 42 J. P. 293; 26 W. R. 385, C. A.

Annotations:—*Refd.* *Chesham Automobile Supply v. Beresford Hotel, Birchington* (1913), 29 T. L. R. 584. *Mentd.* *Johnson v. Lancashire & Yorkshire Ry.* (1878), 3 C. P. D. 499; *Cox v. Liddell* (1895), 2 Mans. 212; *Whiteley v. Hilt*, [1918] 2 K. B. 808.

194. —.]—*RUST v. McNAUGHT* (1917), 144 L. T. Jo. 76; *on appeal* (1918), 144 L. T. Jo. 440, C. A.

195. Effect of conversion—Whether lien attaches to purchase money.]—Deft. held a certain deed of lease on which he had a lien for £300 as attorney of S.; a commission of bkpt. was issued against S. in Dec. 1829; deft. acted as attorney under that commission; & in 1831, after notice of a petition to supersede it, he joined with the assignee under the commission in a sale of the lease, & out of the proceeds was paid the £300 due to him from S. The commission of bkpt. having been superseded in 1832 for want of a sufficient petitioning creditor's debt, & a new commission having issued:—*Held*: deft. was liable to refund the £300 in an action for money had & received to the use of the assignee under the second

PART II. SECT. 9, SUB-SECT. 6.

k. Effect of conversion.]—*M'MILLAN v. RITCHIE* (1861), 7 N. B. R. (2 All.) 242.—CAN.

commission, & also money received in 1831 for rent, etc., accruing to S.—CLARK v. GILBERT (1835), 2 Bing. N. C. 343; 2 Scott, 520; 1 Hodg. 347; 5 L. J. C. P. 61; 132 E. R. 135.

Annotations:—Mentd. Chinory v. Viall (1880), 5 H. & N. 288; Cox v. Liddell (1895), 2 Mans. 212.

See, generally, TROVER.

SUB-SECT. 7.—BY WAIVER.

A. In General.

196. Lien treated as non-existent.]—(1) Where goods were sent directed to the residence of the buyer, arrived at the warehouse of a wharfinger, & subsequently, the buyer being insolvent, the contract between him & the seller was rescinded, but no application was made to the wharfinger until six weeks after their arrival at the warehouse:—*Held*: the mere delay in applying to the wharfinger did not determine the *transitus*, the goods were still *in transitu*, & consequently the wharfinger could not set up a lien in respect of the general balance due to him from the seller.

(2) Where a person was assumed to have had a lien upon goods for his general balance as a wharfinger, & upon being applied to by the consignor made a charge only in respect of the particular goods, but was not paid at the time on account of the difficulty of getting change for a bank note, & the card of the consignor, with the consent of the wharfinger, was nailed on the goods, & the parties separated upon the understanding that the consignor should send for the goods & pay the sum which had been named:—*Held*: these facts amounted to a waiver by the wharfinger of his lien for his general balance, & he could not detain the goods after a tender of the sum he had previously named.—MORLEY v. HAY (1828), 3 Man. & Ry. K. B. 396; 7 L. J. O. S. K. B. 104.

197. — Omission to claim for many years.]—A debenture for a tontine annuity was deposited by an intestate with his bankers, one of whom received the dividends, & placed them to the credit of intestate's account. Intestate died in 1801, & a commission issued against the bankers in 1810; notwithstanding which, the same partner continued to receive the dividends, & pay them to intestate's widow, up to the period of his own death which happened in 1822; some time after which the assignees of the bankers claimed a lien on the debenture, for a debt due from intestate to the banking house:—*Held*: after so long an abandonment of any claim of lien, the assignees could not now support such claim; & the debenture, also, could not be considered as having been left in the order & disposition of the bankers, having been deposited in the nature of a trust.—*Re NOBLE, Ex p. DOUGLAS* (1833), 3 Deac. & Ch. 310.

198. —.]—H. & co., of Newfoundland, by order of Messrs. D., of Jamaica, shipped a cargo of fish on board a vessel, chartered by Messrs. D., & consigned it, by D.'s request, to S. & L., Messrs. D.'s factors, in Jamaica. Messrs. D. were, at that time, indebted to S. & L. for large advances made to them; &, after they had ordered the cargo, they applied to S. & L. for a further advance, informing them, that they might expect the cargo, & authorising them to sell it, on their

account, & give them credit for the proceeds. S. & L. made the required advance. No agreement was reduced into writing as to the pledge of the cargo. Before the arrival of the vessel, Messrs. D., being in insolvent circumstances, informed S. & L. that, in the circumstances of the firm, they could not think of receiving the cargo; &, on the arrival of the vessel, Messrs. D., by letter to S. & L., repeated their determination not to receive the cargo, & desired them to sell it; to render the sales to them, & to remit the proceeds, after deducting freight, etc., to H. & co. Messrs. D. also wrote, to the same effect, to Messrs. H. & co., who, by letter, acquiesced in this repudiation; the letter did not arrive in Jamaica until some months after the sale. S. & L. offered no objection to Messrs. D.'s proposal, & sold the cargo; they did not then claim any lien on the cargo, but they afterwards refused to account for the proceeds to H. & co., claiming a lien on the goods as the factors, & creditors, of Messrs. D. Upon a bill of exceptions to the judge's directions in an action of *assumpsit*, brought by H. & co., against S. & L.:—*Held*: S. & L. having sold the cargo, under the direction of Messrs. D., must be considered as the agents of H. & co., &, if they had originally any lien on the cargo, they had, by their conduct, waived it.—HARRISON v. SCOTT (1846), 5 Moo. P. C. C. 357; 10 Jur. 443; 13 E. R. 528, P. C.

199. Election—Proof in bankruptcy of debtor.]—A creditor, having a lien on property of bkpt. for his debt, held to be concluded by proving his debt, voting in the choice of assignees, & signing the certificate, & ordered to deliver up the property on which he had a lien.—*Re AUBUSSON, Ex p. SOLOMON* (1821), 1 Gl. & J. 25.

Annotations:—*Refd. Stammers v. Elliott* (1867), L. R. 4 Eq. 675; *Re Firth, Ex p. Schofield* (1879), 12 Ch. D. 337; *Re Rhoades, Ex p. Rhoades*, [1899] 1 Q. B. 905.

200. — Assent to composition deed.]—Where a composition deed between a debtor & his creditors provides that those who come in under it shall thereby release their debts, a lien creditor cannot realise his lien & prove for the difference, but if he elects to take the benefit of the deed, must first give up the property on which he claims the lien.—BUCK v. SHIPPAM (1846), 1 Ph. 694; 41 E. R. 796.

201. Grounds of claim to retain not stated—Purchase by creditor from bankrupt debtor.]—WHITE v. GAINER, No. 5, ante.

202. Undertaking to deliver goods—To order of purchaser—Purchase-money remaining unpaid—Goods resold by purchaser.]—Defts. sold goods to B. & co. & at the same time handed to B. & co. two documents, each as follows: "We hereby undertake to deliver to your order endorsed hereon twenty-five tons merchantable zinc off your contract of this date." Before delivery B. & co. became insolvent & unable to pay defts. whereupon defts. retained the goods by virtue of their lien as unpaid vendors of insolvent purchasers. B. & co. resold the goods to pltf. & endorsed & handed to them the two documents above referred to. In an action by pltf. against defts. for refusing to deliver the goods:—*Held*: inasmuch as defts. were entitled to set up their lien as against B. & co., & inasmuch as the two documents were only undertakings to do something, & not representations of any fact, defts. were not estopped by them

PART II. SECT. 9, SUB-SECT. 7.—A.

196 l. Lien treated as non-existent.]—A lien is waived if the person who has the lien on a chattel tries to justify the detention on grounds other than lien.—HEARN v. EASTERN MOTORS, LTD.,

[1924] 1 D. L. R. 561; 56 N. S. R. 463.—CAN.

1. Authority to owner to sell property—Account settled out of proceeds.]—Where a thresher agrees that the farmer for whom he threshes may

sell a car of grain in his own name, on the understanding that out of the proceeds the threshing account will be paid, he thereby waives his lien in so far as the grain in that car is concerned.—FAHLMAN v. MACLEAN (Sask.),

Sect. 9.—Extinguishment of lien: Sub-sect. 7, A. & B.; sub-sects. 8, 9 & 10.]

from setting up their lien as against plts., & were therefore entitled to retain the goods.—*FARMELOE v. BAIN* (1876), 1 C. P. D. 445; 45 L. J. Q. B. 264; 34 L. T. 324.

Waiver of solicitor's lien.]—See SOLICITORS.

203. Creditor getting execution on goods.]—

(1) A party, who having a lien on goods, causes them to be taken in execution at his own suit, loses his lien thereby although the goods are sold to him under the execution, & are never removed off his premises.

A lien is destroyed if the party entitled to it gives up his right to the possession of the goods. If another person had sued out execution, debt. might have insisted on his lien. But M. himself called on the sheriff to sell; he set up no lien against the sale; on the contrary, he thought his best title was by virtue of that sale. Now, in order to sell, the sheriff must have had possession; but after he had possession from M., & with his assent, M.'s subsequent possession must have been acquired under the sale, & not by virtue of his lien (*BEST, C.J.*).

(2) *Qu.*: whether a trainer of racehorses has a lien on the horses for his services in training.—*JACOBS v. LATOUR* (1828), 5 Bing. 130; 2 Moo. & P. 201; 6 L. J. O. S. C. P. 243; 130 E. R. 1010.

Annotations:—*As to (1) Rejd. Compston v. Haigh* (1836), 5 L. J. C. P. 99; *The Repulse* (1845), 2 Wm. Rob. 398. *As to (2) Rejd. Judson v. Etheridge* (1833), 1 Cr. & M. 743; *Scarfe v. Morgan* (1838), 4 M. & W. 270; *Jackson v. Cummins* (1839), 5 M. & W. 342; *Forth v. Simpson* (1849), 13 Jur. 1024.

B. By Taking Security.

204. General rule.]—Factor's lien both for his expenditure on the goods in his possession, & his general balance, lost by a special contract for a particular mode of payment.

Where by the usage of trade a person has a lien on goods in his hands for work performed upon them, & further, for work upon other goods, not then in his possession, having been delivered over, according to the usages of different trades, it is settled that by taking a security the lien is gone, even with regard to the goods in his possession (*LORD ELDON, C.*).—*COWELL v. SIMPSON* (1809), 16 Ves. 275; 33 E. R. 989, L. C.

Annotations:—*Consd. Stevenson v. Blakelock* (1813), 1 M. & S. 535; *Chase v. Westmore* (1816), 5 M. & S. 180; *Robartes v. Jefferys* (1830), 8 L. J. O. S. Ch. 137. *Appld. Hewison v. Guthrie* (1836), 2 Bing. N. C. 755. *Consd. Angus v. McLachlan* (1883), 23 Ch. D. 330; *Re Taylor, Stileman & Underwood*, [1891] 1 Ch. 590; *Re Lumley* (1892), 37 Sol. Jo. 83; *Re Morris*, [1908] 1 K. B. 473. *Id. Crawshaw v. Homfray* (1820), 4 B. & Ald. 50; *Balch v. Symes* (1823), Turn. & R. 87; *Pinnock v. Harrison* (1838), 3 M. & W. 532; *Lloyd v. Mason* (1845), 4 Hare, 132; *Spartali v. Benecke* (1850), 10 C. B. 212; *Thames Iron Works v. Patent Derrick Co.* (1860), 1 John. & H. 93; *Macnee v. Gorst* (1867), L. R. 4 Eq. 315; *Hope v. [1911] A. C. 419. Mentd. Re Bodega Co. R. 249.*

205. —.]—In trover by the assignees of a bkpt. to recover a policy of insurance, debt. pleaded a custom for insurance brokers to have a general lien upon policies of insurance in their possession for their general balance; that mutual dealings & accounts existed between bkpt. & debt.; & that at the time of the conversion bkpt.

was indebted to debt. in £200. Replication: that the £200 was the price of goods sold to bkpt. upon twelve months' credit; & that a bill of exchange was drawn & accepted in payment, which bill was not due at the time of the conversion:—*Held*: by taking the security the lien was gone.—*HEWISON v. GUTHRIE* (1836), 2 Bing. N. C. 755; 2 Hodg. 51; 3 Scott, 298; 5 L. J. C. P. 283; 132 E. R. 290.

Annotations:—*Appld. Angus v. McLachlan* (1883), 23 Ch. D. 330. *Rejd. Re Morris*, [1908] 1 K. B. 473.

206. —.]—A. & B., a solr., were exors. B. deposited some of his deeds in the trust box, to secure some money due to testator's estate. The box remained in B.'s possession, & on his death the deeds were found to have been abstracted from it, & they could not be identified. The legal personal representative of B. then deposited certain specific deeds, selected by A., as a security for the debt:—*Held*: (1) assuming that A. had, in consequence of B.'s wrongful act, obtained a general lien on all B.'s deeds for the money, still he had waived it by taking the particular security from the legal personal representative; (2) the creditors of B. were bound by the arrangement between his legal personal representative & A.—*MASON v. MORLEY* (No. 1) (1865), 34 Beav. 471; 34 L. J. Ch. 422; 12 L. T. 414; 11 Jur. N. S. 459; 13 W. R. 669; 55 E. R. 717.

207. Security taken from guarantor.]—A person who has a lien on property, accompanied by the guarantee of a third person, does not lose his lien by taking the bills of that third person for the amount, concurrently with, & in order to a sale of the property to satisfy the debt.—*SOLARTE v. HILBERS* (1832), 1 L. J. K. B. 196.

208. Question of intention—Security taken by innkeeper.]—The mere taking by an innkeeper from his guest of a security for the payment of his bill does not necessarily destroy the lien which the innkeeper has by the common law upon the goods of his guest. In order to destroy the lien there must be something in the facts of the case, or in the nature of the security taken, which is inconsistent with the retention of the lien, or which is destructive of it.—*ANGUS v. McLACHLAN* (1883), 23 Ch. D. 330; 52 L. J. Ch. 587; 48 L. T. 863; 31 W. R. 641.

Annotation:—*Consd. Re Morris*, [1908] 1 K. B. 473.

209. —.]—Whether the taking of security by a person having a lien is an abandonment of the lien depends on the intention, whether expressed or to be gathered from the circumstances of the case.—*Re TAYLOR, STILEMAN & UNDERWOOD, Ex p. PAYNE COLLIER*, [1891] 1 Ch. 590; 60 L. J. Ch. 525; 64 L. T. 605; 39 W. R. 417; 7 T. L. R. 262, C. A.

Annotations:—*Consd. Re Lumley* (1892), 37 Sol. Jo. 83. *Appld. Bissill v. Bradford & District Tram Co.* (1893), 9 T. L. R. 337; *Re Douglas Norman*, [1898] 1 Ch. 190. *Consd. Re Morris*, [1908] 1 K. B. 473. *Rejd. Re Hanbury, Whitting & Nicholson* (1896), 75 L. T. 449. *Mentd. Re Kingdon & Wilson*, [1902] 2 Ch. 242.

— Security taken by solicitor.]—See SOLICITORS.

210. Specific security for smaller sum.]—Notice of an assignment of freight must be given to the broker & not to the freighters. A specific security for a smaller sum will not do away with a general lien for a larger.—*GARDNER v. LACHLAN* (1836),

(Claim for storage only.)—LAWSON v. CORBETT (1881), 14 N. S. Il. (2 R. & G.) 322; 2 C. L. T. 94.—CAN.

PART II. SECT. 9, SUB-SECT. 7.—B.

204 i. General rule.]—A., having taken a likeness for B., agreed to take

in payment therefor \$20 in cash & a *cognovit* for \$70 payable at a future date. After receipt of \$20 & tender of the *cognovit*:—*Held*: the agreement was a waiver of A.'s right to lien.—*DEMPSEY v. CARSON* (1862), 11 C. P. 462.—CAN.

m. Claim for special charges—
Proper charges omitted — Whether
(1881),

n. Lien for storage & wharfage—

as reported in *Donnelly*, 119; 47 E. R. 266; *on appeal* (1838), 4 My. & Cr. 129, L. C.

Annotation:—*Mentd.* *Cooke v. Hemming* (1868), L. R. 3 C. P. 334.

211. Bill given for debt—Effect of subsequent dishonour.—*SMITH v. BEEMAN* (1843), 1 L. T. O. S. 233.

212. ———.]—Engineers contracted with debtor, the owner of a barge, to supply steam machinery to the vessel, at the docks of a dock co., for the price of £1050, to be paid by approved bills; one at three months for £260 when the boiler & engine should be placed in the vessel, one at three months for £260, & one at six months for £530, when the vessel should have made a trial trip. The vessel having been taken to the docks, was there entered in the name of one of the engineers; & whilst shipwrights & other agents of debtor were occasionally or constantly on board, the vessel remained in the possession of the engineers till the boat was ready to make a trial trip. In the interim the engineers had been paid £360, partly in cash, & partly by debtor's acceptance, which they discounted. On the day appointed for the trial trip debtor filed a liquidation petition, & a receiver took possession of the vessel. A few days afterwards debtor's acceptance was dishonoured:—*Held*: the lien of the engineers for the unpaid price for the machinery & their labour was not affected by their having agreed to take bills in payment, nor by the nature of the possession, nor by their having discounted debtor's acceptance.—*Re WESTLAKE, Ex p. WILLOUGHBY* (1881), 16 Ch. D. 604; 44 L. T. 111; 29 W. R.

Annotation:—*Refd.* *The Rellim* (1922), 39 T. L. R. 41.

SUB-SECT. 8.—BY BANKRUPTCY OF DEBTOR.

213. Act of bankruptcy a general assignment.—General assignment of all effects an act of bkpcy.; giving therefore no lien; but a lien under a previous deposit & execution was not affected.—*Ex p. SMITH* (1813), 1 Ves. & B. 518; 35 E. R. 201, L. C.

214. Goods appropriated as cover for acceptance—Of agent—Goods “in order & disposition” of bankrupt.—*HOGGARD v. MACKENZIE*, No. 216, *post*.

Lien as security.—*See, generally, BANKRUPTCY, Vol. IV., pp. 388, 389, Nos. 3553–3560.*

SUB-SECT. 9.—UNDER STATUTES OF LIMITATION.

See Nos. 16–19, ante.

SUB-SECT. 10.—OTHER MODES OF EXTINGUISHMENT.

215. Lien arising by contract—Contract becoming void—Failure to comply with statutory re-

quirements.—(1) A pawnbroker, who, in taking pledges, omits to pursue the course required by Pawnbrokers Act, 1799 (c. 99), s. 6, acquires no property in the pledges, & cannot maintain a lien on them against the assignee of a pawner, who afterwards becomes a bkpt.

If the contract be void, the lien is void also (*TINDAL, C.J.*).

(2) A lien can only arise in one of three ways; either of an express contract; by a general course of dealing in the trade in which the heir is set up; or from the particular circumstance of the dealing between the parties (*TINDAL, C.J.*).—*FERGUSON v. NORMAN* (1838), 5 Bing. N. C. 76; 1 Arn. 418; 6 Scott, 794; 8 L. J. C. P. 3; 2 J. P. 809; 3 Jur. 10; 132 E. R. 1034.

Annotations:—*As to* (1) *Refd.* *Re Robinson, Clarkson v. Robinson*, [1910] 2 Ch. 571. *Generally, Mentd.* *Fitch v. Rochfort* (1849), 13 L. T. O. S. 113; *Attenborough v. London* (1853), 8 Exch. 661; *Victorian Daylesford Syndicate v. Dott*, [1905] 2 Ch. 624; *Whiteman v. Sadler*, [1910] A. C. 514; *Lougher v. Molyneux*, [1916] 1 K. B. 718; *Cornelius v. Phillips*, [1918] A. C. 199; *Anderson v. Daniel*, [1924] 1 K. B. 138.

216. — Lien of branch manager—Bankruptcy of debtor—Goods remaining in order or disposition of bankrupt.—A Scotch firm had a branch in London, which was wholly conducted by an agent & manager at a salary, but in their name. By contract, he was to have a lien on goods consigned to him for bills accepted by him for the firm. The firm became bkpt. in Scotland:—*Held*: the goods under the manager's control at the time were within the “order & disposition” of bkpts., & passed to their assignees unaffected by his lien.—*HOGGARD v. MACKENZIE* (1858), 25 L. J. Q. B. 493; 4 Jur. N. S. 1008; 6 W. R. 572.

217. — Termination of contract—Order winding up company.—*WILTSHIRE IRON CO. v. GREAT WESTERN RY. CO.*, No. 294, *post*.

218. Termination of relationship giving rise to lien—Guest at inn ceasing to be traveller—Question of fact.—A traveller who goes to a common inn is not necessarily entitled to accommodation therein as long as he chooses to remain on payment of the inn charges & conducting himself properly, & if he forms an intention of staying in the inn & has no intention of going on to any other place, he ceases to be a traveller, & the innkeeper is entitled to terminate the relation of host & guest by reasonable notice. The question whether a traveller staying in a common inn has ceased to be a traveller is a question of fact, in determining which the length of his stay in point of time must be taken into consideration, but is not of itself conclusive. *Semble*: the innkeeper's lien upon the traveller's goods for his charges terminates at the same time as the right of the traveller to be lodged in the inn as a traveller.—*LAMOND v. RICHARD*, [1897] 1 Q. B. 541; 66 L. J. Q. B. 315; 76 L. T. 141; 61 J. P. 260; 45 W. R. 289; 13 T. L. R. 235; 41 Sol. Jo. 292, C. A.

Annotations:—*Distd.* *Chesham Automobile Supply v. Beresford Hotel, Birchington* (1913), 29 T. L. R. 584. *Mentd.* *Sealey v. Tandy* (1901), 85 L. T. 459.

By death of creditor—Tenant for life of West Indian Estates.—*See No. 445, post.*

PART II. SECT. 9, SUB-SECT. 10.

a. Nature of property changed—By manufacture.—*M.*, being the owner of certain land, sold & conveyed the timber & cordwood thereon to *M.* who took possession, giving his note as part payment; he then converted the timber into cordwood & sold it to *S.* & absconded:—*Held*: *M.* had clearly lost his lien.—*WYATT v. BANK OF TORONTO* (1858), 8 C. P. 104.—*CAN.*

p. Property destroyed by fire.—*PATRICK v. WALBOURNE* (1896), 27 O. R. 221.—*CAN.*

q. ——*CHEW v. TRADERS BANK OF CANADA* (1910), 19 O. L. R. 74; 14 O. W. R. 415.—*CAN.*

r. Sale under terms of lien note—Owner dissatisfied with proceeds—Repossession & sale by sheriff—No extinguishment.—*GARTSIDE v. LELAND & MYERS* (1915), 31 W. L. R. 827; 24

D. L. R. 732; 8 Sask. L. R. 213.—*CAN.*

t. Solicitor's lien—Suing for costs.—A solr. does not lose his retaining lien by suing his client & obtaining judgment for his costs.—*Re AIKIN'S ASSIGNEES' ESTATE*, [1894] 1 I. R. 225.—*IR.*

a. Expiry of time allowed—For commencement of action.—*MEUNIER v.*

Sect. 9.—Extinguishment of lien: Sub-sect. 10. Part III. Sects. 1 & 2: Sub-sects. 1 & 2, A. & B.]

219. Denial of possession — Loss of possession not explained.]—A. delivered to B. a pawnbroker's duplicate, for B. to take some goods of A.'s out of pledge. B. did so; but on A. sending to B. for

the goods, B. said he had not got them, & refused to tell who had:—*Held*: if, after this, trover was brought against B., he could not insist on a lien on the goods for the money he had advanced to get them out of pledge.—*JONES v. CLIFF* (1833), 5 C. & P. 560, N. P.; *subsequent proceedings*, 1 Cr. & M. 540.

Part III.—General Lien.

SECT. 1.—IN GENERAL.

220. No existence apart from custom or agreement.]—*LILLEY v. BARNSELY*, No. 326, *post*.

221. Not favoured by courts.]—*RUSHFORTH v. HADFIELD*, No. 277, *post*.

222. —.]—*BOCK v. GORRISSEN*, No. 124, *ante*.

223. Where relation of principal & agent does not exist.]—If a policy of insurance is left in the hands of an agent, merely for safe custody, though he advances money to the assured, without any other security than the policy, the agent acquires no general lien on the instrument for such advances, *sed aliter* if left with him as a security generally.

Deft. is not an agent in the meaning of the word, which is necessary to confer a general lien. In a case like the present, a general lien can be claimed only in respect of a general balance of accounts, & we have no decisive evidence here that there ever existed any general balance of accounts between the parties. A special contract may raise a special lien, & I shall therefore leave it to the jury, as a question of fact, to say whether the policy of insurance was left in the hands of deft., merely as the agent of the intestate, for safe custody, or whether it was deposited with him as a security for his advances, telling them, that in point of law, in the former case, their verdict must be for pltf., & in the latter, for deft. (*ABBOTT, C.J.*).—*MUIR v. FLEMING* (1822), Dow. & Ry. N. P. 29, N. P.

224. Not affected by Statute of Limitations.]—If by the custom & usage of trade, a party is entitled to a lien on goods for a general balance, & he gets possession of the goods of his debtor, he may hold them till satisfied his whole demand, even though part of it was barred by Stat. Limitations.—*SPEARS v. HARTLY* (1800), 3 Esp. 81, N. P.

Annotations:—Refd. R. v. Humphery (1825), M'Cle & Yo. 173. *Mentd. Courtenay v. Williams* (1844), 3 Hare, 539; *Dingle v. Coppen, Coppen v. Dingle*, [1899] 1 Ch. 726.

SECT. 2.—HOW ARISING.

SUB-SECT. 1.—BY CONTRACT.

225. General rule.]—(1) No lien on goods except for the price of working them up.

(2) The convenience of commerce & natural justice are on the side of liens . . . where there is an express contract; where it is implied from the usage of the trade; or from the manner of

dealing between the parties in the particular case; or where deft. has acted as a factor (*LORD MANSFIELD, C.J.*).

(3) A dyer has no lien on goods delivered to him in the course of trade, but for the price of dying.

(4) I have inquired into the case *Ex p. Deeze*, No. 257, *post*. . . . If the usage there stated be true, the packer was in the nature of a factor, & as such, had a lien for the general balance. It was settled in 1755, "that a packer, being in the nature of a factor, would be entitled to a lien" (*LORD MANSFIELD, C.J.*).—*GREEN v. FARMER* (1768), 4 Burr. 2214; 1 Wm. Bl. 651; 98 E. R. 154.

Annotations:—As to (2) Apld. Webb v. Fox (1797), Poake, Add. Cas. 167; *Savill v. Barchard* (1801), 4 Esp. 53. *Refd. Kirkman v. Shawcross* (1794), 6 Term Rep. 14; *Houghton v. Matthews* (1803), 3 Bos. & P. 485; *Barnett v. Brandao* (1843), 6 Man. & G. 630. *As to (3) Follid. Bennett v. Johnson* (1784), 2 Chit. 455. *As to (4) Follid. Re Witt, Ex p. Shubrook* (1876), 2 Ch. D. 480. *Generally, Refd. Young v. Bank of Bengal* (1836), 1 Deac. 622; *Scarfe v. Morgan* (1838), 4 M. & W. 270. *Mentd. Wilson v. Creighton* (1782), 3 Doug. K. B. 132; *Lempriere v. Pasley* (1788), 2 Term Rep. 485; *Jones v. Smith* (1794), 2 Ves. 372; *Olive v. Smith* (1813), 5 Taunt. 56; *Graham v. Russell* (1816), 3 Price, 227; *Birdwood v. Raphael* (1818), 5 Price, 593; *Rose v. Hart* (1818), 2 Moore, C. P. 547; *Turner v. Thomas* (1871), L. R. 6 C. P. 610.

226. —.]—*RUSHFORTH v. HADFIELD*, No. 277, *post*.

227. —.]—*HOLDERNESS v. COLLINSON*, No. 273, *post*.

228. —.]—*FERGUSON v. NORMAN*, No. 215, *ante*.

229. —.]—*LILLEY v. BARNSELY*, No. 326, *post*.

230. Application of rule — Lien on horse at livery—For money lent.]—*DONATTY v. CROWTHER*, No. 52, *ante*.

231. What amounts to a contract — Delivery with notice of claim of general lien.]—An agreement entered into by a number of dyers, dressers, bleachers, etc., at a public meeting, that they would not receive any more goods to be dyed, etc., etc., but on condition that they should respectively have a lien on those goods for their general balance, is good in law; & any one, who after notice of it delivers goods to either of those persons, must be taken to have assented to those terms, & consequently cannot demand goods so delivered to any such dyer, etc., without paying the balance of his general account.—*KIRKMAN v. SHAWCROSS* (1794), 6 Term Rep. 14; 101 E. R. 410.

Annotation:—Distd. Oppenheim v. Russell (1802), 3 Bos. & P. 42.

HINMAN (1916), 35 W. L. R. 121; 11 W. W. R. 121.—CAN.

*b. Misdescription of property—Overstatement.]—*As a general rule the fact that the claim or statement describes more land than is subject to a lien does not defeat the lien as to the land properly subject thereto if there is no fraudulent intent, & no one is

injured thereby.—*POLSON v. THOMSON* (1916), 34 W. L. R. 745; 10 W. W. R. 865.—CAN.

PART III. SECT. 2, SUB-SECT. 1.

225i. General rule.]—To constitute a lien on any property, there must be a clear agreement for the specific appropriation of the property.—*Re DADIA BIBER, DEBNARAIN BOSE v. LEISK*

(1863), 2 Hyde, 267.—IND.

225 ii. —.]—Where a person does work under an entire contract with reference to goods delivered at different times such as to establish a lien, he is entitled to that lien on all goods dealt with under that contract.—*MILLER v. NASMYTH'S PATENT PRESS CO., LTD.* (1882), 1 L. R. 8 Calc. 312.—IND.

232. ———.]—A co. imported into England frozen meat purchased by them in Australia. For the purpose of financing the co. in the business plths. paid the price owing by the co. to the persons from whom the co. had bought the meat, & reimbursed themselves out of the proceeds of bills of exchange discounted by a bank, which bills had been drawn to the bank's order by plths. & accepted by the co. The bills of lading for the meat were deposited with the bank as security that the bills of exchange would be met. On the arrival of the meat in England the co. with the assent of the bank placed the meat in defts.' cold store to be delivered by defts. to the bank's order or against bills of lading. Defts.' terms of storage, which were the terms usual in the trade, provided that defts. should have a general lien on the meat for all charges accrued & accruing against the storer or for any other money due from the owners of the goods. The co. having failed to meet their acceptances, plths. paid the bank & received the bills of lading from the bank & demanded delivery of the meat from defts. Defts. claimed to exercise a lien on the meat for charges due to them from the co. for the storage of other goods:—*Held*: the meat having been placed in defts.' store with the assent of the bank on the terms of defts. having a general lien, defts. were entitled to enforce the general lien against plths., who had succeeded to the rights of the bank as regards the meat.—*JOWITT & SONS v. UNION COLD STORAGE CO.*, [1913] 3 K. B. 1; 82 L. J. K. B. 890; 108 L. T. 724; 29 T. L. R. 477; 57 Sol. Jo. 560; 18 Com. Cas. 185.

Annotations:—*Consd.* Cassils & Sassoon v. Holden Wood Bleaching Co. (1914), 84 L. J. K. B. 834. *Refd.* Pennington v. Reliance Motor Works, [1923] 1 K. B. 127.

———.].—*See, also*, CARRIERS, Vol. VIII., p. 221, Nos. 1411–1415.

———. *Authority of bank manager.*—*See* BANKERS, Vol. III., p. 162, No. 242.

233. ——— *Representation as to existence of lien—Acted on by representee.*—An equitable lien on title deeds relating to an estate in China, was created by verbal representations, leading the party in possession of such title deeds to consider that he held them not only as security for a portion of the purchase-money of the estate still unpaid, but also for the general balance of accounts which were then due, or might become due to him from a large mercantile firm in London:—*Held*: such representations being acted upon were equivalent to a written contract.

The question of determination is, whether there was, on the part of the party making the representation, a contract or representation so acted on as to be equivalent to a contract such as would give the party claiming the lien the lien he insists on for his general balance. Neither he nor any one claiming through him can now be heard to dispute the existence of that lien which was stated to exist at the time when indulgence or acceptance was wanted & obtained (*GIFFARD, V.-C.*).—*WATSON v. CHAPMAN, CHAPMAN v. WATSON* (1868), 18 L. T. 705.

———. *See, generally*, BUILDING CONTRACTS, Vol. VII., pp. 415, 416.

Contract implied by usage.—*See* Sub-sect. 2, *post*.

234. *Power to create—Receiver appointed by court—In debenture-holder's action.*—*Moss S.S. Co., LTD. v. WHINNEY*, No. 80, *ante*.

235. *Extent of lien—Construction of contract—"All goods on hand"—Whether materials for use in manufacture included.*—Defts. were the proprietors of a scribbling & fulling mill & were

employed by H. & co. (amongst others) to scribble & full wools & cloths, under a stipulation that "all goods on hand" should be subject to a lien for a general balance. H. & co. dyed their wools on deft.'s premises, & kept there a quantity of oil & dye-woods, the oil being there for the purpose of being used as required by defts.' servants in the process of scribbling, but kept locked up & delivered out in small quantities by a servant of H. & co., & the dye-woods to be used by H. & co. in dyeing the wools in an intermediate stage of the process of scribbling:—*Held*: the oil & dye-woods were not subject to the lien.—*CUMPSTON v. HAIGH* (1836), 2 Bing. N. C. 449; 1 Hodg. 373; 2 Scott, 684; 132 E. R. 176; *sub nom.* *COMPSTON v. HAIGH*, 5 L. J. C. P. 99.

236. ——— *"Goods"—Whether engine under repair included.*—*KINNEAR v. MIDLAND RY. Co.*, No. 309, *post*.

237. ——— *Goods shipped by receiver for debenture-holders—Lien for arrears of freight due from shippers—Whether freight due from company included.*—*MOSS S.S. Co., LTD. v. WHINNEY*, No. 80, *ante*.

Upon whom binding.—*See* No. 295, *post*.

Building owner's lien.—*See* BUILDING CONTRACTS, Vol. VII., pp. 415, 416.

SUB-SECT. 2.—BY CUSTOM OR USAGE.

A. In General.

238. *General rule.*—*GREEN v. FARMER*, No. 225, *ante*.

239. ———.]—*RUSHFORTH v. HADFIELD*, No. 277, *post*.

240. ———.]—If a party claim a lien on plates for his bill for printing from them, in order to establish it, he must show a course of dealing so general & uniform that persons must be supposed to form their contracts tacitly on the understanding that there is such an usage. *Semble*: there is no such usage, with respect to stereotype. *Qu.*: if there be with respect to copperplate printing.—*BLEADEN v. HANCOCK* (1829), 4 C. & P. 152; *Mood. & M.* 465, N. P.

Annotation:—*Appld.* *Steadman v. Hockley* (1846), 15 M. & W. 553.

241. ———.]—*BOCK v. GORRISEN*, No. 124, *ante*.

Upon whom binding.—*See* No. 295, *post*.

Proof of custom or usage.—*See* CUSTOMS & USAGES, Vol. XVII., pp. 19 *et seq.*, 35 *et seq.*

B. Persons Entitled.

242. *Agent—With notice that debtor not owner—Principal undisclosed.*—Merchants in London, upon the instruction of shipping agents at Havannah with respect to a cargo of tobacco to be consigned to the London merchants & after receiving the shipping documents, effected policies of marine insurance in the ordinary form on behalf & for the benefit of all parties whom it might concern. The Havannah agents shipped & consigned the tobacco in their own names, but were in fact acting as commission agents for Havannah merchants to whom the tobacco belonged; & the London merchants before effecting the policies had notice that the Havannah agents had an unnamed principal. A total loss having occurred the London merchants received the policy moneys, but before receipt had notice that the moneys were claimed by the Havannah principals:—*Held*: an action lay by the Havannah principals against the London merchants for the policy

Sect. 2.—How arising: Sub-sect. 2, B.]

moneys; the London merchants were not entitled to a lien upon the moneys for the balance of their general account with the Havannah agents, & could not in that action set off their claim to that balance, or set off anything except the premiums, stamps & commissions in respect of the insurance.—*MILDRED, GOYENECHÉ & Co. v. MASPONS Y HERMANO* (1883), 8 App. Cas. 874; 53 L. J. Q. B. 33; 49 L. T. 685; 32 W. R. 125; 5 Asp. M. L. C. 182, H. L.; *affg. S. C. sub nom. MASPONS Y HERMANO v. MILDRED, GOYENECHÉ & Co.* (1882), 9 Q. B. D. 530, C. A.

Annotations:—Mentd. Kaltenbach v. Lewis (1885), 10 App. Cas. 617; *Harper v. Keller, Bryant* (1915), 20 Com. Cas. 291.

See, generally, AGENCY, Vol. I., pp. 547 et seq.

243. Banker.]—*BOCK v. GORRISSEN*, No. 124, *ante*.

See, generally, BANKERS, Vol. III., pp. 283 et seq.

244. Bleachers—At Nottingham.]—A general lien established in the bleaching trade at Nottingham.—*PLAICE v. ALLCOCK* (1866), 4 F. & F. 1074, N. P.

245. —.]—Pltfs., being possessed of a quantity of calico, sent it to some calico printers to be printed. The printers without any express authority from pltfs. so to do, sent on the calico to defts., who were bleachers, with instructions to them to bleach it. There was nothing in these instructions to indicate to whom the goods belonged, but each piece of calico was marked with pltfs.' initials. On defts.' invoices & on their correspondence paper was a printed notice that all goods received by them would be subject to a lien for the general balance of account. After defts. had bleached all the calico, & while half of it remained in their hands, the printers went into liquidation, being indebted to defts. in respect of a general balance of account between them. Pltfs. demanded delivery from defts. of the calico which remained in their hands, but defts., relying on an alleged custom in the calico printing trade, claimed to be entitled to retain the goods under a lien for the general balance of account between themselves & the printers. Defts. also asserted such a general lien by virtue of an authority from pltfs. to the printers to create such a lien to be implied from the ordinary course of business in the calico printing trade. In the alternative defts. asserted a particular lien for the price of bleaching pltfs.' goods:—*Held*: such alleged custom not being proved, & there being no evidence of such implied authority, defts. were not entitled to retain the goods under either a general lien or a particular lien.—*CASSILS & Co. & SASSOON & Co. v. HOLDEN WOOD BLEACHING CO., LTD.* (1914), 84 L. J. K. B. 834; 112 L. T. 373, C. A.

Annotations:—Consd. Pennington v. Reliance Motor Works, [1923] 1 K. B. 127. *Mentd. Green v. All Motors*, [1917] 1 K. B. 625.

246. Calico printers.]—Calico printers have a lien for the general balance.

The judge being of opinion that this case fell within the rule laid down in *Green v. Farmer*, No. 225, *ante*, & that deft. would have no lien unless by special usage of the trade or the agreement of the parties, deft. called a witness, who proved that such was the universal mode of dealing in the trade, & that in an action wherein he was a deft., the right had been litigated & established; & upon

this evidence, deft. obtained a verdict.—*WEBB v. Fox* (1797), Peake, Add. Cas. 167, N. P.

247. —.]—Calico printers have a lien for a general balance on goods delivered to them to print. Where calico goods are delivered to a person to have them printed, & such delivers them to a calico printer for that purpose, to whom he is then indebted; the calico printer may hold these goods against the owner, by virtue of his lien.—*WELDON v. GOULD* (1801), 3 Esp. 268, N. P.

248. —.]—*LILLEY v. BARNSELY*, No. 326, *post*.

249. Commission agent.]—*KNIGHT v. HARRISON* (1823), cited 4 M. & W. at p. 272; 150 E. R. 1431.

Annotation:—Mentd. Scarfe v. Morgan (1838), 4 M. & W.

250. Consignee of goods.]—*FRITH v. FORBES*, No. 125, *ante*.

251. Dyers.]—Dyers have not a general lien, independent of the usage of trade. A dyer has a lien upon an article delivered to him to be dyed, only for the particular price of dyeing that article, & not for his general balance.—*BENNETT v. JOHNSON* (1784), 2 Chit. 455; 3 Doug. K. B. 387; 99 E. R. 710.

252. —.]—Dyers have a lien on goods sent to them to dye, for the balance of a general account.—*SAVILL v. BARCHARD* (1801), 4 Esp. 53, N. P.

253. —.]—As the usage was negatived, defts. could not retain for the price of dyeing any other than the particular goods dyed, or at most only for the dyeing of such goods as were delivered to them at one & the same time under one entire contract. At any rate, the circumstances of defts. having had different parcels of goods in their hands at one time which had been delivered at several times, did not give them a lien on the goods in question remaining in their hands for the price of dyeing such other distinct parcels as had been returned to the owner (*per CUR.*).—*CLOSE v. WATERHOUSE* (1802), 6 East, 523, n.; 102 E. R. 1388.

254. Factors.]—*BOCK v. GORRISSEN*, No. 124, *ante*.

255. —.]—*GREEN v. FARMER*, No. 225, *ante*. *See, generally, AGENCY, Vol. I., pp. 547 et seq.*

256. Fuller.]—Trover for cloths deposited by bkpt. previously to his bkpcy. with deft., a fuller, for the purpose of being dressed:—*Held*: deft. was not entitled to detain them for his general balance for such work done by him for bkpt. previously to his bkpcy.; for there was no mutual credit within 5 Geo. 2, c. 30, s. 28.—*ROSE v. HART* (1818), 8 Taunt. 499; 2 Moore, C. P. 547; 129 E. R. 477.

Annotations:—Expld. Sampson v. Burton (1820), 2 Brod. & Bing. 89. *Consd. Booth v. Hutchinson* (1872), L. R. 15 Eq. 30. *Refd. Astley v. Gurney* (1869), L. R. 4 C. P. 714. *Mentd. Clarke v. Fell* (1833), 4 B. & Ad. 404; *Gibson v. Bell* (1835), 1 Bing. N. C. 743; *Young v. Bank of Bengal* (1836), 1 Deac. 622; *Stanger v. Miller* (1865), 4 H. & C. 1; *Naoroji v. Chartered Bank of India* (1868), L. R. 3 C. P. 444; *Re Winter, Ex p. Bolland* (1878), 8 Ch. D. 225; *Elliott v. Turquand* (1881), 7 App. Cas. 79; *Palmer v. Day*, [1895] 2 Q. B. 618; *Re Daintrey, Ex p. Mant*, [1900] 1 Q. B. 546; *Lister v. Hooson* (1907), 77 L. J. K. B. 161.

Insurance broker.]—*See, generally, INSURANCE, Vol. XXIX., pp. 84 et seq.*

257. Packer.]—A packer may retain goods till he is paid the price of packing, & if he has another debt due to him from the same person, the goods shall not be taken from him till he has paid the

PART III. SECT. 2, SUB-SECT. 2.—B.

254 l. Factors.]—*EVANS v. BULLEY* (1823), 1 Nfld. L. R. 330.—*NFLD.*

whole, notwithstanding debtor is become a bkpt.—*Ex p.* DEEZE (1748), 1 Deac. 684, n.; 1 Atk. 228; cited 4 Burr. at p. 2222; 26 E. R. 146, L. C.

Annotations:—*Expld.* *Re Mathews, Ex p. Ockenden* (1754), 1 Atk. 235. *Consd.* *Green v. Farmer* (1768), 4 Burr. 2214; *Houghton v. Matthews* (1803), 3 Bos. & P. 485; *Rose v. Hart* (1818), 2 Moore, C. P. 547. *Expld.* *Young v. Bank of Bengal* (1836), 1 Deac. 622. *Apprvd. & Follid.* *Re Witt, Ex p. Shubbrook* (1876), 2 Ch. D. 489. *Reid.* *Jones v. Smith* (1794), 2 Ves. 372; *Olive v. Smith* (1813), 5 Taunt. 56. *Mentd.* *French v. Fenn* (1783), 3 Doug. K. B. 257; *Smith v. Hodson* (1791), 4 Term Rep. 211; *Glennie v. Edmunds* (1813), 4 Taunt. 775; *Sampson v. Burton* (1820), 2 Brod. & Bing. 89; *Easum v. Cato* (1822), 5 B. & Ald. 861; *Barnett v. Brandao* (1843), 1 L. T. O. S. 387.

258. ———.]—*GREEN v. FARMER*, No. 225, *ante*.

259. ———.]—A packer is entitled to a general lien on the goods of his customer which are in his hands.—*Re WITT, Ex p. SHUBROOK* (1876), 2 Ch. D. 489; 45 L. J. Bcy. 118; 34 L. T. 785; 24 W. R. 891, C. A.

Annotation:—*Reid.* *Re Catford, Ex p. Carr v. Ford* (1894), 71 L. T. 584.

260. *Printers.*]—*BLEADEN v. HANCOCK*, No. 240, *ante*.

261. ———.]—*REGENCY PRESS, LTD. v. HOWES (H.) & Co., LTD.* (1923), *Times*, Mar. 1.

262. *Receiver.*]—The receiver appointed by debenture-holders, who was also liquidator of a colliery co. & had become possessed of the proceeds of sale of the colliery plant for which he was accountable to the debenture-holders, claimed the right to retain the moneys as an indemnity fund against any future claims which might be made against him for damages to the surface arising out of his working of the coal:—*Held*: he had no such lien at law, & no equitable lien either upon principle or authority.—*DYSON v. PEAT*, [1917] 1 Ch. 99; 86 L. J. Ch. 204; 115 L. T. 700; 61 Sol. Jo. 131; [1917] H. B. R. 97.

Ship's captain.]—*See, generally*, SHIPPING.

263. *Silk factor.*]—Deft., as factor for J., purchased from time to time large quantities of silk, & paid for same. No specific remittances were made to deft. by J. on account of any particular purchase, but a general account current was kept between them, which was made up every half year by deft., & then checked by J. & the next account began with the balance of the preceding one. After the purchase of a certain lot of silk by deft., two such accounts were delivered, & balances struck, which showed that deft. had, subsequent to the purchase of this silk, received remittances from J. amply sufficient to cover both its price & also all the preceding items of the account against him:—*Held*: this amounted to a payment to deft. of the price of the goods in question, so that a custom which entitled him to sell only in case such payment had not been made, did not apply.—*SIEBEL v. SPRINGFIELD* (1863), 3 New Rep. 36; 9 L. T. 324; 12 W. R. 73.

Annotations:—*Reid.* *Johnson v. Stear* (1863), 15 C. B. N. S. 330. *Mentd.* *De Comas v. Prost* (1865), 3 Moo. P. C. C. N. S. 168.

Solicitors.]—*See* BANKRUPTCY, Vol. IV., p. 232, No. 2172; Vol. V., p. 632, No. 5689; COMPANIES, Vol. IX., pp. 551 *et seq.*; Vol. X., p. 952, Nos. 6525–6529; DISCOVERY, Vol. XVIII., pp. 113 *et seq.*, Nos. 645–669; EXECUTION, Vol. XXI., p. 643, No. 2228; EXECUTORS, Vol. XXIII., p. 278, Nos. 3433–3435; INSURANCE, Vol. XXIX., p. 387, Nos. 3089, 3090; & *generally*, SOLICITORS.

264. *Stockbroker.*]—Stockbrokers advancing to bankers, their customers, a specific loan upon specific securities, have thereon not only a special lien in respect of such loan, but also a general lien in respect of whatever else may be due to them

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from the bankers on account of their general business transactions; the rule in such cases being that the general lien is not excluded by a special contract, unless the special contract be inconsistent with it. The circumstance that the securities, though treated by the bankers as their own, belonged, in fact, to third parties, if not to the brokers when making the advance, does not affect their right to a general lien.—*JONES v. PEPPERCORNE* (1858), John. 430; 28 L. J. Ch. 158; 32 L. T. O. S. 240; 5 Jur. N. S. 140; 7 W. R. 103; 70 E. R. 490.

Annotations:—*Consd.* *Bock v. Gorrisen* (1860), 2 De G. F. & J. 434; *Re Bowes, Strathmore v. Vane* (1886), 33 Ch. D. 586. *Follid.* *Re London & Globe Finance Corp.*, [1902] 2 Ch. 416. *Consd.* *Hope v. Glendinning*, [1911] A. C. 419. *Mentd.* *Inman v. Clare* (1858), John. 769; *Leese v. Martin* (1873), L. R. 17 Eq. 224.

265. ———.]—Documents relating to shares belonging to a customer were held by stockbrokers to secure a specific advance of £15,000. When this amount was repaid the documents were left with the brokers, & on subsequent transactions on the Stock Exchange by the customer, acting through the same brokers, losses were made for which the customer was liable to the brokers:—*Held*: although the specific purpose of the deposit had been satisfied by the repayment of the £15,000 the brokers had a general lien on the shares for the amount due in respect of the Stock Exchange transactions.—*Re LONDON & GLOBE FINANCE CORPN.*, [1902] 2 Ch. 416; 71 L. J. Ch. 893; 87 L. T. 49; 18 T. L. R. 679.

Annotation:—*Consd.* *Hope v. Glendinning*, [1911] A. C. 419.

See, generally, STOCK EXCHANGE.

Sub-contractor.]—*See* No. 324, *post*.

266. *Warehousekeeper—London.*]—In trover deft. justified the retaining of the goods under an ancient custom from time immemorial used in the trade of public warehousekeepers in London, for all such public warehousekeepers to have a general lien upon all goods from time to time housed or remaining in their warehouses, for & in the name of the merchants or other persons by whom such public warehousekeepers are retained or employed, for all moneys, or any balance thereof, due from such merchants or other persons to such public warehousekeepers for or on account of advances or expenses which such public warehousekeepers should have made or been put to in or about the payment of duties or of customs on goods consigned to them from abroad, or the payment of freight, & other charges for the conveyance of such goods to the port of London, or the entering, landing, & warehousing such goods:—*Held*: such custom was unreasonable & unjust, & could not be supported in law.—*LEUCKHART v. COOPER* (1836), 3 Bing. N. C. 99; 7 C. & P. 119; 2 Hodg. 150; 3 Scott, 521; 6 L. J. C. P. 131; 132 E. R. 347.

Annotations:—*Consd.* *Dresser v. Bosanquet* (1862), 32 L. J. Q. B. 57. *Reid.* *Kaltenbach v. Lewis* (1883), 24 Ch. D. 54; *Re Catford, Ex p. Carr v. Ford & Canning* (1894), 43 W. R. 159.

267. ———. *Bristol.*]—*Re HANCOCK, Ex p. LUDLOW*, [1879] W. N. 65.

268. ———.]—There is a custom in the city of Bristol that a warehousekeeper is entitled to a general lien on all goods warehoused with him which are the property of the depositor, for all warehouse rent, labourage, & other charges, in connection with such goods or with any other goods warehoused by the same person either before or after.—*Re CATFORD, Ex p. CARR v. FORD* (1894), 71 L. T. 584; 43 W. R. 159; 11 T. L. R. 62; 39 Sol. Jo. 65; 1 Mans. 488; 15 R. 3.

Sect. 2.—How arising: Sub-sect. 2, B.; sub-sects. 3, 4 & 5. Sect. 3.]

269. —.]—HILL & SONS v. LONDON CENTRAL MARKETS COLD STORAGE CO., LTD., No. 149, ante. See, generally, BAILMENT, Vol. III., pp. 75 et seq.

270. Wharfinger.]—A wharfinger has a lien on goods brought to his wharf for the balance of a general account.—NAYLOR v. MANGLES (1794), 1 Esp. 109, N. P.

Annotations:—Consd. *Spears v. Hartly* (1800), 3 Esp. 81; *R. v. Humphery* (1825), M'Cle. & Yo. 173. **Expld.** *Holderness v. Collinson* (1827), 6 L. J. O. S. K. B. 17. **Refd.** *Rushforth v. Hadfield* (1805), 2 Smith, K. B. 634.

271. —.]—A wharfinger's general lien on the goods of his customer in his possession for his balance, in respect of freight & wharfage, due before the *teste* of an immediate extent, issued against such customer being the Crown's debtor, shall prevail against the extent.

Qu.: whether a wharfinger's lien for warehouse room stands on the same footing.

Where a wharfinger detained goods on his premises, seized there under an immediate extent, in respect of a lien for wharfage, which was afterwards established, his claim for warehouse room, from the *teste* of the extent till the forcible removal of the goods was allowed.—*R. v. HUMPHERY* (1825), M'Cle. & Yo. 173; 148 E. R. 371.

Annotations:—Refd. *Giles v. Grover* (1832), 9 Bing. 128; *Scarfe v. Morgan* (1838), 2 Jur. 569; *British Empire Shipping Co. v. Simes* (1858), 27 L. J. Q. B. 397.

272. —.]—Goods consigned to a factor for sale, & by him deposited in the warehouse of a wharfinger, cannot be held by the latter to answer his general demand against the factor.—MELLISH v. CATTLEY (1826), 5 L. J. O. S. K. B. 74.

273. —.]—A wharfinger at Hull claimed a general lien for wharfage, labourage (comprising landing, weighing, & delivery), & warehouse rent. The claim for wharfage was admitted; but as to the residue, upon a case, stating that in Hull such claim had, in a great majority of instances, been acquiesced in, but in others, had been rejected, & that the right had long been, & still was, a disputed point there:—Held:** the claim could not be supported, as the right of general lien arises out of an express or implied contract, of which the former had not been made, & the latter could not be inferred from the circumstances stated in the case.—*HOLDERNESS v. COLLINSON* (1827), 7 B. & C. 212; 1 Man. & Ry. K. B. 55; 6 L. J. O. S. K. B. 17; 108 E. R. 702.**

Annotation:—Refd. *Dresser v. Bosanquet* (1862), 11 W. R. 116.

274. —.]—S., a woolstapler at Huddersfield, was in the habit of making purchases of wool, which he directed to be consigned to deft., a wharfinger & shipping agent at Hull, who forwarded them to him at Huddersfield by carrier. In July, 1841, S. purchased certain wool in Scotland, which was paid for by E., his agent there, & by him forwarded to deft. at Hull. Part of this wool, consisting of ten bags, arrived at Hull

on Sept. 27, & a portion of it was, at ten o'clock on that morning, taken possession of by deft., the remainder being taken possession of by him between ten o'clock & four. E. received from S., in repayment of the advances made by him for the purchase of the wool in question, acceptances of S., which were running at the time of S.'s bkpcy., & were afterwards dishonoured. On Sept. 21, E. received a letter from S., in which he informed him of his insolvency, & directed him to get the wool, & do the best he could to save himself. Accordingly, on some day between Sept. 26 & Oct. 1, E. gave directions to deft. to seize the wool. The remaining portion of the wool arrived at Hull on Oct. 3, & was delivered into deft.'s warehouse on Oct. 6, 7 & 8. An act of bkpcy. was committed by S. on Sept. 22; the *fiat* was dated & issued on Sept. 27, & was signed between twelve o'clock & two o'clock on that day, but it did not appear at what hour it was delivered out. Deft., who claimed to retain the wool in satisfaction of a general balance, had been in the habit of sending to bkpt., by the carrier, together with the goods, printed delivery orders which stated that all goods were considered as general lien, subject not only to freight, but also to the balance of any former account due from the owners or consignors. These orders had been seen more than once in bkpt.'s hands, & on one occasion the weights therein stated had been altered by him:—In an action of trover by the assignees of S. to recover the value of the thirty-six bags of wool:—**Held:** (1) E. had no right to the goods, in respect of which deft. could retain them; (2) deft. had not established any right of general lien, by virtue of which he could retain any part of the goods. **Seemle:** 2 & 3 Vict. c. 29, operates to protect a claim of general lien on goods of a bkpt. coming into the hands of the party before the *fiat*, without notice of an act of bkptcy.—*BOWMAN v. MALCOLM* (1843), 11 M. & W. 833; 12 L. J. Ex. 397; 1 L. T. O. S. 386; 152 E. R. 1042.

275. —.]—BOCK v. GORRISSEN, No. 124, ante.

—.]—See, generally, BAILMENT, Vol. III., pp. 75 et seq.

SUB-SECT. 3.—BY COURSE OF DEALING.

276. General rule.]—GREEN v. FARMER, No. 225, ante.

277. —.]—Where no lien exists at common law it can only arise by contract with the particular party, either express or implied: it may be implied either from previous dealings between the same parties upon the footing of such a lien, or even from a usage of the trade so general as that the jury must reasonably presume that the parties knew of & adopted it in their dealing. But where, as in the case of a common carrier claiming a lien for his general balance, such a lien is against the policy of the common law & the custom of

269 i. Warehousekeeper.]—SMITH (D. A.), LTD. v. CAMPBELL (1911), 17 W. L. R. 493.—CAN.

c. Furniture mover.]—A furniture mover is entitled to a possessory lien on proof of usage of such claim in the district.—*WELCH v. SCOTT* (B. C.), [1919] 3 W. W. R. 425.—CAN.

d. Materialman.]—Where a materialman furnishes material to an owner of certain land ostensibly for the construction of a building on that land, the materialman is entitled to a lien on that land though it be afterwards proved that the materials were

not actually incorporated in the building.—*CANADIAN LUMBER YARDS, LTD. v. FERGUSON*, [1920] 1 W. W. R. 266.—CAN.

e. Stockbrokers — On uncompleted share transfer.]—Applts., stockbrokers in Edinburgh, claimed to retain in their hands an uncompleted transfer of shares purchased & paid for by resp. until a claim by applts. arising out of a subsequent transaction between them & resp. was satisfied:—Held:** applts. as stockbrokers had a general lien on the transfer in question until the claim against resp. was satisfied.—*HOPE &***

Co. v. GLENDINNING, [1911] A. C. 419.—SCOT.

f. Law agent.]—The only person who has a right of retention available against every one is a law agent.—*MACRAE v. LEITH*, [1913] S. C. 901; 50 Sc. L. R. 406; 1 S. L. T. 273.—SCOT.

g. Calenderers & packers.]—Calenderers & packers in Glasgow have by usage of trade, a right to retain goods for a general balance.—*STRONG v. PHILIPS & Co.* (1878), 5 R. (Ot. of Sess.) 770; 15 Sc. L. R. 443.—SCOT.

the realm, which only gives him a lien for the carriage price of the particular goods, there ought to be very strong evidence of a general usage for such a lien to induce a jury to infer the knowledge & adoption of it by the particular parties in their contract: & the jury having negatived such a general usage, though proved to have been frequently exercised by defts. & various other common carriers throughout the north for ten or twelve years before, & in one instance so far back as thirty years, though not opposed by other evidence, the ct. refused to grant a new trial. *Semble*: the cts. lean very strongly against the establishment of a lien for a general balance by carriers as a usage of trade.

Growing liens are always to be looked at with jealousy, & require stronger proof. They are encroachments upon the common law. If they are encouraged the practise will be continually extending to other trades & other matters. The farrier will be claiming a lien upon a horse sent to him to be shod (LORD ELLENBOROUGH, C.J.).—RUSHFORTH v. HADFIELD (1806), 7 East, 224; 3 Smith, K. B. 221; 103 E. R. 86; *previous proceedings* (1805), 6 East, 519.

Annotations:—*Reid*. Judson v. Etheridge (1833), 3 Tyr. 954; United States Steel Products Co. v. G. W. Ry., [1916] 1 A. C. 189.

278. —.]—FERGUSON v. NORMAN, No. 215, *ante*.

SUB-SECT. 4.—BY STATUTE.

279. Whether excluding lien by usage.]—GREEN v. ST. KATHERINE'S DOCK CO., No. 129, *ante*.

280. —.]—A dock co.'s special Act enabled them to detain, until payment, any timber, goods, etc., on which the "owner, consignor, or consignee," should not have paid the charges for wharfage, rent, etc., given by the Act; & if timber, goods, etc., should have been removed without payment, to restrain & detain & sell "any goods & chattels of the owner, consignor, or consignee respectively." A subsequent Act incorporated parts of Harbours, Docks, & Piers Clauses Act, 1847 (c. 27); by sect. 3 of which the word "owner," when used in relation to "goods," includes "any consignor, consignee, shipper, or agent for sale or custody of such goods, as well as the owner thereof"; & by sect. 45 of which a dock co., if goods have been removed without payment of rates, etc., "may distrain or arrest any other goods within the limits of the dock, etc., belonging to the person liable to pay such rates, & may sell," etc.:—*Held*: (1) the dock co. had no right to detain timber really belonging to A., but standing in their books in the name of the brokers C. M. & co., for unpaid rent & rates due on other goods which stood in the same broker's name, but which did not belong to A.; (2) it was not necessary to consider the question whether at common law the co. could have had a general lien for the first of their charges, which was for wharfage & wharfingers only, the relations of the parties being regulated by the special Act of Parliament under which they acted.—DRESSER v. BOSANQUET (1863), 4 B. & S. 486; 2 New Rep. 372; 32 L. J. Q. B. 374; 9 Jur. N. S. 458; 11 W. R. 840; 122 E. R. 542, Ex. Ch.

Annotation:—*As to* (2) *Reid*. *Re Catford*, Ex p. Carr & Ford (1894), 1 Mans. 488.

Under Harbours, Docks, & Piers Clauses Act, 1847 (c. 27), s. 45.]—*See* WATERS & WATER-COURSES.

SUB-SECT. 5.—OTHER CASES.

281. Whether by general assignment of all effects—Assignment an act of bankruptcy.]—Ex p. SMITH, No. 213, *ante*.

SECT. 3.—EFFECT OF LIQUIDATION AND BANKRUPTCY.

282. Bankruptcy of debtor.]—The attorney has a lien upon the papers in the same manner against assignees as against bkpt.; & though this does not arise by any express contract or agreement, yet it is as effectual, being an implied contract by law. But as to papers received after the bkpcy., they cannot be retained; & therefore, if the assignees desire it, the bill may be taxed, & upon payment, papers delivered up; & this although the attorney had come in, & proved his debt, for a creditor who has a security may come in & prove his debt, because possibly his security may prove deficient (LORD TALBOT, C.).—Ex p. BUSH (1734), 2 Eq. Cas. Abr. 109; 22 E. R. 93, L. C.

283. —.]—Ex p. DEEZE, No. 257, *ante*.

284. —.]—Ex p. ANDREWS (1764), 1 Cooke's Bankrupt Laws, 8th ed. 423, L. C.

285. —.]—Ex p. SMITH, No. 213, *ante*.

286. Bankruptcy of principal—Effect on factor's lien.]—A cargo came into deft.'s possession as factor on Oct. 21. & was sold by him on Oct. 26, on which day the principal committed an act of bkpcy. The proceeds of sale were received by deft. at some subsequent time:—*Held*: as deft. became lawfully possessed of the cargo before the act of bkpcy. he had a right to proceed with the sale, to receive the money, & to hold it in payment of his own balance as against bkpt.'s assignee.—ROBSON v. KEMP (1802), 4 Esp. 233, N. P.
Annotation:—*Mentd*. Smallcombe v. Bruges (1824), M'Cle. 45.

287. —.]—S., who had for many years traded as a timber merchant in his own name, entered into an agreement with F. & Co., who were also timber merchants, to carry on his business thenceforth as their agent at a remuneration by way of a share of profits. The business was thenceforth carried on under this agreement, but in the name of S. as before. S. dealt with the timber in his possession as if he were the absolute owner of it, except as between himself & F. & co., & there was nothing done to inform the outside world of the change which had taken place. In the course of the business F. & co. drew bills on S., which he accepted in his own name to be protected by F. & co. Both F. & co. & afterwards S. filed liquidation petitions. Before S.'s liquidation, F. & co.'s trustee demanded the timber in his hands, which was refused:—*Held*: to the extent of the current bills, S.'s estate had a lien on the timber. *Semble*: the reputed ownership clause applies to goods in the hands of a factor, unless the relation of principal & factor is notorious.—*Re* FAWCUS, Ex p. BUCK (1876), 3 Ch. D. 795; 34 L. T. 807.

PART III. SECT. 3.

2821. Bankruptcy of debtor.]—*Re* JASPER LIQUOR CO., LTD., Ex p. SCOTT (1915), 32 W. L. R. 213; 9 W. W. R. 6, 364; 25 D. L. R. 21.

Sect. 3.—Effect of liquidation and bankruptcy. Sects. 4, 5 & 6.]

288. — Effect on agent's lien.]—A business, which was the property of A., was carried on in the name of B., who was the agent of A. at a fixed salary; [B.] being under considerable liabilities in respect of that business, [A.] became bkpt.; [B.] was held to have a lien on the property of the concern to the extent of his liabilities; & the assignees of [A.] were restrained from interfering with the business or the property belonging to it, & from receiving moneys due to it.—*FOX-CRAFT v. WOOD* (1828), 4 Russ. 487; 38 E. R. 888, L. C.

289. — —.]—A co. employed an agent for the sale of goods in a shop taken for that purpose. The agent was to be paid a commission on the sale, & he was to accept bills for the co. for such a reasonable amount as was represented by the goods on his premises; & if on the bills arriving at maturity the agent had not sufficient funds in his hands to meet the bills the co. were to make good the difference. The co. failed & was wound up, & at that time a bill accepted by the agent had not arrived at maturity:—*Held*: the agent had a lien upon the goods in his hands for the amount of the bill.—*Re PAVY'S PATENT FELTED FABRIC CO.* (1876), 1 Ch. D. 631; 45 L. J. Ch. 318; 24 W. R. 507.

290. Possession obtained after petition—Before winding up order—Carrier's lien.]—The N. Iron & Steel co. was indebted to the M. Ry. co. for goods carried by the latter for the former. A petition was presented praying for a winding up order of the N. co. That co. then sent other goods to the M. co. for carriage by them, after which an order was made to wind up the N. co. The M. co. then refused to deliver to the official liquidator of the N. co. the goods in their hands, claiming a lien on them for the debt previously due for the carriage of the other goods. The official liquidator of the N. co. then took out a summons in chambers to obtain delivery of the goods to him on payment of the money due for the carriage thereof:—*Held*: the summons must be dismissed, & the official liquidator of the N. co. must pay the debt due to the M. co. if he wished to obtain possession of the goods in their hands.—*Re NORTHFIELD IRON & STEEL CO., LTD.* (1866), 14 L. T. 695.

Annotation:—Distd. Re Bushell, Ex p. G. W. Ry. (1882), 22 Ch. D. 470.

291. — — Lien by contract.]—In 1876 an agreement was entered into between the L. Coal co. & the G. W. Ry. co., by which coals consigned by the coal co. were carried to a "ledger account," one condition of which was, that the goods & waggons belonging to or sent by the person having a ledger account should be subject to a general lien in favour of the railway co. for all moneys due to them, etc., from such person on any account, such lien to take effect immediately after the failure of payment on demand of any sums appearing to be due on the ledger account; "in case of bkpcy., insolvency, or stoppage of payment, such lien to take effect immediately for any sum appearing due in the books of the co.," with a right to sell such goods & waggons, & out of the proceeds to retain the sums due. The coal co. became insolvent, & on Dec. 16, 1885, a petition was presented for winding up, & in Feb. 1886, an order to wind up was made, & on Jan. 20 following a provisional liquidator was appointed. When the petition was presented the coal co. was indebted to the railway co. in respect of charges for freight. Of the fifteen waggons in use by the coal co., &

employed in carrying coal over the railway co.'s line, nine had been received by the railway co. prior to presentation of the winding up petition & had been detained by them ever since; four in the possession of the railway co. when the petition was presented had travelled up & down the line since, but returned into the possession of the railway co. before the date of the winding up order; two did not come into the possession of the railway co. until between the presentation of the petition & the winding up order. The liquidator claimed delivery up by the railway co. of the fifteen waggons which the co. claimed to retain in satisfaction of the general lien under the agreement:—*Held*: the lien given to the railway co. by the agreement, which was made for the ordinary purposes of the coal co.'s business, was good & valid, & took effect upon the insolvency of that co., & had not been displaced by anything that had taken place in the winding up proceedings.—*Re LLANGENNECH COAL CO.* (1887), 56 L. T. 475.

292. — Receiver & manager appointed.]—A trader opened with a railway co. a credit account for freight, by which it was agreed that the co. should have a general lien for all moneys due by him to them on any account on all goods belonging to him in their hands. He afterwards filed a liquidation petition, under which a receiver of his property & manager of his business was appointed. In order to carry on the business the receiver bought some goods, which he paid for with his own money, & sent them to the co. consigned to the trader. The co. claimed the benefit of the agreement, & refused to deliver the goods until they were paid the amount which the trader owed them for freight due at the time of the filing of the petition. The receiver in order to obtain the goods paid the co. £50 under protest, & then applied to the Ct. of Bkpcy. to order the co. to repay him the £50, & an order was made accordingly:—*Held*: the Ct. of Bkpcy. had no jurisdiction to make the order. *Semble*: the co. would have no defence to an action by the receiver for the £50.—*Re BUSHELL, Ex p. GREAT WESTERN RY. CO.* (1882), 22 Ch. D. 470; 52 L. J. Ch. 734; 48 L. T. 196; 31 W. R. 419, C. A.

293. Possession at date of petition—Lost & recovered before winding up order.]—*Re LLANGENNECH COAL CO., No. 291, ante.*

294. Possession obtained after winding up order—Debt accrued due before liquidation.]—In 1864 an agreement was entered into between pltfs., a joint stock co., limited, & defts., a railway co., by which goods consigned to pltfs. were carried by defts. on a credit account; one condition being that the goods or waggons belonging to or sent by pltfs. should be subject to a general lien in favour of defts. for all moneys due to them from pltfs., to take effect at the option of defts. at any time after the failure of payment of any sums appearing due on the credit account, or in case of bkpcy., insolvency, or stoppage of payment. Coke had been carried for some time by defts. for pltfs. under this agreement, & on Nov. 19, 1866, there was £2,000 due from pltfs. to defts. on the account for carriage. On Oct. 30, 1866, a petition for winding up pltfs.' co. was presented by a creditor, & notice was given in the *London Gazette*, & on Nov. 16 an order for winding up was made under Companies Act, 1862 (c. 89). On Nov. 19, an official liquidator was appointed; but the formal appointment was not made till Nov. 30. Pltfs.' business was still carried on under the liquidator; & on Nov. 20, coke consigned to pltfs.' co. was put

PART III.—GENERAL LIEN.

in trucks belonging to pl'tfs. on defts.' line, & they detained them at the place of loading for three days, in exercise of their general lien; but, on the liquidator informing them of the order for winding up, they forwarded the trucks at once. An action having been brought by the liquidator in the name of the co. for this detention:—*Held*: the action was maintainable.—*WILTSHIRE IRON CO. v. GREAT WESTERN RY. CO.* (1871), L. R. 6 Q. B. 776; 40 L. J. Q. B. 308; 23 L. T. 666; 19 W. R. 935, Ex. Ch.

Annotation:—*Mentd.* Sankey Brook Coal Co. v. Marsh (1871), L. R. 6 Exch. 185.

See, also, No. 80, *ante*.

SECT. 4.—EXTENSION OF PARTICULAR TO GENERAL LIEN.

295. By usage—As between carriers & consignee—Whether rights of consignor affected.]—

(1) An usage for carriers to retain goods as a lien for a general balance of account between them & the consignees, cannot affect the right of the consignor to stop the goods *in transitu*.

(2) I think it impossible to maintain that an agreement between the consignees of goods & the carriers upon the western road can put an end to the right of stopping *in transitu* vested in the consignors of goods before that agreement existed (*LORD ALVANLEY, C.J.*).

(3) A special acceptance can only be made with the consignor or his servant when he brings the goods: it cannot be made with the consignee. Nor can the consignor agree that the consignee shall not take the goods until he shall have paid the general balance (*ROOKE, J.*).—*OPPENHEIM v. RUSSELL* (1802), 3 Bos. & P. 42; 127 E. R. 24.

Annotations:—*As to* (1) *Consd.* Leuckhart v. Cooper (1836), 3 Bing. N. C. 99. *Refd.* Richardson v. Goss (1802), 3 Bos. & P. 119; Harris v. Packwood (1810), 3 Taunt. 264; Morley v. Hay (1828), 3 Man. & Ry. K. B. 396; Jackson v. Nichol (1839), 5 Bing. N. C. 508; Pearson v. Goschen (1864), 17 C. B. N. S. 352; Booth S.S. Co. v. Cargo Fleet Iron Co., [1916] 2 K. B. 570; United States Steel Products Co. v. G. W. Ry., [1916] 1 A. C. 189.

296. By agreement—Between carriers & consignees—Whether rights of consignor affected.]—*OPPENHEIM v. RUSSELL*, No. 295, *ante*.

297. — Between carriers & consignor—Whether rights of carrier against consignee affected.]—*OPPENHEIM v. RUSSELL*, No. 295, *ante*.

298. — Between warehouseman & vendor—After goods sold—Whether purchaser bound.]—Where goods have been warehoused, & the owner has sold them, although the purchaser has not taken possession of the goods, a document pur-

porting to give the warehousemen a lien for sums due to them by the vendor, is not binding upon the purchaser.—*NICHOLSON v. HARPER*, [1895] 2 Ch. 415; 64 L. J. Ch. 672; 73 L. T. 19; 59 J. P. 727; 43 W. R. 550; 11 T. L. R. 435; 39 Sol. Jo. 524; 13 R. 567.

299. — What amounts to agreement.]—*KINNEAR v. MIDLAND RY. CO.*, No. 309, *post*.

300. By notice—As between carrier & owner—Right to retain for general balance of consignee—Consignee a factor.]—A carrier had given notice that all goods would be subject to a lien, not only for the freight of the particular goods, but also for any general balance due from their respective owners. Goods having been sent by the carrier addressed to the order of J. a mere factor:—*Held*: the carrier had, not as against the real owner, any lien for the balance due from J. *Qu.*: whether, if the notice had been, that all goods, to whomsoever belonging, should be subject to a lien for any general balance that may be due from the persons to whom they are addressed, he would have any right to retain the goods for the balance due from J.—*WRIGHT v. SNELL* (1822), 5 B. & Ald. 350; 106 E. R. 1219.

Annotations:—*Appld.* Leuckhart v. Cooper (1836), 3 Bing. N. C. 99. *Consd.* Cassils & Sassoon v. Holden Wood Bleaching Co. (1914), 84 L. J. K. B. 834. *Refd.* United States Steel Products Co. v. G. W. Ry., [1916] 1 A. C. 189. *Mentd.* Riley v. Horne (1828), 5 Bing. 217.

SECT. 5.—AGAINST WHOM OPERATIVE.

Particular lien—Extended to general lien.]—*See* Sect. 4, *ante*.

SECT. 6.—PLEADING.

See, generally, PLEADING.

301. Must be specifically pleaded.]—In an action of detinue for certain goods, to wit, one thousand yards of broad cloth & two pieces of other cloth, deft. by his plea claimed a lien for fulling the cloths mentioned in the declaration; & it appeared at the trial that originally eight pieces of cloth had been delivered at the same time to deft. to be fulled, & that six out of the eight pieces had afterwards been redelivered:—*Held*: the plea only extended to the two pieces actually detained, & deft. could not under that plea set up a claim of lien for fulling more than two pieces, but should have asserted specifically his claim in respect of the eight.—*COOMBS v. NOAD* (1842), 10 M. & W. 127; 2 Dowl. N. S. 315; 11 L. J. Ex. 409; 152 E. R. 410.

PART III. SECT. 6.

h. Misdescription of property—Lien on land—Right to amend.]—*RAFUSE v. HUNTER, MACDONALD v. HUNTER*

(1906), 12 B. C. R. 126; 3 W. L. R. 381.—*CAN.*

k. Readiness to abandon lien —

*On tender of amount due.]—**JUGGERNAUTH DOSS v. BRIJNATH DOSS* (1878), I. L. R. 4 Cal. 322; 3 C. L. R. 375.—*IND.*

Part IV.—Particular Lien.

SECT. 1.—IN GENERAL.

302. Possession wrongfully obtained.]—If a surveyor by order of the vestry demolish part of a building not within the line, & remove the materials to a place of his own, & claim a lien for the expenses, this amounts to a conversion.—*SEAR v. FREEBODY* (1858), 31 L. T. O. S. 131; 22 J. P. 707.

See, generally, Part II., Sect. 3, sub-sect. 1, B. (a), ante.

303. Creation of lien—By one co-owner.]—The secret removal of entire chattels by one tenant in common, without the consent or knowledge of the other, & for the purpose of selling them & applying the proceeds to his own use, does not amount to a conversion, nor is it an unlawful act for which the co-tenant can maintain an action at law, even although the removal has created a lien on the chattels by a third party.—*JONES v. BROWN* (1856), 25 L. J. Ex. 345; 27 L. T. O. S. 203; 4 W. R. 680.

Annotation:—Reid. Nyburg v. Handelaar (1892), 8 T. L. R. 395.

304. Arising out of contract—Contract must be certain.]—To an action of detinue for title deeds, deft. pleaded that K. was seised of the mesuages to which they related, & devised them to D. for life, who agreed with deft. to sell him all her interest therein; before this agreement, the deeds were in the custody of deft. as D.'s agent, & that, upon the making of the agreement, D. left them in the possession of deft., that he might hold them until the agreement was performed etc.:—*Held*: this statement did not show with sufficient certainty any contract whereby deft. acquired a lien on the deeds.—*ROBERTSON v. SHOWLER* (1845), 13 M. & W. 609; 2 Dow. & L. 687; 14 L. J. Ex. 120; 153 E. R. 254.

Annotations:—Mentd. Fancourt v. Thorne (1846), 9 Q. B. 312; *Belfast & Ballymena, etc. Rys. v. Keys* (1861), 9 H. L. Cas. 556.

305. ———.]—The ct. will not decree a lien upon a kind of property, unless where the words attempted to be relied upon are sufficiently explicit.—*RICHARDSON v. REID* (1848), 10 L. T. O. S. 459.

306. ——— Must be consistent with terms of contract.]—*CHASE v. WESTMORE*, No. 64, *ante*.

307. ——— Lien on part for whole debt—Where contract entire.]—*BLAKE v. NICHOLSON*, No. 367, *post*.

308. ———.]—*CHASE v. WESTMORE*, No. 64, *ante*.

309. Carrier's common law right enlarged by agreement—Construction of agreement.]—Pltf. was assignee of a bkpt. colliery co., & defts. were carriers of goods on their line of railway from their B. station, having also an establishment at D. on their line, where they made & repaired their own locomotive engines, & also occasionally repaired those belonging to colliery proprietors whose

works were connected with the main line of the railway. Before their bkpcy. the colliery co. carried on business as coal merchants & coal proprietors about two miles from the B. station, at which latter their works were connected, by a tramway of their own, with the main line of defts.' railway; & in June, 1864, defts. opened a monthly credit account with the colliery co. for the carriage of their goods by defts. from the B. station, upon certain written conditions, the sixth of which provided that if the monthly accounts were not paid in accordance with the specified conditions, defts. were "to have the right at any time to detain any goods or waggons in their possession by way of lien to secure the general balance owing to them." In July, 1864, a locomotive engine of the colliery co., used by them for taking coals & goods from their works to deft.'s line at B., being out of repair, it was sent, by agreement, to defts.' establishment at D. to be repaired by them, & was drawn by defts. from B. to D. for that purpose attached to one of their ordinary luggage trains, & a sum of £2 18s. for such haulage was charged by defts. to the colliery co. in the monthly carriage account for July, & was not disputed by the latter before their bkpcy. Upon the subsequent adjudication of the colliery company as bkpts., in Oct. 1864, defts. claimed to hold the locomotive engine, which was then in their establishment at D. undergoing repairs, as a security, not only for the cost of such repairs & the charge for haulage, but also for a general balance due to them for the carriage of coals, etc., for the colliery co., & on a special case, stated without pleadings under the C. L. P. Act, 1852 (c. 76), for the opinion of the Ct. of Exch.:—*Held*: the terms of the sixth condition of the agreement between defts. & the colliery co., which was intended merely to enlarge the rights of defts. as carriers, & to give them as such a right of lien beyond what they would have at common law, applied only to coals & such like "goods" to be carried in the ordinary way, & not to the engine in question, which was delivered to defts., not under any contract to carry, but under an agreement to repair, to which the charge for haulage was incidental; & therefore, the right of general lien claimed by defts. did not attach.—*KINNEAR v. MIDLAND RY. CO.* (1868), 19 L. T. 387.

310. Transfer—Payment of claim & transfer of goods.]—If A. have a lien on goods of a bkpt. in his hands, & B., without knowledge of any act of bkpcy., pay A. the sum for which he has a lien, & advance a further sum to bkpt. upon those goods, which are delivered to him, trover will not lie by assignees. He has the same lien as A.; but if the value of the goods be more than the whole sum advanced, the assignees may maintain an action for money had & received for the residue.—*DIXON v. PURSE* (1800), Peake, Add. Cas. 187, N. P.

PART IV. SECT. 1.

1. *Building contract—Payment by shares in purchasing company—Subsequent agreement for extras—Payable in cash.]—*The owner of land agreed with a co. to build a factory thereon, which, when completed, was to be conveyed

to the co. in return for a certain number of shares. During the progress of the building certain extra work for the co., agreed to be paid for in cash, became necessary, & was begun before but not completed until after the execution of the conveyance to the co.:—*Held*: the owner had no vendor's

lien for the value of the extra work.—*Re TORONTO DROP FORGE CO.* (1893-4), 24 O. R. 191.—CAN.

m. *Arising out of contract—Property in general terms—Ejusdem generis.]—*LONDON GUARANTEE & ACCIDENT CO. v. GEORGE (1906), 16 Man. L. R. 132.—CAN.

PART IV.—PARTICULAR LIEN.

SECT. 2.—AT COMMON LAW.

SUB-SECT. 1.—WORK DONE OR MONEY EXPENDED.

A. In General.

311. General rule.] — CHASE v. WESTMORE, No. 64, *ante*.

312. —.] — BEVAN v. WATERS, No. 53, *ante*.

313. —.]—(1) A certificated conveyancer is not entitled to a lien upon deeds delivered to him, & "with & in respect of" which he has done business, the business not having been done upon the deeds, or their value thereby increased. *Semble*: *aliter*, if he had done work upon them.

(2) A lien exists at common law where labour has been expended upon an article (ALDERSON, B.). —STEADMAN v. HOCKLEY (1846), 15 M. & W. 553; 15 L. J. Ex. 332; 7 L. T. O. S. 211; 10 Jur. 819; 153 E. R. 969.

Annotation:—As to (1) & (2) *Reid*. Castellain v. Thompson, Thompson v. Castellain (1862), 32 L. J. C. P. 79.

314. Must relate to particular chattel.]—Where, after a fire at a wharfinger's, the salvage of certain oil belonging to various owners, the identity of which was lost, was retained in the warehouses under an arrangement with the agent of the owners, to pay charges upon the whole; & there was a distinct quantity of oil belonging to another owner, the identity of which was not lost, & which was not treated as salvage:—*Held*: the wharfingers had no lien on this oil for the charges on the whole of the salvage.—GRANT v. HUMPHERY (1862), 3 F. & F. 162, N. P.

B. Conditions Precedent.

(a) Request of Owner.

315. General rule.]—In trover debt. cannot justify detaining goods till money laid out upon them without authority is paid. But it may be deducted in damages.—STONE v. LINGWOOD (1725), 1 Stra. 651; 93 E. R. 759.

316. —.]—If a servant employs a tradesman to do any work, who has not been employed before by his master, & the tradesman does the work without any communication with the master, though the thing to which the work was done was the property of the master, he is not liable.

Deft. had no right to hold the [chattel] as a lien, whatever claim of that sort he might have, he must derive it from legitimate authority (LORD ELLENBOROUGH, C.J.).—HISCOX v. GREENWOOD (1802), 4 Esp. 174, N. P.

Annotation:—*Reid*. Pennington v. Reliance Motor Works, [1923] 1 K. B. 127.

Work or expenditure by gratuitous bailee.]—See BAILMENT, Vol. III., p. 66, Nos. 88, 89.

317. Hire of custody by bailee—Without authority of bailor.]—BUXTON v. BAUGHAN, No. 48, *ante*.

318. Order given by person having no title—No authority from owners.]—T. & co., the owners of flats or barges at Liverpool, were employed by H. & co. to carry certain copper ore to one L., the owner of crushing-mills at Birkenhead, who, in consideration of being employed to crush the ore,

agreed to indemnify H. & co. against all risk in the transit. Whilst on its way to Birkenhead, the barge with the ore on board foundered in the river. T. & co. thereupon gave notice of the loss to H. & co., & requested to be employed to raise the cargo, to which a clerk in the employ of H. & co. replied,—“We have nothing to do with it: you had better see L. He has the management of it.” T. & co. went to L., who said,—“Oh: I am all right. I am insured with M.”; &, in answer to a suggestion of T. & co. as to the necessity for prompt action, he added: “You had better prepare for getting it up; but you must go to M. for orders.” T. & co. then went to M. who said: “You had better get on with it, & do the best you can for us.” T. & co. thereupon proceeded with the work, &, after incurring great labour & expense, succeeded in recovering the ore. H. & co. afterwards tendered the sum agreed to be paid for the carriage of the ore to Birkenhead, & demanded it: but T. & co. refused to part with it, claiming a lien upon it for the expenses incurred in raising it from the bottom of the river:—*Held*: there was no contract for the work done, as between T. & co. & H. & co., in respect of which such claim of lien could be sustained. *Qu*: under what circumstances a man is entitled to sue or to assent a lien for work bestowed upon a chattel, whereby its value is increased.—CASTELLAIN v. THOMPSON, THOMPSON v. CASTELLAIN (1862), 13 C. B. N. S. 105; 1 New Rep. 97; 32 L. J. C. P. 79; 7 L. T. 424; 11 W. R. 147; 1 Mar. L. C. 259; 143 E. R. 41.

Annotations:—*Expld*. The Solway Prince, [1896] P. 120. *Reid*. Hingston v. Wendt (1876), 1 Q. B. D. 367.

319. Order given by servant or agent—Without authority of master—Tradesman never employed before.]—HISCOX v. GREENWOOD, No. 316, *ante*.

320. — Acting within scope of employment.]—Lien may be derived through the acts of servants or agents acting within the scope of their employment. If a servant deliver cloth to a tailor, to make his master's liveries, the tailor will have a lien on the cloth for the value of his work; but though the servant pay the tailor his charge, that will not give the servant a lien on the liveries (LORD ELLENBOROUGH, C.J.).—HUSSEY v. CHRISTIE (1808), 9 East, 426; 103 E. R. 636; *previous proceedings* (1807), 13 Ves. 594, L. C.

Annotations:—*Reid*. *Ex p*. Halkett (1814), 3 Ves. & B. 135; Smith v. Plummer (1818), 1 B. & Ald. 575; Bristow v. Whitmore (1861), 9 H. L. Cas. 391; The Gustaf (1862), 7 L. T. 259.

321. Order given by hire-purchaser — Hirer liable to keep chattel in repair.]—By a hire-purchase agreement pltf. let a dogcart to a person who in the course of time sent the cart to be repaired to deft., who was a coachbuilder. The hire-purchase agreement contained a clause by which the hirer undertook “to keep & preserve the dogcart from injury.” Some instalments under the agreement being unpaid pltf. sought to recover the cart, but deft. claimed a lien upon it for the cost of the repairs:—*Held*: under the circumstances the hirer had authority to send the cart to be repaired, & therefore deft.'s lien was good, not only against the hirer, but also against the pltf.—KEENE v. THOMAS, [1905] 1 K. B.

PART IV. SECT. 2, SUB-SECT. 1.—A.

311 i. General rule.]—STUART v. TAYLOR (1914–15), 7 O. W. N. 551; 33 O. L. R. 20.—CAN.

314 i. Must relate to particular chattel.]—*Re* CREDITORS' RELIEF ACT (Sask.) (1922), 65 D. L. R. 768; [1922] 1 W. W. R. 991.—CAN.

n. Lien pro tanto.] — The fact that deft. threshers broke their contract in not threshing the whole of pltf.'s crop as agreed:—*Held*: not to deprive them of their right to be paid for what they threshed, no stipulation having been made that they were not to be paid until all the threshing was done.—HILL v. HOWIE, [1919] 2

W. W. R. 392.—CAN.

PART IV. SECT. 2, SUB-SECT. 1.—B. (a).

o. Repairs & storage of car in garage.]—WEBSTER v. BLACK (1914), 28 W. L. R. 300; 17 D. L. R. 15; 24 Man. L. R. 456.—CAN.

Sect. 2.—At common law: Sub-sect. 1, B. (a), (b) & (c), & C.]

136; 74 L. J. K. B. 21; 92 L. T. 19; 53 W. R. 336; 21 T. L. R. 2; 48 Sol. Jo. 815, D. C.

Annotations:—*Expld.* Cassils & Sassoon v. Holden Wood Bleaching Co. (1914), 84 L. J. K. B. 834. *Apprvd. & Follid.* Green v. All Motors, [1917] 1 K. B. 625. *Expld.* Pennington v. Reliance Motor Works, [1923] 1 K. B. 127. *Refd.* Jowitt v. Union Cold Storage Co., [1913] 3 K. B. 1.

322. ———.]—By a hire-purchase agreement pltf. let a motor car to a person who agreed to "keep the car in good repair & working condition;" & the car was to be the property of pltf. until all the instalments were paid. During the currency of the agreement the car was injured by an accident & the hirer sent it to defts. to be repaired. Defts. were informed that the car was held on a hire-purchase agreement. After the car was sent to defts., & before the contract for the repairs was made, default was made in payment of an instalment under the hire-purchase agreement. Pltf. did not terminate the agreement until the repairs had been commenced, when he demanded the car from defts., but did not tender the amount then due for the cost of the repairs. Defts. refused to deliver it up, claiming a lien on the car for the cost of repairs; & the repairs were subsequently completed:—*Held*: defts. had a lien on the car as against pltf. for the cost of the repairs.—*GREEN v. ALL MOTORS, LTD.*, [1917] 1 K. B. 625; 86 L. J. K. B. 590; 116 L. T. 189, C. A.

Annotation:—*Refd.* Pennington v. Reliance Motor Works, [1923] 1 K. B. 127.

323. Order to sub-contractor—Without owner's authority.]—CASSILS & CO. & SASSOON & CO. v. HOLDEN WOOD BLEACHING CO., LTD., No. 245, *ante*.

324. ———.]—Pltf. ordered a saloon body for his motor car from one E., who undertook the work for £500 & then bargained with defts. that they would do it for £377. Pltf. gave no authority to E. to deliver the car to any third person. Pltf. paid E., & when the work had been done, E. took the car away from defts.' works without paying defts. & redelivered it to pltf. Subsequently the car was sent by pltf. to defts. for repairs, & defts. then claimed a lien upon it for the amount owed to them by E. In an action for the return of the car:—*Held*: E. had no implied authority from pltf. to create a lien in favour of defts., & pltf. was entitled to succeed.—*PENNINGTON v. RELIANCE MOTOR WORKS, LTD.*, [1923] 1 K. B. 127; 92 L. J. K. B. 202; 128 L. T. 384; 38 T. L. R. 670; 66 Sol. Jo. 667.

Whether person other than owner can confer lien.]—*See, generally*, Part II., Sect. 3, sub-sect. 4, *ante*.

(b) Completion of Work.

325. General rule.]—No right of lien attaches until the work on the goods is completed (*PARKE, B.*).—*PINNOCK v. HARRISON* (1838), 3 M. & W. 532; 1 Horn & H. 114; 7 L. J. Ex. 137; 150 E. R. 1256.

326. Completion prevented by owner—Lien for work actually done.]—(1) If A. deliver a chattel to B. under a contract by the latter to perform certain work thereon at a fixed price, & before such work is completed, A. countermand the order, & demand the chattel from B., at the same time tendering a sum sufficient to pay for the work actually done, he will be entitled to maintain trover therefor, without tendering the contract price. But, in such a case, the jury must estimate the measure & value of the work done, as if the contract had never existed.

If one man enters into a contract with another to get certain work done, & the latter agrees to do that work for a specific sum, but the party to whom belongs the chattel on which the work is to be done prevents him from completing such work, the party so prevented has a right of action to recover any damage which he may have sustained by reason of such prevention; & he has also a right of lien for the value of the work actually done, as well as for any expense incurred by him in doing same (*ROLFE, B.*).

(2) Particular liens are well established; but, with the exception of bankers & factors, I am not aware of any instance in which, in the absence of an express or implied agreement to that effect, the law allows a general lien (*ROLFE, B.*).

(3) *Semble*: by the custom of trade in Manchester as between calico printers & engravers, the latter have no right of general lien for balances due to them from the former.—*LILLEY v. BARNSELY* (1844), 1 Car. & Kir. 344; 2 Mood. & R. 548, N. P.

Annotation:—*As to* (1) *Refd.* Green v. All Motors, [1917] 1 K. B. 625.

(c) Improvement of Chattel.

327. General rule.]—A person to whom a horse is delivered to be stabled, taken care of, fed & kept, has no lien on him for the expense incurred in so doing.

Admitting that a trainer has a lien, it must be on the ground that he has done something for the benefit & improvement of the animal (*BOLLAND, B.*).—*JUDSON v. ETHERIDGE* (1833), 1 Cr. & M. 743; 3 Tyr. 954; 2 L. J. Ex. 300; 149 E. R. 598.

Annotations:—*Expld.* Castellain v. Thompson, Thompson v. Castellain (1862), 13 C. B. N. S. 105. *Refd.* Jackson v. Cummins (1839), 5 M. & W. 342. *Mentd.* Hatton v. Car Maintenance Co. (1914), 110 L. T. 765.

328. ———.]—(1) Generally speaking, a bailee has a lien on goods bailed to him in those cases only where an additional value has been conferred by him on the chattel, either directly by the exercise of personal labour & skill, or indirectly by the intermediate use of any instrument over which he has control, & therefore, an agister to whom cattle have been bailed, has by the general law no lien on them for the value of the pasturage consumed; & this holds whether they be milch cattle or not.

(2) A bailee can have no lien on a chattel, where, by the essence of the contract, he has no right to the uninterrupted possession of it; & therefore, *semble*; if a race horse be delivered to a trainer to be trained generally, he has no lien upon it; as, by the custom in such cases, the owner is entitled during the process to take the animal elsewhere for the purpose of running races; *aliter*, if the bailment were to train the animal for a specific race, or if it were not of a race horse.—*JACKSON v. CUMMINS* (1839), 5 M. & W. 342; 8 L. J. Ex. 265; 3 J. P. 451; 3 Jur. 436; 151 E. R. 145.

Annotations:—*As to* (1) *Refd.* The Alan Ker, How v. Kirchner (1857), 30 L. T. O. S. 296; *As to* (2) *Apld.* Forth v. Simpson (1849), 13 Q. B. 680. *Expld.* Castellain v. Thompson, Thompson v. Castellain (1862), 13 C. B. N. S. 105.

329. Application of rule—Mortgage deed delivered to apply for payment.]—Where a mtge. deed was delivered to a party as evidence of his title to apply for payment of principal & interest due thereon, no lien attaches on the deed in respect of his work & labour in so applying; for the value of the article deposited is not increased by any work done on or with respect to it.—*SANDERSON v. BELL* (1834), 2 Cr. & M. 304; 3 L. J.

66; 149 E. R. 776; *sub nom.* SAUNDERSON *v.* BELL, 4 Tyr. 244.

Annotations:—*Refd.* Steadman *v.* Hockley (1846), 10 Jur. 819; Castellain *v.* Thompson, Thompson *v.* Castellain (1862), 13 C. B. N. S. 105; Webb *v.* Smith (1885), 30 Ch. D. 192.

330. ——— **Deed delivered to conveyancer.]—**STEADMAN *v.* HOCKLEY, No. 313, *ante*.

331. Limited to value of labour.]—GREEN *v.* FARMER, No. 225, *ante*.

332. Improvement distinguished from maintenance.]—The owner of a motor car had an agreement with a co. under which the latter were for three years to maintain the car & its accessories, provide a driver who was to be the co.'s servant, & do the necessary repairs. The owner was to pay the co. a fixed annual sum up to a limited mileage & at a rate for every mile beyond the limit. The car when in London was kept at the co.'s garage, & whether the owner was in London or elsewhere she took the car out when & as she liked. An amount having become due by the owner under the agreement, the co. took possession of the car & claimed a lien on it for the amount due:—*Held*: (1) inasmuch as what the co. did to the car was not to improve it, but only to maintain it in its former condition, the co. had no lien on the car; & (2) even if the co. had a lien, their lien would have been lost by the arrangement, acted on, under which the owner was entitled to take away the car as & when she pleased.—HATTON *v.* CAR MAINTENANCE CO., LTD., [1915] 1 Ch. 621; 84 L. J. Ch. 847; 110 L. T. 765; 30 T. L. R. 275; 58 Sol. Jo. 361.

Annotation:—*As to* (2) *Refd.* Pennington *v.* Reliance Motor Works, [1923] 1 K. B. 127.

C. Particular Instances.

333. Accountant—Employed in bankruptcy proceeding—Whether lien on certificate.]—An accountant who has been employed in a bkpcy. has no lien on bkpt.'s certificate for the payment of his costs.—ANON. (1830), 1 Russ. & M. 330; 39 E. R. 127, L. C.

334. ——— **Lien on books examined & arranged.]—***Semble*: an accountant has, as against the assignees, a lien on books intrusted to him for examination & arrangement by a bkpt. before the bkpcy.—*Re* HILL, *Ex p.* SOUTHALL (1848), 17 L. J. Bcy. 21; 12 Jur. 576.

Agister.]—See ANIMALS, Vol. II., p. 254, Nos. 356-359.

335. Arbitrator—On award—For fees.]—[An arbitrator] has a lien upon the award for his services (PARKE, B.).—*Re* COOMBS & FRESHFIELD & FERNLEY (1850), 4 Exch. 839; 154 E. R. 1456.

Annotations:—*Refd.* Roberts *v.* Eberhardt (1858), 28 L. J. C. P. 74; Crampton & Holt *v.* Ridley (1887), 20 Q. B. D. 48. *Mentd.* *Re* Cardigan & Henderson (1852), 22 L. J. Q. B. 83; Barnes *v.* Braithwaite (1857), 2 H. & N. 569; Barnes *v.* Hayward (1857), 1 H. & N. 742.

336. ——— **Under Lands Clauses Consolidation Act, 1845 (c. 18), s. 35, if a difference between a landowner & promoters of an undertaking has been referred to arbn., & an award made, the ct. will compel the promoters by man-**

damus, at the landowner's instance, to take up the award. The promoters must, for that purpose, pay the fees due on the award; the arbitrators or umpire having a lien on the award for such fees, which the promoters are bound to satisfy, except so far as the obligation may be limited by sect. 34.—*R. v.* SOUTH DEVON RY. CO. (1850), 15 Q. B. 1043; 20 L. J. Q. B. 145; 16 L. T. O. S. 149; 15 Jur. 464; 117 E. R. 754.

Annotations:—*Mentd.* L. & N. W. Ry. *v.* Walker (1900), 82 L. T. 93; *R. v.* Barton & Immingham Light Ry., *Ex p.* Simon, [1912] 3 K. B. 72.

337. ——— **Reasonable fees.]—**There is only a lien for reasonable fees for an arbn. & award, & I think it is established that any excess can be recovered. The question is whether the fees were reasonable. What was, in fact, a reasonable amount is a question for the ct. It appears to me that 25 guineas a day for the days on which the arbn. was sitting, with some further allowance for time taken in considering the award, was reasonable (RIDLEY, J.).—LLANDRINDOD WELLS WATER CO. *v.* HAWKSLEY (1903), 67 J. P. 439; 19 T. L. R. 402; *revsd.* on other grounds (1904), 68 J. P. 242, C. A.

338. Artificer—For goods worked up.]—SCARFE *v.* MORGAN, No. 180, *ante*.

Auctioneer.]—See AUCTION & AUCTIONEERS, Vol. III., pp. 35, 36, Nos. 255-258.

Barrister.]—See BARRISTERS, Vol. III., p. 337, Nos. 265-267.

339. Coachbuilder—On carriages sent for repairs.]—HOULDITCH *v.* MILNE (1800), 3 Esp. 86; 1 Wms. Saund. 211, n., N. P.

Annotations:—*Refd.* Clancy *v.* Piggott (1835), 2 Ad. & El. 473. *Mentd.* Edwards *v.* Kelly (1817), 6 M. & S. 204; Rounce *v.* Woodyard (1846), 8 L. T. O. S. 186.

340. ——— **—.]—**KEENE *v.* THOMAS, No. 321, *ante*.

341. Conveyancer—Only on papers on which work done—Whether attorney or not.]—(1) The lien which an attorney has on the papers in his hands, is only commensurate with the right which the party delivering the papers to him, has therein.

(2) Every one, whether attorney or not, has by the common law a lien on the specific deed or paper delivered to him to do any work or business thereon, but not on other muniments of the same party, unless the person claiming the lien be an attorney or solr.—HOLLIS *v.* CLARIDGE (1813), 4 Taunt. 807; 128 E. R. 549.

Annotations:—*As to* (1) *Refd.* Pratt *v.* Vizard (1833), 5 B. & Ad. 808; Wakefield *v.* Newbon (1844), 6 Q. B. 276. *As to* (2) *Consd.* Steadman *v.* Hockley (1846), 10 Jur. 819. *Refd.* Castellain *v.* Thompson, Thompson *v.* Castellain (1862), 1 New Rep. 97; Keene *v.* Thomas (1904), 74 L. J. K. B. 21.

342. ——— **—.]—**STEADMAN *v.* HOCKLEY, No. 313, *ante*.

343. Dyer—For price of dyeing.]—GREEN *v.* FARMER, No. 225, *ante*.

344. ——— **—.]—**BENNETT *v.* JOHNSON, No. 251, *ante*.

345. Engineer—For cost of putting engines in barge—Lien on barge.]—*Re* WESTLAKE, *Ex p.* WILLOUGHBY, No. 212, *ante*.

PART IV. SECT. 2, SUB-SECT. 1.—C.

p. Accountant — Documents for report—Until fee paid.]—STUART *v.* STEVENSON (1828), 6 Sh. (Ct. of Sess.) 591.—SCOT.

q. — On company's books.]—An accountant who receives a co.'s books for the purpose of balancing them & preparing a balance sheet has a right of retention over them for the payment of his fees.—FINDLAY (LIQUIDATOR OF SCOTTISH WORKMANS ASSUR-

ANCE CO., LTD.) *v.* WADDELL, [1910] S. C. 670; 47 Sc. L. R. 478; 1 S. L. T. 315.—SCOT.

r. On books of insolvent.]—Professional accountants have no lien on the books of an insolvent for work done at his request before the insolvency, in examining his books in order to draw up a statement of his affairs.—WALKER'S TRUSTEE *v.* JONES, COSNETT & BALL (1883), 2 S. C. 354.—S. AF.

t. — On books on which work done.]—An accountant has a lien on

the books upon which he has actually performed work.—RAYMER & CO. *v.* GOLDBERG & GOLDBERG (1912), S. R. 147.—S. AF.

a. Thresher.]—*Re* SMITH, *Ex p.* VANCISE (1921), 63 D. L. R. 359; 15 Sask. L. R. 19; [1922] 1 W. W. R. 283.—CAN.

b. Materialman.]—A materialman has no lien unless the goods were supplied for the purpose of being used in the particular building upon which he claims to have a lien.—SPRAGUE *v.*

Sect. 2.—At common law: Sub-sect. 1, C.]

346. Farrier—Animal cured of disease.]—SCARFE v. MORGAN, No. 180, *ante*.

347. — For shoeing horse.]—ORCHARD v. RACKSTRAW, No. 389, *post*.

348. Furniture remover—On goods removed.]—HIRST v. PAGE & Co. (1891), 7 T. L. R. 537, N. P.

349. — —.]—A carman & furniture remover who is prepared to enter into contracts for the carrying & removal of furniture, but who does not hold himself out to carry furniture for anybody who may bring it to him, on any reasonable terms that may be offered, is not a common carrier, & has no lien for his charges on goods he has carried or removed for a third person against the true owner of the goods.—ELECTRIC SUPPLY STORES v. GAYWOOD (1909), 100 L. T. 855.

Annotation:—Mentd. Belfast Ropework Co. v. Bushell, [1918] 1 K. B. 210.

350. Horsebreaker.]—SCARFE v. MORGAN, No. 180, *ante*.

351. Judicial officers.]—TAYLOR v. LEWIS (1750), 2 Ves. Sen. 111; 3 Atk. 727; 28 E. R. 73, L. C.

Annotation:—Mentd. Robins v. Fennell (1847), 10 L. T. O. S. 246.

352. — Clerk of assize—On records for his fees.]—A clerk of assize has not a lien upon the records in his custody for his fees.—R. v. BURY (1779), 1 Leach, 201; 168 E. R. 203.

Annotations:—Refd. Re R. v. Harland, *Ex p.* Newton v. Bayley (1839), 4 Jur. 192. *Mentd.* Re R. v. Harland, *Ex p.* Newton v. Alderson (1839), 4 Jur. 191.

353. — Bankruptcy officer—On documents for fees.]—The officer for enrolling proceedings has no lien on the proceedings under a commission of bkpcy. for the fees of enrolment.—*Ex p.* SANDERSON (1812), 19 Ves. 161; 34 E. R. 478, L. C.

354. — Partition commissioners—On commission for charges.]—Comrs. under a commission of partition have no lien on the commission for their charges.—YOUNG v. SUTTON (1814), 2 Ves. & B. 365; 35 E. R. 358.

355. — Commissioners taking acknowledgments—On documents for fees.]—The comrs. under Fines & Recoveries Act, 1833 (c. 74), have a lien for their fees upon the deeds which come into their possession in the performance of their duty. But one comr. having been paid his own fees, cannot retain deeds for the fees of another, unless authorised by that other to do so.—*Ex p.* GROVE (1836), 3 Bing. N. C. 304; 5 Dowl. 355; 2 Hodg. 246; 3 Scott, 671; 6 L. J. C. P. 30; 132 E. R. 428.

356. — Commissioners for taking evidence—On depositions for fees.]—Comrs. for the examination of witnesses have a lien on the depositions for their fees, & will not be compelled to return them, until they have received payment.—PETERS v. BEER (1851), 14 Beav. 101; 20 L. J. Ch. 424; 18 L. T. O. S. 23; 15 Jur. 1024; 51 E. R. 224.

357. — Clerk to justices—On books for fees.]—A., who was clerk to the justices of a petty sessional division, was accustomed to make his

private entries in the books, which he himself purchased, in which he entered the magisterial business. Upon his death his exor. took possession of these books, & upon being applied to by B who was appointed as the successor of A., to give them up, he refused to do so, alleging as his reason the above facts, & that he had a lien upon them for certain fees due to A. in his lifetime still unpaid:—*Held*: he had no right to detain them.—R. v. RASTRICK (1858), 31 L. T. O. S. 220; 22 J. P. 386; 6 W. R. 654.

358. Literary man—For remuneration—On papers arranged & annotated.]—Pltf. had instituted a suit for the recovery of letters & documents, upon which deft. claimed a lien for literary labour performed thereon at pltf.'s request, part of such labour consisting of notes, etc., written upon the documents themselves. Upon a common summons by pltf. that deft. might be ordered to produce the letters & documents, & pltf. be at liberty to inspect same, the ct. granted the application.

Deft. is a deposittee of documents, & may be entitled to retain them until his lien for remuneration is satisfied. He claims a lien for labour said to be expended on the documents themselves, *e.g.* in notes, marks & arrangement (LORD ROMILLY, M.R.).—BROUGHAM (LORD) v. CAUVIN (1868), 37 L. J. Ch. 691; 18 L. T. 281; 16 W. R. 688.

359. Livery stable keeper—On horse sent to be trained—For mere keep.]—BEVAN v. WATERS, No. 53, *ante*.

360. — For veterinary charges.]—ORCHARD v. RACKSTRAW, No. 389, *post*.

361. — For keep.]—A. was indebted to the pltf. in £7 4s. for the keep of a horse, & deft., in consideration that pltf. at his request would deliver him the horse, to the use of A. promised to pay the £7 4s.:—*Held*: the consideration was good, for pltf. might have detained the horse till paid.—MACKERNEY v. EWRIN (1628), Hut. 101; 123 E. R. 1129.

362. — —.]—ORCHARD v. RACKSTRAW, No. 389, *post*.

363. Miller—On corn in his hands for grinding.]—A commission of bkpcy. issued against M., at the time he became a bkpt. indebted to petitioner in £286 7s. 10d. for grinding of corn, & he had in his custody thirty-six loads & three bushels of wheat belonging to bkpt., part ground & part grinding, besides a great number of sacks. £16 5s. was due to petitioner for grinding the corn which was in his hands at the time M. became a bkpt. The wheat sold by the assignees, by agreement between them & petitioner, without prejudice to his claim, he now applied to be paid his whole debt out of the money arising by the sale. Lord Chancellor of opinion petitioner had no specific lien upon the corn & sacks, but only *pro tanto* as due for grinding the corn in his hands.—*Re* MATTHEWS, *Ex p.* OCKENDEN (1754), 1 Atk. 235; 26 E. R. 151, L. C.

Annotations:—Consd. Green v. Farmer (1768), 4 Burr. 2214; Olive v. Smith (1813), 5 Taunt. 56; Rose v. Hart (1818), 2 Moore, C. P. 547; Young v. Bank of Bengal (1836), 1 Deac. 622. *Refd.* Jones v. Smith (1794), 2 Ves. 372; Houghton v. Matthews (1803), 3 Bos. & P. 485;

*gave in favour of.]—*Where buildings are erected on lands leased to a married woman on a verbal undertaking by her to secure the builder by a mtgs., on the premises, & a bill of sale on all her other property, the builder has a lien on the leasehold premises & the other personal property.—CHUTE v. GRATTEN (1894), 32 N. B. R. 549.—CAN.

f. —.]—SAVORY v. BALDOCHI (1906), T. S. 623.—S. AF.

g. Packer.]—A packer has a lien upon the goods packed by him for the

BESANT (1885), 3 Man. L. R. 519.—CAN.

c. Sub-contractors.]—Claimants who have done work as sub-contractors under a contract cannot for lien purposes dissolve the contract into its original component parts & claim to rank as materialmen in respect of the value of material covered by their sub-contracts & claim that they are only relegated to the status of sub-contractors with respect to the balance of their claim.—WORTMAN v. FRID-

LEWIS Co. (1915), 33 W. L. R. 119; 9 W. W. R. 812.—CAN.

d. Pondkeeper.]—The legal obligation of a pondkeeper is the same as that of a warehouse-keeper; & in the absence of an agreement or general usage of trade establishing a general lien, he has only a special lien on timber in his possession, for his reasonable charges for the care of it.—JACK v. EAGLES (1850), 7 N. B. R. (2 All.) 95.—CAN.

e. Builder—Bill of sale & mort.

Glennie v. Edmunds (1813), 4 Taunt. 775; *Barnett v. Brandao* (1843), 1 L. T. O. S. 387. *Mentd. Re Witt, Ex p. Shubrook* (1876), 34 L. T. 785.

364. ———.]—*CHASE v. WESTMORE*, No. 64, *ante*.

365. Motor car repairer.]—*GREEN v. ALL MOTORS, LTD.*, No. 322, *ante*.

366. Parliamentary agents.]—The lien of a Parliamentary agent attaches to books & papers intrusted to him by the law clerk of the trustees of a public road to obtain a renewal of their Act of Parliament.—*RIDGWAY v. LEES* (1856), 25 L. J. Ch. 584.

367. Printer—On individual numbers not delivered—For balance due for printing whole.]—(1) A printer employed to print certain numbers, but not all consecutive numbers, of an entire work, has a lien upon the copies not delivered for his general balance due for printing the whole of those numbers.

The supplying the paper from time to time did not make it the less one entire work (*LE BLANC, J.*).

(2) I think *deft.* had a lien for the whole balance, the work being an entire work in the course of prosecution, upon the same principle that a tailor, who is employed to make a suit of clothes, has a lien for the whole price upon any part of them. It would be inconvenient if he was obliged to make stops in the course of the work; the nature of the work affords a reason for his general lien (*LORD ELLENBOROUGH, C.J.*).—*BLAKE v. NICHOLSON* (1814), 3 M. & S. 167; 105 E. R. 573.

Annotation:—As to (1) *Reid. Ford v. Baynton* (1832), 1 Dowl. 357.

368. Sailmaker—On sails repaired—Effect of arrest of ship—Under warrant.]—A sailmaker having in his possession the sails of a vessel to repair, has a lien upon the sails for the costs of repairing them, but he may not detain them when the ship is arrested under warrant of the ct. The ct. can protect his just rights & virtually enforce such lien.—*THE HARMONIE* (1841), 1 Wm. Rob. 178; 8 L. T. 121; 166 E. R. 539.

Annotation:—*Reid. The Tergeste* (1902), 72 L. J. P. 18.

369. Salvagor—On things saved.]—A man entitled to salvage has a lien for it upon the thing saved.—*HARTFORD v. JONES* (1698), 1 Ld. Raym. 393; 2 Salk. 654; 91 E. R. 1161.

Annotations:—*Consd. The Fulham*, [1899] P. 251. *Reid. Nicholson v. Chapman* (1793), 2 Hy. Bl. 254; *Dean v. Hornley* (1854), 3 E. & B. 180; *Aitchison v. Lohre* (1879), 4 App. Cas. 755; *The Gas Float Whitton No. 2*, [1896] P. 42. *Mentd. Hawkes v. King* (1729), 1 Barn. K. B. 301.

370. ——— Mortgage security.]—In 1899 a customer of a bank mortgaged certain lands to the bank to secure the balance for the time being owing on foot of overdrafts, bills of exchange, promissory notes, credits, advances, interest, commission, discount, & premiums on policies of insurance. The security was to bear interest computed from day to day at the current bank rate up to 6 per cent. The deed contained a proviso that no greater principal sum than £5,700 should be recoverable on the security. In keeping the mtgor.'s current account, which was continued from the date of the mtge. until after action brought &

was approved each half-year by the mtgor., the interest was charged from day to day with half-yearly rests, so that the interest was capitalised every half-year. In 1903 the mtgor. owed to the bank on his current account & on promissory notes a sum in excess of £5700, & on his failure to reduce his overdraft, the bank refused to honour his cheques except certain cheques drawn by him for the preservation of the subject matter of the security, & for this purpose the bank also made certain payments, which they debited to the overdrawn account. In Dec. 1904, the bank appointed a receiver of the mortgaged premises under the Conveyancing & Law of Property Act, 1881 (c. 19):—*Held*: the bank had no lien for salvage in respect of the moneys paid to preserve the subject matter of the security, inasmuch as those payments were not made by the bank, but by the mtgor. out of moneys advanced to him by the bank.—*YOURELL v. HIBERNIAN BANK*, [1918] A. C. 372; 87 L. J. P. C. 1; 117 L. T. 729, H. L.

———.]—*See, generally, SHIPPING.*

371. ——— Expenditure without authority of owner.]—A quantity of timber, placed in a dock on the bank of a navigable river, being accidentally loosened, is carried by the tide to a considerable distance, & left at low water upon a towing path, A. finding it in that situation, voluntarily conveys it to a place of safety, beyond the reach of the tide at high water. A. has no lien on the timber for the trouble or expense to which he may have put himself in the carriage of it, but is liable to an action of trover, unless he deliver it up to the owner on demand, though nothing be tendered him by the owner by way of compensation. But in such a case, in all probability, A. might maintain an action against the owner for a compensation.—*NICHOLSON v. CHAPMAN* (1793), 2 Hy. Bl. 254; 126 E. R. 536.

Annotations:—*Reid. Vivian v. Mersey Docks Board* (1869), L. R. 5 C. P. 19; *Hingston v. Wendt* (1876), 1 Q. B. D. 367; *Aitchison v. Lohre* (1879), 4 App. Cas. 755; *Peruvian Guano Co. v. Dreyfus*, [1892] A. C. 170; *Gwilliam v. Twist* (1895), 2 Q. B. 84; *The Gas Float Whitton No. 2*, [1896] P. 42; *Prager v. Blatspiel Stamp & Heacock*, [1924] 1 K. B. 566.

372. ———.]—*CASTELLAIN v. THOMPSON, THOMPSON v. CASTELLAIN*, No. 318, *ante*.

373. Servant—For money expended on master's behalf—On goods supplied by tradesman.]—*HUSSEY v. CHRISTIE*, No. 320, *ante*.

Shipwright—On ship for repairs.]—See SHIPPING.

374. Stallion-owner—On mare for fees for service.]—*SCARFE v. MORGAN*, No. 180, *ante*.

375. Surveyor—On maps & books.]—Pltf. was employed by *defts.* to survey & map the parish of G., on paper to be provided by them. No sum was agreed upon by the parties to be paid for the work. The work having been finished, pltf.'s attorney refused to deliver it, except on payment of £204 4s. 10d. He tendered the map & books to *defts.*' attorney for inspection, & offered, if the expenses were paid, to send them into the country for the inspection of *defts.* He also asked *defts.*' attorney to make a tender, which the latter refused

materials used & work done in packing.—*HAYWARD v. GRAND TRUNK RY. CO.* (1872), 32 U. C. R. 392.—CAN.

h. Employees on mining locations.]—A blacksmith, employed for sharpening & keeping in order tools used for the work of mining, is entitled to a lien for his wages on the mining location, but a cook who does the cooking for the men employed is not.—*DAVIS v. CROWN POINT MINING CO.* (1901), 22 C. L. T. 52; 3 O. L. R. 69.—CAN.

k. Bandmaster—Instrument.]—DE-MARCHI v. SPARTARI (1914), 27 W. L. R. 152; 5 W. W. R. 1336; 15 D. L. R. 774.—CAN.

l. Farrier—Lien on horse for services rendered.]—NICOLLS v. DUNCAN (1853), 11 U. C. R. 332.—CAN.

m. Cordwood-worker.]—A workman employed to cut trees into cordwood has not at common law a lien for his wages. If the workman, however, contracts to haul as well as cut the wood, he may have a lien for the car-

riage.—*MCMILLAN v. BYERS* (1886), 3 Man. L. R. 361; (1887), 4 Man. L. R. 76.—CAN.

n. Warehouseman.]—A warehouseman has only a lien on the property stored for the storage of grain in his warehouse, & not for the general charges thereon.—*RENALD v. WALKER* (1858), 8 C. P. 37.—CAN.

o. ——— Storage of coals.]—Re COLEMAN (1875), 36 U. C. R. 559.—CAN.

p. Bookkeeper.]—An independent

Sect. 2.—At common law: Sub-sect. 1, C.; sub-sects. 2, 3 & 4. Sects. 3, 4 & 5.]

to do. Defts. paid £42 into ct., & pltf. had a verdict for £73:—*Held*: pltf. might maintain an action; under this contract, he was not bound to deliver up the map & books before he was paid for his work; his demanding more than was found by the jury to be due was no ground of non-suit, as in such a case defts. might have tendered the sum due.—*HUGHES v. LENNY* (1839), 5 M. & W. 183; 2 Horn & H. 13; 8 L. J. Ex. 177; 151 E. R. 79.

376. Tailor—Making clothes—On any part for whole price.]—*BLAKE v. NICHOLSON*, No. 367, *ante*.

377. Town clerk—On papers of corporation—Work done as solicitor.]—A town clerk has a lien on papers of the corpn. with respect to which he has done work as attorney or solr., but not on such as he holds merely as town clerk.—*R. v. SANKEY* (1836), 5 Ad. & El. 423; 2 Har. & W. 275; 6 Nev. & M. K. B. 839; 5 L. J. K. B. 255; 111 E. R. 1226.

Annotation:—*Reid. Newington L. B. v. Eldridge* (1879), 12 Ch. D. 349.

378. Trainer of race horses—On horses sent to be trained.]—*JACOBS v. LATOUR*, No. 203, *ante*.

379. ———.]—*FORTH v. SIMPSON*, No. 51, *ante*.

380. ——— For keep & exercise.]—*BEVAN v. WATERS*, No. 53, *ante*.

381. Vendor of goods—For duties paid.]—A. bought two pipes of wine in bond; the agent of the seller gave him a delivery note, upon which one pipe was subsequently delivered to his order, the other remaining in the bonded warehouse at a rent charged to A.; he having become bkpt., his assignees claimed that pipe on payment of the warehouse rent:—*Held*: the seller has a right to retain it until the duties advanced upon it were repaid him.—*WINKS v. HASSALL* (1829), 9 B. & C. 372; Dan. & Ll. 312; 7 L. J. O. S. K. B. 265; 109 E. R. 138.

Annotation:—*Reid. Miles v. Gorton* (1834), 2 Cr. & M. 504.

SUB-SECT. 2.—CARRIER'S LIEN.

See *CARRIERS*, Vol. VIII., p. 219, Nos. 1391 *et seq.*

bookkeeper has a lien on books on which he has bestowed his time & labour.—*SPURRIER v. COXWELL*, [1914] C. P. D. 83.—S. AF.

g. Watch repairer.]—*WEBBER v. COGSWELL* (1877), 2 S. C. R. 15.—CAN.

r. Auctioneer — Lien for commission.]—*SASSIN v. PHILLIPS*, [1912] C. P. D. 382.—S. AF.

t. Livery stable keeper.]—*FORD v. REED BROTHERS*, [1922] T. P. D. 266.—S. AF.

a. Printer—On stereotype plates.]—A printer into whose hands stereotype plates are put for the purpose of printing from them, has no right of lien or retention over them, for his account for printing from them the work of which they are the plates.—*BROWN v. SOMMERVILLE* (1844), 6 Dunl. (Ct. of Sess.) 1267; 16 Sc. Jur. 544, 604.—SCOT.

b. Maintenance of motor car.]—There is no lien at common law on a motor car for moneys due under an agreement to "well & sufficiently maintain" & keep in order the car & to supply a chauffeur to drive it.—*HATTON v. CAR MAINTENANCE CO., LTD.* (1914), 48 L. L. T. Jo. 217.—IR.

PART IV. SECT. 2, SUB-SECT. 4.

384 i. Delivery by third party—Without consent of owner.]—A livery-stable keeper has no lien as against the owner of a horse for boarding it, where it has been placed in the stable, without the authority of the owner, by a person who has agreed with the owner to race the horse & pay its expenses & to share its winnings with the owner.—*YEO v. FARRAGHER*, [1918] 1 W. W. R. 624; 39 D. L. R. 324; 28 Man. L. R. 424.—CAN.

PART IV. SECT. 3.

c. Thresher's lien.]—*PRINNEVEAU v. MORDEN & JONES* (1913), 24 W. L. R. 268; 4 W. W. R. 637; 11 D. L. R. 272; 6 Alta L. R. 52.—CAN.

d. ———.]—Threshers' Lien Act (Sask.) gives the thresher the right to sell the grain taken under his thresher's lien.—*RUDY v. SONMORE* (1916), 34 W. L. R. 1122.—CAN.

e. ———.]—When a thresher takes grain to satisfy his lien under Threshers' Lien Act, 1920, he may take only sufficient grain reasonably to satisfy his claim.—*MCLEAN v. SHANNON* (Sask.), [1924] 3 W. W. R. 316.—CAN.

f. ———.]—To entitle a thresher

SUB-SECT. 3.—INNKEEPER'S LIEN.

See *INNS & INNKEEPERS*, Vol. XXIX., pp. 18 *et seq.*

SUB-SECT. 4.—BAILEE'S LIEN.

382. General rule—Lien for rent.]—A. applied to B., the proprietor of a house, with cellars, which he was in the habit of letting, telling him that he wanted cellar room to do a pipe of wine, but adding, that he did not know but very shortly he might want a good deal of room; B., upon this, said that he had better put it into his (B.'s) own cellar; which he did:—*Held*: under these circumstances, B. was entitled to detain the wine, till a reasonable & proper sum had been paid him for rent.—*GRAY v. CHAMBERLAIN* (1830), 4 C. & P. 260, N. P.

383. ——— Possession must be uninterrupted.]—*JACKSON v. CUMMINS*, No. 328, *ante*.

384. Delivery by third party—Without consent of owner.]—*BUXTON v. BAUGHAN*, No. 48, *ante*.

385. Transfer of goods with lien on them—Right of bailee.]—If A., holding B.'s goods with a lien on them against B., transfer them to C., C. cannot hold them against B. to the extent of A.'s lien under 6 Geo. 4, c. 94, unless the transfer be expressly made as a pledge.—*THOMPSON v. FARMER* (1827), Mood. & M. 48, N. P.

See, further, *BAILMENT*, Vol. III., pp. 72 *et seq.*

SECT. 3.—STATUTORY LIEN.

386. For tolls—Whether other methods of recovery excluded.]—A co., having become by assignment conservators of the river Tone, were empowered by special Acts to levy tolls upon goods carried in barges thereon, & to "stop, arrest, & detain" the barges until the tolls were paid. In an action for tolls by the co.:—*Held*: inasmuch as the statute only gave a lien upon the goods for the tolls, & prescribed no method which would be equivalent, by enabling the co. to recover the money, to the common law remedy, the statutory remedy was cumulative, & not exclusive, & the action would lie.—*GREAT WESTERN RY. CO. v.*

to a lien under The Threshers' Lien Act, 1920, the provisions of sect. 2 must be complied with.—*BRITISH AMERICAN ELEVATOR CO., LTD. v. MACLEAN* (Sask.), [1924] 1 W. W. R. 1159.—CAN.

g. Farm worker's lien.]—*MILES v. OSLER & NANTON TRUST CO.* (Man.), [1924] 2 W. W. R. 510.—CAN.

h. For electric light.]—*STENNETT v. EDMONTON* (1908), 8 W. L. R. 62.—CAN.

k. For taxes.]—*GREENWOOD CORPN. v. CANADIAN MORTGAGE & INVESTMENT CO., LTD.*, [1921] 2 W. W. R. 746.—CAN.

l. For advances by municipality—Purchase of seed grain.]—*UNITED GRAIN GROWERS, LTD. v. MCRAE & RURAL MUNICIPALITY OF LITTLE BOW*, No. 98 (1922), 63 D. L. R. 138; 17 Alta. L. R. 513; [1922] 1 W. W. R. 1064.—CAN.

m. ———.]—The liens arising under The Seed Grain Acts do not operate so as to attach grain grown in years subsequent to the advance after ownership of the land has passed from the owner to whom the advance was made.—*HOME INVESTMENT & SAVINGS ASSOCN. v. PROVINCIAL TREASURER OF ALBERTA* (Alta.), [1924] 1 W. W. R. 822.—CAN.

n. For advances to manufacturer—

SHARMAN (1892), 61 L. J. Q. B. 600; 40 W. R. 643; 36 Sol. Jo. 541, D. C.

For excise duties.]—See REVENUE.

SECT. 4.—EXTENT OF LIEN.

387. Retention charges.] — LENTON v. COOK (1736), Bull. N. P., 7th ed. 45 a.

Annotation:—**Consd.** British Empire Shipping Co. v. Somes (1858), E. B. & E. 353.

388. — Where no express contract.]—HARTLEY v. HITCHCOCK, No. 49, *ante*.

389. —.]—A livery stable keeper has no lien for the charges of a veterinary surgeon for skill & work bestowed on a horse at the request of the owner while the horse is standing at livery at the stables of the liveryman.

A livery stable keeper has no lien as livery stable keeper for the keep of a horse standing at livery, & a farrier has no lien for shoeing a horse while so standing at livery, because he has not possession of the horse. There is no rule of law which gives a livery stable keeper a claim of lien for money paid by him to a veterinary surgeon for work done to a horse at livery (CRESSWELL, J.).—ORCHARD v. RACKSTRAW (1850), 9 C. B. 698; 19 L. J. C. P. 303; 15 L. T. O. S. 91; 14 Jur. 605; 137 E. R. 1066.

Annotation:—**Refd.** Castellain v. Thompson, Thompson v. Castellain (1862), 13 C. B. N. S. 105.

390. —.]—A person who has a lien upon a chattel for a debt cannot, if he keeps it to enforce payment, add, to the amount for which the lien exists, a charge for keeping the chattel till the debt is paid. Where such a charge is made, & the owner of the chattel gives notice that he will pay it, but that he protests against the payment, & will seek to recover it back again, he may maintain an action for money had & received for such a purpose.

A shipowner desired to have his ship repaired. On asking a shipwright for an estimate, he received one, the last item of which was "The cost of use of graving dock for the job will be from 120 to 150 guineas." The ship was repaired. When finished, the account was sent in with this item included. No objection was made to this item, but time was required for payment. The shipwright who claimed & enforced his lien on the ship for payment, urged the removal of the ship, saying that it was unnecessarily occupying his

dock, that he had other ships waiting to go in, & finally, that from a certain day he should charge £21 a day for the use of the dock:—**Held**: these facts did not constitute an implied contract on the part of the shipowner to pay the additional charge, & (having paid it under protest) he might maintain money had & received to recover it back.—SOMES v. BRITISH EMPIRE SHIPPING CO. (1860), 8 H. L. Cas. 338; 30 L. J. Q. B. 229; 2 L. T. 547; 6 Jur. N. S. 761; 8 W. R. 707; 11 E. R. 459, H. L.; *affg.* S. C. *sub nom.* BRITISH EMPIRE SHIPPING CO. v. SOMES (1858), E. B. & E. 353, Ex. Ch.

Annotations:—**Apld.** Bruce v. Everson (1883), Cab. & El. 18. **Refd.** Miedbrodt v. Fitzsimon, The Energie (1875), 32 L. T. 579; Ivens v. G. W. Ry. (1889), 53 J. P. 148; Booth S.S. Co. v. Cargo Fleet Iron Co., [1916] 2 K. B. 570. **Mentd.** Assets Development Co. v. Close (No. 2) (1901), 46 Sol. Jo. 12.

391. — By carrier.]—When a passenger leaves an article at a railway station the co. are not bound to send it to his residence without a reasonable charge for so doing, nor liable for its non-delivery when sent for, unless reasonable means are afforded to them of finding & identifying it; but they cannot charge warehouse room for it, if, however they afterwards detain it for any petty charge, the proper course is to pay the charge, & sue to recover it in the county ct.; & if the article is ready for delivery the damage may properly be only nominal, whether on a special count or on a count in trover.—DIMSDALE v. LONDON & BRIGHTON RY. CO. (1862), 3 F. & F. 167, N. P.; *subsequent proceedings* (1863), 8 L. T. 453.

392. —.]—A workman detaining a chattel in respect of a lien for work done thereon has no claim for warehouse charges during such detention.—BRUCE v. EVERSON (1883), Cab. & El. 18.

—**Goods found.]**—See BAILMENT, Vol. III., p. 66, Nos. 88, 89.

—**Bailee for valuable consideration.]**—See BAILMENT, Vol. III., p. 75, No. 145.

393. Payments—Charges of veterinary surgeon—Treatment of horse at livery—At request of owner.]—ORCHARD v. RACKSTRAW, No. 389, *ante*.

Work done or expenditure on chattel.]—See, generally, Sect. 2, sub-sect. 1, *ante*.

SECT. 5.—EXTENSION OF PARTICULAR TO GENERAL LIEN.

See Part III., Sect. 4, *ante*.

Warehouse receipts.]—34 Vict. c. 5, s. 47, enables a person making advances to a manufacturer, to stipulate for obtaining a lien on warehouse receipts to be subsequently granted to the manufacturer.—SUTER v. MERCHANTS BANK (1876), 24 Gr. 365.—CAN.

o *Garage-keeper.]*—WEBSTER v. BLACK (1914), 28 W. L. R. 300; 17 L. R. 15; 24 Man. L. R. 456.—CAN.

p. *For tolls.]*—CALEDONIAN RY.

Co. v. GUILD (1873), 1 R. (Ct. of Sess.) 198; 11 Sc. L. R. 125.—SCOT.

PART IV. SECT. 4.

q. *Construction of part of article—Lien on whole.]*—A carriage builder, who constructs a stationary top for an express waggon & fastens the same with bolts & nuts, has a lien on the whole structure, waggon & top, for the price of building the top.—HARDISTY

v. CARNEIL (1899), 40 N. S. R. 214.—CAN.

r. *Contract for manufacture of lumber—No lumber set aside for purpose of contract.]*—RANDOLPH v. RANDOLPH (1907), 4 E. L. R. 17; 3 N. B. Eq. Rep. 576.—CAN.

t. *Material for several buildings—Sale of some of buildings.]*—POLSON v. THOMSON (1916), 34 W. L. R. 745; 10 W. W. R. 865.—CAN.

Part V.—Equitable Lien.

SECT. 1.—NATURE.

394. Possession not necessary.]—NICHOLS v. CLENT, No. 43, ante.

395. —.]—Where a conveyance has been executed, but the whole of the purchase-money has not been paid, the vendor has not a lien upon the title deeds for the remainder of the purchase-money.

The equitable right of the vendor is inaccurately described by the word lien, if that word is to be understood in its legal acceptation, which always implies possession by the party setting up the lien of the thing on which it exists; the legal principle in such a case being, that the party having rights, which in good conscience he may enforce, & which are more or less connected with the thing of which he has possession, shall not be compelled to part with his possession until those rights are satisfied. But the vendor's right in equity is altogether independent of his possession of the land or of the deeds. He has what, though called a lien, is, in truth, an equitable charge on the land, & which, in general, he may enforce in the same way as any other equitable mtge. (ROLFE, B.).—**GOODE v. BURTON** (1847), 1 Exch. 189; 16 L. J. Ex. 309; 9 L. T. O. S. 357; 11 Jur. 851; 154 E. R. 80.

Annotation:—Mentd. Swanley Coal Co. v. Denton, [1906] 2 K. B. 873.

396. Whether equitable charge.]—GOODE v. BURTON, No. 395, ante.

See, also, No. 571, post.

397. Distinguished from legal charge—Wholly enforceable in equity.]—A ct. of equity entertains two kinds of suits in relation to charges on land; one, where there is merely an equitable lien, & the other, where there is a legal charge. In the former kind of suit, the proceedings are entirely in equity, & there is nothing to be done elsewhere. In the latter, this ct. only gives its aid to enforce the legal lien. That aid is quite independent of the jurisdiction of this ct. to protect property pending litigation.

Pltf. filed his original bill as a judgment creditor of the mtgor. seeking to redeem a mtge. He afterwards paid off the mtge., amended his bill, & prayed an account & payment by the mtgor. :—*Held*: the suit was nevertheless a judgment creditor's suit, & must fail.—**GODFREY v. TUCKER** (1863), 33 Beav. 280; 3 New Rep. 20; 33 L. J. Ch. 559; 9 Jur. N. S. 1188; 12 W. R. 33; 55 E. R. 375; *sub nom.* **GODFREY v. SACREE, GODFREY v. TUCKER**, 9 L. T. 359.

SECT. 2.—HOW ARISING.

398. Agreement to grant possession of title deeds.]—What possession, & what agreement, as to the possession of title deeds, shall constitute an equitable lien.

Would such an agreement as that give a lien? . . . An agreement, that when, upon a contingency, B. should become entitled to the possession of the deeds he would deliver the possession of the

deeds is going much further than any ct. of equity has ever gone or ever could in reason go (LEACH, M.R.).—**ROBARTS v. JEFFERYS** (1830), 8 L. J. O. S. Ch. 137.

Annotation:—Consd. Re Taylor, Stilleman & Underwood, [1891] 1 Ch. 590.

Deposit of land certificate or charge certificate.]—*See Land Registration Act, 1925 (c. 21), s. 66.*

399. Agreement for half the value of estate recovered.]—By an agreement between A. & B., A. agreed to exert himself to prove that B. was entitled to certain property in India, for which A. was to have half the value of what might be recovered. A. succeeded in recovering a certain amount, which was sent home to the correspondents in London of a firm in Calcutta, who acted for A. in the matter. Upon demurrer to a bill to declare A.'s right to half the amount under the agreement :—*Held*: A. had no lien on the fund, & his right, if any, was purely legal & not equitable.

The agreement creates no lien, but pltf. by it were to get half of the value, & not half of the specific thing to be recovered which was the subject of the agreement (STUART, V.C.).—**ALEXANDER v. HAMMOND** (1854), 24 L. T. O. S. 174; 3 W. R. 145.

400. Parol agreement.]—G. being indebted to pltf., & having purchased some wool of B., in consideration, as alleged, of the debt, due to pltf., & for the purpose of securing the payment, & with the intention of assigning & making over the wool, & of vesting it in pltf., in an interview with pltf., said, "There is the wool which has gone to D.; go & sell that wool; pay B. the balance due to him on such wool, & keep the remainder yourself." G. died a few hours afterwards, & letters of administration were granted to his brothers, who claimed the wool, which was removed by pltf. from the custody of a wharfinger at D., & sold by pltf. after the death of G., or the proceeds; but on the above uncontradicted allegation in pltf.'s bill :—*Held*: pltf. had established an equitable lien, & his right to retain the proceeds.

In this case everything was by parol; the words are clear & that coupled with the conduct of the intestate amounts to the creation of a valid equitable lien. . . . I find no law which says a valid equitable lien cannot be created by parol (STUART, V.C.).—**GURNELL v. GARDNER** (1863), 4 Giff. 626; 3 New Rep. 59; 9 L. T. 367; 9 Jur. N. S. 1220; 12 W. R. 67; 66 E. R. 857.

Annotation:—Reid. Parish v. Poole (1884), 53 L. T. 35.

401. Indorsement on policy of intent to assign—No communication.]—ADAMS v. CLAXTON (1801), 6 Ves. 226; 31 E. R. 1024.

Annotations:—Mentd. Vulliamy v. Noble (1817), 3 Mer 593; *Brown v. Sansome* (1825), M'Cle. & Yo. 427; *Raw v. Cutten* (1832), 9 Bing. 96; *Morgan v. Evans* (1834), 8 Bl. N. S. 777; *Cooper v. Cooper* (1838), 7 L. J. Ch. 253; *M'Fadden v. Jenkyns* (1842), 1 Hare, 458; *Ottey v. Pensam* (1842), 1 Hare, 322; *Pile v. Pile* (1875), 23 W. R. 440.

402. Judgment affecting lands.]—Ex p. SEAFORTH (LORD), No. 602, post.

403. —.]—It is not correct to say that, according to the usual acceptation of the term, a

PART V. SECT. 2.

*a. By bond.]—*A co. having executed a bond which, though it

contained no direct words of charge, was evidently intended to give a lien on the property of the co. :—*Held*: the

lien was sufficiently created.—**DUNDAS CORPN. v. DESJARDINS CANAL CO.** (1870), 17 Gr. 27.—**CAN.**

creditor obtains a lien by virtue of his judgment. If he had an equitable lien, he would have a right to come here to have the estate sold; but he has no such right (LORD COTTENHAM, C.).—NEATE v. MARLBOROUGH (DUKE) (1838), 3 My. & Cr. 407; 2 Jur. 76; 40 E. R. 983, L. C.

Annotations:—*Reid*. Gordon v. Horsfall (1847), 5 Moo. P. C. C. 393; Bond v. Bell (1857), 4 Drew. 157; Godfrey v. Tucker (1863), 33 Beav. 280; Anglo Italian Bank v. Davies (1878), 9 Ch. D. 275; Flegg v. Prentis, [1892] 2 Ch. 428; Marshall v. South Staffordshire Tram. Co., [1895] 2 Ch. 36. *Mentd.* Smith v. Hurst (1852), 10 Harc. 30; Benham v. Keane (1861), 3 De G. F. & J. 318; Dossell v. Reece (1865), 13 L. T. 156; Re Watkins, *Ex p.* Evans (1879), 13 Ch. D. 252; Cadogan v. Lyric Theatre, [1894] 3 Ch. 338; Tyrrell v. Painton, [1895] 1 Q. B. 202.

See, further, Sect. 3, sub-sect. 9, *post*; & generally, JUDGMENTS, Vol. XXX., pp. 118 *et seq.*

404. Order dismissing action with costs—Registered under Judgments Act, 1838 (c. 110).—MILLER v. PRIDDEN, No. 540, *post*.

405. Order appointing receiver.—Judgment creditors obtained, in the action in which they had recovered the judgment, an *ex p.* order appointing a receiver, to receive the moneys receivable in respect of the share to which the debtor was entitled in the residuary estate under the will of his mother; & it was ordered that the receiver should pay the balance or balances appearing due on his accounts, or such part thereof as should be certified as proper to be so paid, in or towards satisfaction of what should for the time being be due in respect of the judgment. After the order had been made, notice of it was served upon the exors. of the mother. Before any payment had been made by the exors. to the receiver on account of the debtor's share, a receiving order in bkpcy. was made against him, & he was soon afterwards adjudicated bkpt.:—*Held*: the order appointing a receiver did not make the judgment creditors "secured creditors" within sects. 9 & 168 of Bkpcy. Act, 1883 (c. 52); the order did not amount to a delivery of the share in equitable execution to the judgment creditors; & they had by virtue of the order no priority over the other creditors of bkpt.

In my opinion, therefore, this order was not a "charge," was not a "mtge.," & was not a "lien," either legal or equitable, & consequently T. & Sons were not "secured creditors" within the meaning of sub-sect. 2 of sect. 9, & by virtue of sub-sect. 1 the bkpcy. took away from them the right to receive this money in priority to the other creditors (LORD ESHER, M.R.).—*Re* POTTS, *Ex p.* TAYLOR, [1893] 1 Q. B. 648; 62 L. J. Q. B. 392; 69 L. T. 74; 41 W. R. 337; 9 T. L. R. 308; 37 Sol. Jo. 306; 10 Morr. 52; 4 R. 305, C. A.

Annotations:—*Reid*. Croshaw v. Lyndhurst Ship Co., [1897] 2 Ch. 154; *Re* Anglesey, *De Galve v. Gardner*, [1903] 2 Ch. 727; *Ridout v. Fowler*, [1904] 1 Ch. 658; *Re* Pearce, *Ex p.* Official Receiver, [1919] 1 K. B. 354; *Giles v. Kruyer*, [1921] 3 K. B. 23. *Mentd.* Minter v. Kent, Sussex & General Land Soc. (1895), 14 R. 236; *Tilling v. Blythe* (1899), 47 W. R. 273; *Ideal Bedding Co. v. Holland*, [1907] 2 Ch. 157; *Re* Beaumont, *Woods v. Beaumont* (1910), 79 L. J. Ch. 744; *Re* Gershon & Levy, *Ex p.* Cook & Richards, *Ex p.* Westcott, [1915] 2 K. B. 527; *Singer v. Fry* (1915), 84 L. J. K. B. 2025.

As to effect of judgments & orders generally, *see* JUDGMENTS, Vol. XXX., pp. 118 *et seq.*

Specific appropriation of goods to meet bills—Subsequent bankruptcy of party in possession of goods.—*See* BANKRUPTCY, Vol. V., pp. 704, 705, Nos. 6180–6183.

SECT. 3.—PARTICULAR CLASSES OF CASES.

SUB-SECT. 1.—BREACH OF TRUST.

See, generally, TRUSTS & TRUSTEES.

By corporation.—*See* CORPORATIONS, Vol. XIII., p. 427, No. 1507.

SUB-SECT. 2.—COMPANY'S LIEN ON SHARES.

See, generally, BANKERS, Vol. III., pp. 155, 156, Nos. 219, 220; COMPANIES, Vol. IX., pp. 341 *et seq.*

SUB-SECT. 3.—COSTS.

See, generally, PRACTICE.

406. Costs ordered to be paid out of estate.—Costs, when decreed out of an estate, are a lien thereon, which makes it a security (LORD HARDWICKE, C.).—*BLOWER v. MORRET* (1754), 1 Dick. 254; 3 Atk. 772; 21 E. R. 266, L. C.

Annotations:—*Reid*. Morgan v. Scudamore (1796), 3 Ves. 195. *Mentd.* Lowten v. Colchester Corpn. (1817), 2 Mer. 112.

407. On fund in court—Successful party in interpleader issue.—Upon a bill of interpleader debt., who made it necessary, was ordered to pay all the costs; & pltf. has a lien for his costs upon the fund paid into ct.—*ALDRIDGE v. MESNER* (1801), 6 Ves. 418; 31 E. R. 1122, L. C.

Annotations:—*Reid*. Agar v. Blethyn (1835), Tyr. & Gr. 160. *Mentd.* Mason v. Hamilton (1831), 5 Sim. 19; *East India Co. v. Campion & Bazett* (1837), 1 Jur. 422.

See, generally, INTERPLEADER, Vol. XXIX., pp. 497 *et seq.*

408. On deeds lodged in court—Claim by next friend of infant plaintiff—Suit disavowed by plaintiff at majority.—A suit was instituted on behalf of an infant, & in the course of it deeds were deposited in ct. by debt. for inspection. It was admitted that the deeds belonged to pltf. Pltf., on coming of age, disavowed the suit:—*Held*: the deeds must be delivered out to debt., & the next friend had no lien on them for his costs.—*DUNN v. DUNN* (1854), 3 Drew. 17; 3 Eq. Rep. 129; 18 Jur. 1068; 61 E. R. 807; *on appeal* (1855), 7 De G. M. & G. 25, L. JJ.

See, generally, INFANTS, Vol. XXVIII., pp. 306 *et seq.*

409. Costs of inspectors — Under deed of arrangement.—A deed of arrangement under Bkpcy. Act, 1861 (c. 134), s. 192, provided for the payment in full of the costs of a previous deed of inspectorship, & all costs, charges & expenses incurred by the inspectors for the benefit of the estate, including the costs of an execution creditor, in consideration of the execution being withdrawn:—*Held*: the deed was valid on the ground that the inspectors had an equitable lien for those costs on bkpt.'s estate.—*FITZPATRICK v. BOURNE* (1868), L. R. 3 Q. B. 233; 9 B. & S. 157; 37 L. J. Q. B. 265; 18 L. T. 731; 16 W. R. 849; *on appeal*, L. R. 3 Q. B. 446, Ex. Ch.

See, generally, BANKRUPTCY, Vol. V., pp. 1156, 1157, Nos. 9372–9378.

410. Of action to enforce removal of pirated trade mark.—*PONSARDIN v. PETO, Ex p. UZIELLI*, No. 668, *post*.

411. ——A firm of forwarding agents in London were employed to distribute goods for

Sect. 3.—Particular classes of cases: Sub-sects. 3, 4, 5, 6, 7 & 8, A.]

foreign dealers. The goods were received by the London firm, & lodged at the docks, but were discovered to bear a forged trade mark in imitation of pltf.'s brand. Upon the forgery coming to light, the firm gave full information as to the manner in which the goods came into their custody, & on a bill being filed by pltf. against the dock co. & themselves, they defended the suit, but no participation in the fraud was imputed to them:—*Held*: (1) they were not entitled to their costs, it not clearly appearing that they were willing to assist pltf. in obtaining his remedy, but as innocent parties they were not ordered to pay costs; (2) pltf. was entitled to have the forged trade mark on the goods effaced, & also to a lien on them for costs, unless the owners should intervene.—*UPMANN v. ELKAN, ALLONES v. ELKAN* (1871), L. R. 12 Eq. 140; 40 L. J. Ch. 475; 24 L. T. 896; 36 J. P. 36; 19 W. R. 867; *on appeal*, 7 Ch. App. 130, L. C.

Annotations:—*As to* (1) *Consd.* *Upmann v. Forester* (1883), 24 Ch. D. 231. *Refd.* *Fennessy v. Day & Martin* (1886), 55 L. T. 161. *As to* (2) *Dbtd.* *Moet v. Pickering* (1878), 8 Ch. D. 372. It must not be supposed that I assent to the case that has been referred to, *Upmann v. Elkan* (JAMES, L.J.). *Generally*, *Mentd.* *Cattessons v. Anglo Foreign Manufacturing Co.* (1910), 28 R. P. C. 74.

412. —.]—In an action to restrain the infringement by principal deft. of pltf.'s trade mark:—*Held*: co-defts., who were wharfingers, & had received the goods bearing the pirated trade mark in the ordinary course of business without any knowledge or notice of fraud, & had submitted to act as the ct. should direct "on having their charges for warehouse rent, & their costs of the action paid or provided for," were entitled to be paid their costs of the action by pltf., & had a lien on the goods in their possession for their warehouse charges in priority to the lien, if any, which pltf. might have on the same for their costs of the action. *Semble*: when the pirated trade mark was removed, pltf. had no lien whatever on the goods for their costs of the action.—*MOET v. PICKERING* (1878), 8 Ch. D. 372; 47 L. J. Ch. 527; 38 L. T. 799; 26 W. R. 637, C. A.

Annotation:—*Refd.* *Jowitt v. Union Cold Storage Co.*, [1913] 3 K. B. 1.

See, generally, TRADE MARKS.

413. Of action against building society to recover debt—Debtor successful.]—An action was brought against two defts. & a building society, in which pltf. claimed certain money standing in the name of one of defts. in the books of the society, as his in his marital right as husband of the other deft. Judgment having been given for defts., the solr. for the first two defts. presented a petition under Solicitors Act, 1860 (c. 127), for a charging order on the fund. This was opposed by the building society on the ground that they had a lien on the fund for their costs:—*Held*: the building society were in the position of debtors to one of the other defts., & not of trustees, & consequently had no lien on the fund for their costs.—*PORTER v. WEST* (1880), 50 L. J. Ch. 231; 43 L. T. 569; 29 W. R. 236.

SUB-SECT. 4.—COVENANTS TO SETTLE.

See SETTLEMENTS.

SUB-SECT. 5.—CROWN DEBTS.

Unpaid legacy duty.]—*See* ESTATE & OTHER DEATH DUTIES, Vol. XXI., pp. 72, 73, Nos. 478, 490.

Effect of bankruptcy of debtor.]—*See* BANKRUPTCY, Vol. V., pp. 828 *et seq.*

As to Crown debts generally, *see* CONSTITUTIONAL LAW, Vol. XI., pp. 581, 582

SUB-SECT. 6.—DEBTS DUE TO OR BY DECEASED PERSONS AND LEGACIES.

414. In respect of debts—Effect of Administration of Estates Act, 1833 (c. 104).]—Administration of Estates Act, 1833 (c. 104), which makes real estate of a deceased person assets for payment of debts, does not create a lien or charge on the estate, & therefore, a creditor cannot, without obtaining a judgment, attach the rents & profits of such estate.

Mtgees. of real estate of a testator commenced an action, on behalf of themselves & all other creditors, for administration of his real & personal estate. At the time of the issue of the writ the personal estate had been administered. Testator had devised & bequeathed all his real & personal estate, subject as to his personal estate to payment of his debts & funeral & testamentary expenses, to certain persons, who were represented by defts. There was standing in the ct. to the credit of a partition action, which had been commenced by the devisees, a fund, which had been paid in, representing rents & profits of the real estate. Pltf. in the administration action, before having obtained judgment in their action, applied for an injunction to restrain defts. from applying for a transfer or payment to themselves of the fund in ct.:—*Held*: the application must be refused.—*Re MOON, HOLMES v. HOLMES*, [1907] 2 Ch. 304; 76 L. J. Ch. 535; 97 L. T. 748; 51 Sol. Jo. 552.

Annotation:—*Refd.* *Re Welch, Mitchell v. Willdors*, [1916] 1 Ch. 375.

See, now, Administration of Estates Act, 1925 (c. 23), ss. 32, 35 (1).

415. — Debt charged upon particular fund.]

An engagement of intestate to pay money out of a growing fund:—*Held*: a lien upon the administrator chargeable upon that fund.—*CLARK v. ADAIR* (1772), Lofft. 69; 98 E. R. 537.

Annotation:—*Mentd.* *Master v. Miller* (1791), 4 Term Rep. 320.

416. — Agreement to appropriate stock in satisfaction—Consideration moving from creditor.]

—What circumstances will give the creditor of a testator a specific lien on assets, standing as part of testator's estate at his death.

Must not a ct. conclude that when [the creditor] consented to suspend the action, she was induced to do so by the consideration that the stock which had been purchased was to be applied specifically to the payment of her demand? I am of opinion that she thereby acquired a specific lien on the stock in question (*LEACH, V.-C.*).—*TYLER v. MANSON, MANSON v. TYLER* (1826), 5 L. J. O. S. Ch. 34.

— **Agreement to settle unperformed.]**—*See* SETTLEMENTS.

417. In respect of legacies—Specific legacies sold—Proceeds applied in discharge of incumbrances.]—Testator devised a real estate to his wife for life, with remainder to the issue of a

PART V. SECT. 3, SUB-SECT. 6.

c. In respect of legacies—Maintenance clause.]—*COOL v. COOL* (1904), 25 C. L. T. 6; 3 N. B. Eq. Rep. 11.—*CAN.*

former marriage. He gave specific legacies to his wife, & made her extrix. together with A. & B. The real estate being mtged., the specific legacies in default of general personalty, were sold, to pay off the mtge., & the mtged. premises were assigned to a trustee to attend the inheritance, the wife apparently consenting:—*Held*: the wife without making out a case of fraud, misrepresentation, or ignorance of facts, could not afterwards establish a lien on the mtged. estate to the extent of the moneys produced by the sale of the specific legacies.—*TOPLIS v. VON DER HEYDE* (1840), 4 Y. & C. Ex. 173; 9 L. J. Ex. Eq. 27; 160 E. R. 967.

— **Legacies charged on particular fund.]—** See EXECUTORS, Vol. XXIII., p. 396, Nos. 4683–4685.

418. Right of retainer—Against debtor, legatee or devisee.]—A debt due from a devisee to testator does not constitute any lien upon the devised estate.—*Re COUSEN, Ex p. BARFF* (1848), De G. 613; 17 L. J. Bcy. 22; 11 L. T. O. S. 474; 12 Jur. 668.

Annotations:—*Consd.* Fox v. Buckley (1876), 3 Ch. D. 508. *Refd.* *Re Moore, Moore v. Moore* (1881), 45 L. T. 466; *Re Milnes, Milnes v. Sherwin* (1885), 53 L. T. 534; *Doering v. Doering* (1889), 42 Ch. D. 203.

— — — — —.]—See No. 667, *post*; & generally, EXECUTORS, Vol. XXIII., pp. 436 *et seq.*

— — — — — **In bankruptcy.]—**See BANKRUPTCY, Vol. IV., pp. 416 *et seq.*

— **By executor.]—**See EXECUTORS, Vol. XXIII., pp. 370 *et seq.*

Executor's right of indemnity.]—See EXECUTORS, Vol. XXIV., pp. 605 *et seq.*

SUB-SECT. 7.—DEBTS OF MARRIED WOMAN

419. For necessaries—Whether husband's estate liable.]—A bill filed by a party who had lent money to the wife of debt., while debt. was abroad, for the purchase of necessaries for her maintenance & support, set forth various letters to prove that the husband had authorised his wife to borrow the money, & had authorised his agent, to whom he had given a power of attorney to sell his estates, to satisfy his wife's debts out of the proceeds of such sale. The bill sought to establish a lien upon the husband's assets in this country:—*Held*: as a mere creditor of the husband pltf. had no equity against his assets, & no lien was established by the letters & power of attorney.—*MAY v. SKEY* (1849), 16 Sim. 588; 18 L. J. Ch. 306; 13 Jur. 594; 60 E. R. 1002.

Annotations:—*Expld.* Hirst v. Tolson (1849), 16 Sim. 620. *Consd.* Jenner v. Morris (1861), 3 De G. F. & J. 45. *Refd.* Deare v. Soutten (1869), L. R. 9 Eq. 151.

See, generally, HUSBAND & WIFE, Vol. XXVII., pp. 190 *et seq.*

420. Simple contract debt—Liability of separate estate.]—The right of a creditor of a married woman to enforce payment of a simple contract debt against her separate estate does not create in equity any lien or charge upon the separate estate, or create anything in the nature of a trust so as to prevent the debt being barred by analogy

to Stat. Limitations.—*Re HASTINGS (LADY), HALLETT v. HASTINGS* (1887), 35 Ch. D. 94; 56 L. J. Ch. 631; 57 L. T. 126; 52 J. P. 100; 35 W. R. 584; 3 T. L. R. 499, C. A.

Annotations:—*Mentd.* *Re Roper, Roper v. Doncaster* (1888), 39 Ch. D. 482; *Beck v. Pierce* (1889), 23 Q. B. D. 316; *Hulley v. Silversprings Bleaching & Dyeing Co.*, [1922] 2 Ch. 268.

See, generally, HUSBAND & WIFE, Vol. XXVII., pp. 178 *et seq.*

SUB-SECT. 8.—EXPENDITURE ON PROPERTY OF ANOTHER.

A. In General.

421. General rule—No lien.]—A ship belonging to debt., registered in the port of London, sustained serious damage on her voyage to New Zealand, & on her arrival there was surveyed & pronounced not seaworthy. The master was unable, either by loan or bottomry, to raise money for her repair, & he at length sold the ship to pltf., & on receiving payment of the purchase-money by a bill of exchange in London, executed to them a bill of sale of the ship. Pltfs. repaired the ship & sent her to England with a cargo. Debt. refused to ratify the sale or consent to the registry of the ship in pltf.' names, & on the arrival of the ship in the port of London, debt. put several men on board to take possession of the ship & cargo for them. Pltfs. thereupon applied for an injunction to restrain debt. from interfering with the ship or removing her out of the jurisdiction, & for a manager & receiver of the ship & cargo:—*Held*: pltf., if they had acquired no title as owners of the ship by the purchase, had acquired none by way of lien in respect of the moneys subsequently laid out on her repair.

It appears to me that there can be no such lien in this case. On the bill of sale the property is designated as the property of debt., of which pltf. had become the purchasers. As purchasers, & in the character of owners, they might have done what they pleased with it. According to debt.' case, pltf. purchased without a title, & they have been gratuitously expending money upon a chattel which is not their property. If that be so, a ct. of equity cannot give them a lien. There is no such equity, in the absence of contract (*WIGRAM, V.-C.*).—*RIDGWAY v. ROBERTS* (1844), 4 Hare, 106; 67 E. R. 580.

422. Exception to general rule—Expenditure under erroneous belief in title—Owner must be cognisant of error—Necessity for proof of bad faith.]—The relief in respect of expenditure under an erroneous opinion of title or an expectation of a larger interest, or that the enjoyment would not be disturbed, with the knowledge & permission of the other party, requires a case of bad faith clearly made out.—*DANN v. SPURRIER* (1802), 7 Ves. 231; 32 E. R. 94, L. C.; *subsequent proceedings* (1803), 3 Bos. & P. 399.

Annotations:—*Refd.* *Bigg v. Strong* (1857), 3 Sm. & G. 592; *Re Newbery, White v. Wakley* (1858), 28 L. J. Ch. 77; *Mold v. Wheatcroft* (1859), 27 Beav. 510. *Mentd.*

PART V. SECT. 3, SUB-SECT. 8.—A.

d. **Exception to general rule—Expenditure under erroneous belief in title—Belief must be reasonable.]—***SMITH v. GIBSON* (1865), 25 O. P. 248.—CAN.

e. — — — — —.]—*Held*: pltf. was entitled to a lien for improvements made under the belief that the land

was his own.—*MCCARTHY v. ARBUCKLE* (1879), 29 C. P. 529.—CAN.

f. — — — — — **Enforcement by subsequent mortgagee.]—**A purchaser of land made lasting improvements thereon under the erroneous belief that he had acquired the fee & then made a mtge. in favour of a person who took in good faith under the same mistake

as to title:—*Held*: the mtgee. had a lien to the extent of his mtge. which he was entitled to actively enforce.—*MCKIBBON v. WILLIAMS* (1897), 24 A. R. 122.—CAN.

g. — — — — —.]—*THURESSON v. THURESSON* (1899), 18 P. R. 414.—CAN.

h. — — — — —.]—*CHANDLER v.*

Sect. 3.—Particular classes of cases: Sub-sect. 8, A.

Rochdale Canal Co. v. King (1851), 2 Sim. N. S. 78; Beaufort v. Patrick (1853), 17 Beav. 60; Rochdale Canal Co. v. King (1853), 16 Beav. 630; White v. Wakley (No. 1) (1858), 26 Beav. 17; Davies v. Marshall (1861), 4 L. T. 105; Cotching v. Bassett (1862), 32 Beav. 101; Davies v. Sear (1869), L. R. 7 Eq. 427; Eardley v. Granville (1876), 45 L. J. Ch. 669; McAllister v. Rochester (Bp.), etc. (1879), 42 L. T. 22; Russell v. Watts (1885), 10 App. Cas. 590; McManus v. Cooke (1887), 35 Ch. D. 681; London General Omnibus Co. v. Lavell (1900), 83 L. T. 453.

423. — Wife's pre-marriage contract completed by husband—Purchase subsequently set aside.]—The wife being entitled in equity to real estate under a contract of sale entered into before her marriage, the husband, after their marriage, completed the purchase & took the conveyance to himself; afterwards, acting upon the supposition that the estate was his own, the husband laid out money in improvements upon it, & ultimately, in the lifetime of the wife, under the same mistake, sold the estate, & the purchasers took a conveyance from him. The husband survived the wife. After the death of the husband the heir-at-law of the wife, recovered the estate from the purchasers by a suit in equity:—*Held*: the husband & the purchasers from him were entitled in that suit to a lien on the estate in respect of the purchase-money paid by the husband; & *semble*: also, in respect of the moneys expended on lasting improvements.—NEESOM v. CLARKSON (1845), 4 Hare, 97; 9 Jur. 822; 67 E. R. 576; *previous proceedings* (1842), 2 Hare, 163.

Annotation:—*Refd.* Parkinson v. Hanbury (1867), L. R. 2 H. L. 1.

424. — Supposed owner declared mere trustee.]—E. the owner of a fishery called the B. fishery took by mistake a lease of the same for three years from P., who was a trustee for other parties. The settlement under which E. claimed had conveyed the lands of B., & all other estates of inheritance & hereditaments of which J. was then seised, & J. had previously obtained a conveyance of & was seised in "the lands of B. & the salmon fisheries in the rivers." J. had applied for an Act of Parliament to improve certain parts of the river, & as he died while the bill was being passed, the name of H. his heir-at-law, as the owner, was inserted in the bill which recited in effect that H. was a trustee, though H. represented himself to be owner in fee, & hence the mistake:—*Held*: the fishery passed under the words "estate of inheritance," & E. was entitled to have the lease rescinded on the ground of mistake, subject to a lien in favour of H., for expenditure on improvements.—COOPER v. PHIBBS (1867), L. R. 2 H. L. 149; 16 L. T. 678; 15 W. R. 1049, H. L.

Annotations:—*Mentd.* O'Brien v. Hearn (1870), 18 W. R. 514; Galway County Election Petn., Trench v. Nolan (1872), 27 L. T. 69; Jones v. Clifford (1876), 3 Ch. D. 779; Allen v. Richardson (1879), 13 Ch. D. 524; Blenkhorn v. Fenwick (1880), 43 L. T. 668; Briggs v. Massey (1881), 29 W. R. 926; Daniell v. Sinclair (1881), 50 L. J. P. C. 60; Bettyes v. Maynard (1882), 46 L. T. 766; Soper v.

Arnold (1887), 57 L. J. Ch. 145; General Auction, Estate, & Monetary Co. v. Smith (1891), 40 W. R. 106; Huddersfield Banking Co. v. Lister, [1895] 2 Ch. 273; Alford v. Walker, [1896] 2 Ch. 369; Debenham v. Sawbridge [1901] 2 Ch. 98; Scott v. Coulson, [1903] 2 Ch. 249; *Re Oliver's Settlement*, Evered v. Leigh, [1905] 1 Ch. 191; Carnell v. Harrison, [1916] 1 Ch. 328.

425. — Expenditure acquiesced in by owners—Sons building on father's land—Acquiescence of father.]—A father, the equitable owner of a small bit of land, erected a granary thereon; he afterwards allowed his two sons to use & occupy them, & they erected other buildings thereon at a great expense:—*Held*: under the circumstances stated by the father in his answer, the sons had a lien on the premises for their outlay.—UNITY JOINT STOCK MUTUAL BANKING ASSOCN. v. KING (1858), 25 Beav. 72; 27 L. J. Ch. 585; 31 L. T. O. S. 128; 4 Jur. N. S. 470; 6 W. R. 264; 53 E. R. 563.

Annotations:—*Refd.* Millard v. Harvey (1864), 11 L. T. 360. *Mentd.* Plimmer v. Wellington Corpn. (1884), 9 App. Cas. 699.

—*See, further*, ESTOPPEL, Vol. XXI., pp. 368 *et seq.*

426. Whether future liabilities included.]—DYSON v. PEAT, No. 262, *ante*.

B. Particular Payments.

427. Expenditure by prospective owner—Incumbrance discharged by purchaser.]—A remainderman having sold property to a purchaser, by whom money is advanced to pay off a heavy & pressing incumbrance, the remainderman representing himself to have a right to sell with the concurrence of the tenant for life for that purpose; whereupon a draft of conveyance is prepared, to which the tenants for life & remaindermen are made parties, & the purchaser takes possession: gives such an equitable title to the purchaser, as having cleared the estate from a charge to which the tenant for life was liable, as to establish a lien on the property, which equity will protect by enjoining the tenant for life from proceeding by ejectment to obtain possession until the cause shall be finally determined on the hearing, whatever case may be made by the answer on merits stated on the part of deft. in equity.—LUDLOW v. GRAYALL (1822), 11 Price, 58; 147 E. R. 400.

428. Expenditure under contract—By prospective lessee—Under agreement for lease—Lease not granted.]—MIDDLETON v. MAGNAY, No. 507, *post*.

429. — Default by party claiming lien.]—A man who enters into a contract to expend a certain sum of money on land & after spending part of it declines to perform the contract has no lien on the land for the money which he has expended.—WALLIS v. SMITH (1882), 21 Ch. D. 243; 47 L. T. 389; *on appeal*, 21 Ch. D. 252, C. A.

Annotations:—*Mentd.* General Credit & Discount Co. v. Glegg (1883), 22 Ch. D. 549; Catton v. Bennett (1884), 51 L. T. 70; *Re Russell & Scott & Wallis* (1885), 54 L. J. Ch. 948; Law v. Redditch L. B., [1892] 1 Q. B. 127; Barton v. Capewell Continental Patents Co. (1893), 68 L. T. 857; Ward v. Monaghan (1895), 59 J. P. 392; Willson v. Love, [1896] 1 Q. B. 626; Stegmann v. O'Connor (1899), 80 L. T. 234; Pye v. British Automobile Commercial Syndicate, [1906] 1 K. B. 425; Dewar v. Mintoft, [1912] 2 K. B. 373; Dunlop Pneumatic Tyre Co. v. New Garage & Motor Co., [1915] A. C. 79.

GIBSON (1901), 21 C. L. T. 558; 2 O. L. R. 442.—CAN.

k. —.—.]—CORBETT v. CORBETT (1907), 12 O. L. R. 268; 8 O. W. R. 88.—CAN.

l. —.—.]—RICHARDS v. COLLINS (1912), 23 O. W. R. 499; 4 O. W. N. 375; 27 O. L. R. 390; 9 D. L. R. 249.—CAN.

m. —.— *Expenditure acquiesced in by owners.]*—Where the owner of property stands by & allows a person

to spend money thereon in expectation that he will receive the benefit of it, such person is entitled to a lien for the increased value resulting from the expenditure.—MCBRIDE v. MCNEIL (1912), 23 O. W. R. 558; 4 O. W. N. 475; 27 O. L. R. 455.—CAN.

PART V. SECT. 3, SUB-SECT. 8.—B.

n. *Improvements.]*—BROUGHTON v. SMALLPIECE (1877), 25 Gr. 290.—CAN.

o. —.— *By owner's son—On faith*

of promised gift of land.]—BIEHN v. BIEHN (1871), 18 Gr. 497.—CAN.

p. —.—.]—SMITH v. SMITH (1899), 29 O. R. 309; 26 A. R. 397.—CAN.

q. —.—.]—BOUDREAU v. RE-NEAULT (Alta.) (1910), 15 W. L. R. 414.—CAN.

r. —.— *By person in possession under agreement to purchase.]*—Defts. having taken possession of land under an agreement to purchase in fee:—

430. Expenditure by lessee—Erection of buildings—Provision for compensation on termination of lease by lessor.]—An agreement to let land at a yearly rent, determinable by six months' notice to quit, no term being mentioned, provided that in case A. & B. erected any buildings on the land, they could remove them at any time during their occupation, or otherwise they were to be allowed a beneficial interest in the same to the amount of the sum expended in the erection of the said buildings, such interest to extend over a period of twenty years from the date thereof—*i.e.*, if pltf. were required to give up possession before the expiration of the said term, they were to be allowed one-twentieth part of the amount expended for each remaining year of the unexpired term. A. & B. erected buildings on the land. The land was afterwards sold by the landlord to a co., who served on the tenants a notice to quit, & took possession under the Lands Clauses Consolidation Act, 1845 (c. 18), without offering to pay to A. & B. the proportion of the money expended by them on the buildings:—*Held*: though the tenancy was legally determined, A. & B. had an equitable lien under the agreement, which was such an interest in the land as to entitle them to claim to have the co. restrained from removing the buildings till the proportion due to them was provided for.—*ROGERS v. KINGSTON-UPON-HULL DOCK CO.* (1864), 5 New Rep. 26; 34 L. J. Ch. 165; 11 L. T. 463; 29 J. P. 68; 10 Jur. N. S. 1245; 13 W. R. 217, L. C.

Annotations:—*Mentd.* Morgan v. Davies (1878), 39 L. T. 60; Barlow v. Teal (1885), 15 Q. B. D. 501.

431. Repairs—Lasting improvements.]—NEESOM v. CLARKSON, No. 423, *ante*.

432. — By mortgagor in possession—Lien claimed on fire insurance policy money.]—A lessee who had covenanted to insure against fire in the joint names of himself & his lessor, with a proviso that the policy moneys should be expended in reinstating the premises, assigned them by way of mtgee., with a power of sale under which the mtgee. sold. The mtgee. deed did not notice the policy. The premises were subsequently damaged by fire & were reinstated by the mtgee. On a claim filed by the mtgee. & his vendee, the mtgor. was decreed to deliver up the policy & join with the lessor in signing the receipt to the insurance office to enable the mtgee. to receive the money payable under the policy. A lessee in possession is not entitled as against his mtgee. to a lien on the policy moneys for repairs done by him after a fire.—*GARDEN v. INGRAM* (1852), 23 L. J. Ch. 478; 20 L. T. O. S. 17, L. C.

Annotations:—*Refd.* Lees v. Whiteley (1866), L. R. 2 Eq. 143; Rayner v. Preston (1881), 18 Ch. D. 1.

433. — By owner of rentcharge—Charged on premises repaired.]—Pltfs. were entitled to a rentcharge, created by a deed of 1778, which contained a power on non-payment to enter upon the premises charged, & receive the rents, etc., until satisfaction of all arrears of the rentcharge, "together with all such costs, etc., as should be

laid out, etc., by or by reason of the non-payment thereof." In 1844, the rentcharge being in arrear, & the property so dilapidated as to be unproductive, pltf. entered into possession & expended money in repairs, etc.:—*Held*: they had no lien on the land for the moneys so expended, whether defts., the owners of a subsequent rentcharge, had notice of such repairs & had acquiesced in the making thereof or not, & the remedy of pltf., if any, was at law, & depended on the construction of the deed of 1778.—*HOOPER v. COOKE* (1856), 25 L. J. Ch. 467; 27 L. T. O. S. 178; 2 Jur. N. S. 527, L. C.

434. — Ordinary repairs to house insufficient.]—Pltf. left his own house at the request of deft. & went to reside rent free in one belonging to deft. Pltf. expended £300 in repairs of the house into which he so moved. It did not appear from the evidence that the repairs were other than ordinary repairs. Deft. afterwards brought an action of ejectment against pltf., when he claimed to have a lien on the property for his expenses. Upon a bill filed for *inter alia*, an injunction to restrain the action of ejectment:—*Held*: the nature of the repairs done by pltf. was not sufficient to support his claim to the lien.—*MILLARD v. HARVEY* (1864), as reported in 11 L. T. 360; 10 Jur. N. S. 1167; 13 W. R. 125.

— *By tenant for life.]—*See LAND IMPROVEMENT, Vol. XXX., p. 276, Nos. 6, 11; SETTLEMENTS.

435. Improvements—By co-owner.]—SWAN v. SWAN, No. 439, *post*.

436. — Lease repudiated on lessee's bankruptcy.]—Bkpt. agreed in writing to take a lease of a manufactory for a term of years, & the landlord agreed to erect at his own expense certain buildings, upon bkpt. paying, as an additional rent, £7 10s. per cent. upon the amount so expended. The buildings, however, were subsequently erected by bkpt., on the verbal assurance of the landlord, that bkpt. might deduct the amount expended from the rent. The assignees elected not to adopt the agreement for the lease, but refused to deliver up possession to the landlord, unless he allowed them the sum which bkpt. had expended on the buildings:—*Held*: as both the written & verbal agreement between the landlord & bkpt. contemplated a continuance of the tenancy, which the assignees had themselves repudiated, they had no lien on the premises for the money expended by bkpt.—*Re RYLAND, Ex p. LADD, Ex p. MOLE* (1834), 3 Deac. & Ch. 647, Ct. of R.

— *By tenant for life.]—*See LAND IMPROVEMENT, Vol. XXX., pp. 276, 277, 293, 294, Nos. 7-10, 12-14, 196-204; SETTLEMENTS.

437. Building on land of another—While owner stands by.]—If a stranger build on land knowing it to be the property of another equity will not prevent the real owner from afterwards claiming the land, with the benefit of all the expenditure on it.—*RAMSDEN v. DYSON* (1866), L. R. 1 H. L.

Held: they had a lien on the land for lasting improvements made.—*YOUNG v. DENIKE* (1901), 22 C.L. T. 27; 2 O. L. R. 723.—CAN.

t. —.—.]—*DEVELIN v. RAD-* (1910), 17 O. W. R. 665; 22 O. L. R. 399.—CAN.

a. —.—.]—*ALLAN v. RIOPEL* (Alta.) (1913), 26 W. L. R. 248; 5 W. W. R. 712; 14 D. L. R. 811.—CAN.

b. —.—.]—*Made on faith of unenforceable agreement.]—*Deft. claimed a lien on land for improvements made on the faith of an agreement based on

an immoral consideration:—*Held*: there could be no lien for improvements so made.—*MOON v. CLARKE* (1879), 30 C. P. 417.—CAN.

c. —.—.]—*By lessee—Lessor promising to pay.]—*BERRIE v. WOODS (1886), 12 O. R. 693.—CAN.

d. *Payment of taxes.]—*EWART v. STEVEN (1871), 18 Gr. 35.—CAN.

e. —.—.]—*CHARLTON v. WATSON* (1884), 4 O. R. 489.—CAN.

f. —.—.]—*By mortgagee.]—*A mtgee. had paid taxes on the mortgaged properties for a number of years, & had

redeemed them from a sale for taxes:—*Held*: he had no right to a lien on the lands for the amount.—*GRAHAM v. BRITISH CANADIAN LOAN & INVESTMENT CO.* (1898), 12 Man. L. R. 244.—CAN.

g. —.—.]—*SMITH v. ANDERSON* (1913), 18 B. C. R. 453.—CAN.

h. —.—.]—*Knowledge of owner.]—*Where the owner of land knows, or should be held to know, that another is paying his taxes, the person paying is entitled to a lien on the land for the amount paid, if by his payments the

Sect. 3.—Particular classes of cases: Sub-sect. 8, B. & C. (a), (b) & (c).]

129; 12 Jur. N. S. 506; 14 W. R. 926, H. L.; *reusg. S. C. sub nom. THORNTON v. RAMSDEN* (1864), 4 Giff. 519.

Annotations:—*Reid. Bankart v. Tennant* (1870), L. R. 10 Eq. 141; *Plimmer v. Wellington Corp.* (1884), 9 App. Cas. 699; *Re Clarke, Ex p. Newton & Kearly* (1889), 60 L. T. 335; *Marriott v. Reid* (1900), 82 L. T. 369; *Ahmad Yar Khan v. Secretary of State for India in Council* (1901), 17 T. L. R. 500; *A.-G. to Prince of Wales v. Collom*, [1916] 2 K. B. 193; *Michaud v. Montreal (City)* (1923), 92 L. J. P. C. 161. **Mentd.** *Bastin v. Bidwell* (1881), 44 L. T. 742; *Weller v. Stone* (1885), 54 L. J. Ch. 497; *McManus v. Cooke* (1887), 35 Ch. D. 681; *Proctor v. Bennis* (1887), 36 Ch. D. 740; *Wimbledon & Putney Commons Conservators v. Nicol* (1894), 10 T. L. R. 247; *Re Williams & Parry's Contract* (1895), 72 L. T. 869; *Civil Service Musical Instrument Assocn. v. Whiteman* (1899), 68 L. J. Ch. 484; *Lala Beni Ram v. Kundan Lal* (1899), 15 T. L. R. 258; *Cloutte v. Storey* (1910), 80 L. J. Ch. 193; *Wheeler v. Stratton* (1911), 105 L. T. 786; *Ramsden v. I. R. Comrs.*, [1913] 3 K. B. 580, n.; *Morpeth Corp. v. Northumberland Farmers' Auction Mart Co. & Donkin* (1921), 90 L. J. Ch. 420; *Jones (Holloway) v. Woodhouse*, [1923] 2 K. B. 117.

—*See, generally, ESTOPPEL*, Vol. XXI., pp. 368–370, Nos. 1445–1451.

Insurance premiums.]—*See* Nos. 452, 453, *post*; & *INSURANCE*, Vol. XXIX., pp. 383 *et seq.*

Fine on renewal of lease—Paid by tenant for life.]—*See* SETTLEMENTS.

Calls on shares—Paid by tenant for life.]—*See* SETTLEMENTS.

C. Who Entitled.

(a) Co-Owners.

438. Expenditure by way of salvage.]—*HOPE v. WINTER* (1710), 2 Eq. Cas. Abr. 690; 22 E. R. 580, L. C.

439. Enforceable in partition action.]—Where it is stated by the answer to a bill filed for a partition that deft. has laid out money in building & improving the premises, the ct. will not decree a partition without a reference to the master to take an account. . . . Money laid out in improving the premises does not, however, in strictness create a lien on the premises, but it is a sufficient ground for a ct. of equity to refuse to interfere.—*SWAN v. SWAN* (1820), 8 Price, 516; 146 E. R. 1281.

Annotations:—*Dbtd. & Distd. Re Leslie, Leslie v. French* (1883), 23 Ch. D. 552. **Reid.** *Watson v. Gass* (1881), 45 L. T. 582; *Hill v. Hickin*, [1897] 2 Ch. 579. **Mentd.** *Sinclair v. James*, [1894] 3 Ch. 554.

440. Money of one laid out by other.]—A. & B. were joint owners of a house, & A. had laid out on it moneys he had obtained from B.:—*Held*: B. had no lien on the house for the amount.—*KAY v. JOHNSTON* (1856), 21 Beav. 536; 52 E. R. 967.

Annotations:—*Consd. Re Leslie, Leslie v. French* (1883), 23 Ch. D. 552. **Mentd.** *Re Jones, Farrington v. Forrester* (1893), 62 L. J. Ch. 996.

441. Joint tenants—Outlay by one—Distinguished from tenants in common.]—*LAKE v. GIBSON* (1729), 1 Eq. Cas. Abr. 290; 21 E. R. 1052; *affd. sub nom. LAKE v. CRADDOCK* (1732), 3 P. Wms. 158, L. C.

Annotations:—*Reid. Aveling v. Knipe* (1815), 19 Ves. 441; *Buckley v. Barber* (1851), 6 Exch. 164. **Mentd.** *Jackson v. Jackson* (1804), 9 Ves. 591; *Dale v. Hamilton* (1846), 5 Hare, 369; *Re Rowe, Jacobs v. Hind* (1889), 60 L. T. 596; *Steeds v. Steeds* (1889), 22 Q. B. D. 557.

land is saved to the owner.—*RIDDELL v. McRAE* (Alta.), [1917] 2 W. W. R. 546; 34 D. L. R. 102.—*CAN.*

PART V. SECT. 3, SUB-SECT. 8.—
C. (a).

438 i. Expenditure by way of salvage.]—*MORAN v. MITTU BIBEE* (1876), I. L. R. 2 Calc. 58.—*IND.*

438 ii. —.]—*KINU RAM DAS v.*

MOZAFFER HOSAIN SHAHA (1887), 1 L. R. 14 Calc. 809.—*IND.*

442 i. Tenant in common—Whether entitled.]—The equitable right of a tenant in common of real estate, who has made permanent improvements upon it while in sole occupation, to be compensated for his expenditure to the extent to which the value of the land has been increased thereby, is one which attaches to the land.—*BRICKWOOD v.*

— Payment of premiums—At request of co-owner.]—*See* *INSURANCE*, Vol. XXIX., p. 385.

In common—Whether entitled.]—Part owners of a ship are tenants in common, not joint tenants. No lien therefore, on the share of one, a bkpt. having been also managing owner, for outfit, freight, etc., due to the others.—*Ex p. YOUNG* (1813), 2 Ves. & B. 242; 2 Rose, 78, n.; 35 E. R. 311, L. C.

Annotations:—*Consd. Holderness v. Shackels* (1828), Dan. & Ll. 203. **Apld.** *Re Drury & Hudson, Ex p. Leslie* (1833), 3 L. J. Bcy. 4; *Green v. Briggs* (1848), 6 Hare, 395. **Consd.** *Re Leslie, Leslie v. French* (1883), 23 Ch. D. 552. **Reid.** *The Vindobala* (1887), 13 P. D. 42. **Mentd.** *Richardson v. Bank of England* (1838), 2 Jur. 911.

443. —.]—The owners of a ship are not interested in it as joint tenants, but as tenants in common; upon a bkpcy., therefore, bkpt.'s share passes to the creditors under the bkptcy., without being liable specifically to the claims of the other part owners, in respect of their disbursements & liabilities for the ship.—*Re NICHOLSON, Ex p. HARRISON* (1814), 2 Rose, 76, L. C.

Annotations:—*Reid. Re Drury & Hudson, Ex p. Leslie* (1833), 3 L. J. Bcy. 4; *Green v. Briggs* (1848), 6 Hare, 395; *Re Leslie, Leslie v. French* (1883), 23 Ch. D. 552; *The Vindobala* (1887), 13 P. D. 42.

444. —.]—*GREEN v. BRIGGS* (1848), 6 Hare, 395; 17 L. J. Ch. 323; 11 L. T. O. S. 412; 12 Jur. 326; 67 E. R. 1219.

Annotations:—*Reid. Alexander v. Simms* (1854), 5 De G. M. & G. 57; *Lindsay v. Gibbs* (1856), 22 Beav. 522. **Mentd.** *The Edmond* (1860), 2 L. T. 192; *Vanner v. Frost* (1870), 39 L. J. Ch. 626; *Japp v. Campbell* (1887), 57 L. J. Q. B. 79.

445. — Of West Indian estate.]—*MARRYATT v. HOOKE* (circa 1804), cited in 14 Ves. p. 442; 33 E. R. 590, L. C.

Annotation:—*Consd. Scott v. Nesbitt* (1808), 14 Ves. 438.

446. — Effect of agreement between one co-owner & mortgagee.]—A mtgee. of a ship agreed with one of the part owners, that he would pay all disbursements of a voyage, & in consideration was to have the proceeds of the freight handed over to him in priority of all other charges. He failed to advance any money, & the part owner was obliged to do so instead.

Both having become bkpt., & the ship, etc., having been sold:—*Held*: the assignees of the mtgee. were entitled to their full share of the proceeds, as, though he had not fulfilled his contract, yet the ownership of a vessel is in common, not joint; & this agreement & dealing had not made it joint: & that the part owner had no claim on the share of the mtgee. for his advances.—*Re DRURY & HUDSON, Ex p. LESLIE* (1833), 3 L. J. Bcy. 4.

447. Adjoining owners—Expense of re-building party wall.]—An administrator, who as such receives the improved rents of a house in the metropolis, from the tenant in possession, is liable, under Building Act, 1774 (c. 78), s. 41, to be sued for the moiety, or other proportional part, of the expense of building of a party wall, erected by the owner of the adjoining house in pursuance of the Act. *Semble*: these expenses are in the nature of a lien upon the improved rent; & therefore to the extent of such moiety, or other

YOUNG & MINISTER FOR PUBLIC WORKS OF N.S.W. (1905), 2 C. L. R. 387; 4 S. R. N. S. W. 743; 21 N. S. W. W. N. 257.—*AUS.*

442 ii. —.]—*PATTERSON v. MACKENZIE*, [1924] 3 D. L. R. 243; 2 W. W. R. 657; 18 Sask. L. R. 378.—*CAN.*

k. Payment of fine for renewal of lease.]—*HAMILTON v. DENNY* (1809), 1 Ball & B. 199.—*IR.*

proportional part, the rent is not assets in the hands of the administrator.—**THACKER v. WILSON** (1835), 3 Ad. & El. 142; 4 Nev. & M. K. B. 658; 1 Har. & W. 131; 4 L. J. K. B. 149; 111 E. R. 367.

Annotation:—**Mentd.** *Mason v. Fulham Corpn.* (1910), 102 L. T. 188.

See, generally, **BOUNDARIES**, Vol. VII., pp. 296 *et seq.*

Co-owners of ship.—*See, generally*, **SHIPPING**.

Right of contribution.—*See* **CONTRACT**, Vol. XII., pp. 536 *et seq.*

(b) *Limited Owners.*

448. Tenant for life—Of West Indian estate—Supplying estate with necessities.—In the West Indies, a tenant for life having supplied the estate with necessities, a lien subsists unquestionably, after his death, upon the inheritance (**LORD ELDON, C.**).—**SCOTT v. NESBITT** (1808), 14 Ves. 438; 33 E. R. 589, L. C.

Annotations:—**Refd.** *Sayers v. Whitfield* (1829), 1 Knapp, 133; *Farquharson v. Balfour* (1836), 8 Sim. 210; *Shaw v. Simpson* (1842), 1 Y. & C. Ch. Cas. 732; *Morrison v. Morrison* (1855), 2 Sm. & G. 564; *Fraser v. Burgess* (1860), 13 Moo. P. C. C. 314; *Bertrand v. Davies* (1862), 31 Beav. 429; *Twynam v. Hudson* (1862), 31 L. J. Ch. 577; *Re Harriott, Ex p. Pengelley* (1863), 8 L. T. 854; *Re Leith's Estate, Chambers v. Davidson* (1866), L. R. 1 P. C. 296. **Mentd.** *Re Courtney, Ex p. Pollard* (1840), 4 Deac. 27; *Mansfield v. Ogle* (1855), 24 L. J. Ch. 450; *Securities & Properties Corpn. v. Brighton Alhambra* (1893), 62 L. J. Ch. 566; *Duder v. Amsterdamsch Trustees Kantoor*, [1902] 2 Ch. 132.

— **For repairs & improvements.**—*See* **LAND IMPROVEMENT**, Vol. XXX., pp. 276, 277, 293, 294; **SETTLEMENTS**.

Paying calls on shares.—*See* **SETTLEMENTS**.

— *See, also*, No. 463, *post*.

— **Paying fines on renewal of lease.**—*See* No. 463, *post*; **SETTLEMENTS**.

Trustees.—*See* **TRUSTS & TRUSTEES**.

— **Of literary or scientific institution.**—*See* **LITERARY & SCIENTIFIC INSTITUTIONS**.

Personal representative—Of mortgagee of insurance policy.—*See* No. 449, *post*.

(c) *Mortgagors and Mortgagees.*

See, generally, **MORTGAGE**.

449. Mortgagor—General rule.—A policy of assurance was assigned by L. to S. as a security for a judgment debt due from L. to S. on which S. had created a charge in favour of V. The premiums were paid by S. during his life, & after his death by his administrator, at first of his own authority, & afterwards by the direction of the ct. in an administration suit:—**Held**: as against V., the administrator of S. had a lien upon the money payable under the policy for the amount of the premiums paid by him, but not for the premiums paid by S.

What [V.] obtains by the letter from S. which I have read is an assignment of the bond & judgment to secure payment of what was due to him. The assignment of the policy is to secure payment of that bond & judgment, & he is therefore entitled to a lien upon it (**LORD ROMILLY, M.R.**).—**NORRIS v. CALEDONIAN INSURANCE CO.** (1869), L. R. 8 Eq. 127; 38 L. J. Ch. 721; 20 L. T. 939; 17 W. R. 954.

Annotation:—**Refd.** *Re Leslie, Leslie v. French* (1883), 23 Ch. D. 552.

450. — Repairing mortgaged premises after fire.—**GARDEN v. INGRAM**, No. 432, *ante*.

451. — Purchasing reversion of renewable lease—Lease no longer renewable.—In Nov. 1863, N. purchased the equity of redemption in certain property held under a renewable lease from the Dean & Chapter of C. which expired at Michaelmas 1881. The mtge. upon these leaseholds was held by defts. I. & D. In Oct. 1880, N. borrowed £300 from pltf., & gave her a memorandum that pltf. has advanced to me the sum of £300, to be secured by mtge. from me to her on a messuage etc. (describing the property comprised in the lease), together with interest thereon at 5 per cent. as soon as I have completed the enfranchisement of the said property from the Ecclesiastical Comrs. of England." In Nov. 1881, N., after the expiration of the lease, purchased the reversion in the property from the Ecclesiastical Comrs., in whom it had become vested, & who by their Acts had power to sell the reversion, but not to renew, for £350:—**Held**: the reversion, having been purchased in respect of N.'s interest under the lease, was subject to the old mtge. held by I. & D., & neither under the General Rules of the Ct., nor under Ecclesiastical Comrs. Acts, had N. or pltf., as claiming under him, any lien upon the property as against the mtgees. for the money expended in the purchase of the reversion.—**LEIGH v. BURNETT** (1885), 29 Ch. D. 231; 54 L. J. Ch. 757; 52 L. T. 458; 33 W. R. 578.

— **Keeping up insurance policy.**—*See* **INSURANCE**, Vol. XXIX., p. 384, Nos. 3074–3076.

452. Mortgagee—Keeping up insurance policy—On life of mortgagor.—In 1816, D. assigned a policy of insurance on his life to a trustee to secure a sum of money owing to W.; & soon afterwards, the solr. of W. caused a memorandum to be entered in the office of the insurance co., directing that all letters were to be sent to such solr., & the premiums were thenceforth paid by W., through the hands of such solr.; but the insurance co. were not informed on whose behalf the solr. acted. In 1826, D. became bkpt., & his assignees declined to interfere respecting the policy. The premiums continued to be paid by W., through his solr., during his life, & by the exors. of W., through their bankers, after his death. D. died in 1839:—**Held**: the exors. of W. had a lien on the policy for the amount of the premiums which had been paid by W., & his estate, & the interest thereon; & they were entitled to payment of the amount thereof out of the moneys payable under the policy.—**WEST v. REID** (1843), 2 Hare, 249; 12 L. J. Ch. 245; 7 Jur. 147; 67 E. R. 104.

Annotations:—**Mentd.** *Re Plummer, Ex p. Plummer* (1853), 1 Bankr. & Ins. R. 83; *Drysdale v. Piggott* (1856), 22 Beav. 238; *Saunders v. Dunman* (1878), 7 Ch. D. 825; *Re Leslie, Leslie v. French* (1883), 23 Ch. D. 552; *Lloyd's Banking Co. v. Jones* (1885), 29 Ch. D. 221; *Falcke v. Scottish Imperial Insce.* (1886), 34 Ch. D. 234.

453. — Policy settled—Refusal of trustees to pay.—A policy of insurance on the life of G., granted to a trustee for her, was assigned to trustees, upon trust to invest the proceeds at the death of G. for the benefit of C. for life, for her separate use, without power of anticipation, & after her death upon trusts as she should appoint, & in default of appointment for the persons who

PART V. SECT. 3, SUB-SECT. 8.—
C. (b).

1. **Tenant for life—Salvage.**—**FERGUSON v. FERGUSON** (1885), 17 L. R. Ir. 552.—**IR.**

m. — *Re NEPEAN'S*

SETTLED ESTATE, [1900] 1 I. R. 298.—**IR.**

PART V. SECT. 3, SUB-SECT. 8.—
C. (c).

n. **Mortgagee.**—**FLEMING v. PALMER** (1866), 12 Gr. 226.—**CAN.**

o. — *COOK v. MASON* (1876), 24 Gr. 112.—**CAN.**

p. — *HOLMES & BELL v. NATIONAL FIRE & MARINE INSURANCE CO. OF NEW ZEALAND* (1887), 5 N. Z. L. R. 360 (S. C.).—**N.Z.**

Sect. 3.—Particular classes of cases: Sub-sect. 8, C. (c), (d), (e), (f) & (g); sub-sect. 9.]

would be entitled to her personal estate. The trustees had power to pay the premiums. Notice was given to the assurance co. of the assignment. C. subsequently, by a deed to which G. was a party, appointed the policy & the moneys to become due thereon to pltfs. to secure the repayment of moneys (with interest at 5 per cent.) advanced to G. for the benefit of herself & C. & children. Notice was given to the surviving trustee of the settlement & to the insurance co. Pltfs. had, in consequence of the trustee & others interested in the policy refusing to pay them, paid the premiums & kept the policy on foot. On the death of G. the assurance co. paid the policy moneys to the trustees, who refused to pay pltfs. the sums due to them. The policy moneys were afterwards paid into ct. On bill filed by pltfs.:—*Held*: they were entitled to be repaid at once the moneys which they had advanced for the payment of the premiums with interest at 4 per cent., & 1 per cent. more on the death of C.—*GILL v. DOWNING* (1874), L. R. 17 Eq. 316; 30 L. T. 157; 22 W. R. 360.

Annotations:—*Expld.* *Falcke v. Scottish Imperial Insce.* (1886), 34 Ch. D. 234. *Refd.* *Re Leslie, Leslie v. French* (1883), 23 Ch. D. 552.

454. ———.]—When a person, not the sole beneficial owner, pays the premiums to keep up a policy of life insurance, he is entitled to a lien on the policy or its proceeds in the following cases: (a) by contract with the beneficial owner; (b) by reason of the right of trustees to an indemnity out of their trust property for money expended by them in its preservation; (c) by subrogation to their right of some person who, at the request of trustees, has advanced money for the preservation of the property; (d) by reason of the right of a mtgee. to add to his charge any money paid by him to preserve the property. In no other cases can a lien on a policy for premiums paid be acquired either by a stranger or by a part owner of the policy.—*Re LESLIE, LESLIE v. FRENCH* (1883), 23 Ch. D. 552; 52 L. J. Ch. 762; 48 L. T. 564; 31 W. R. 561.

Annotations:—*Expld.* *Re Winchelsea's Policy Trusts* (1888), 39 Ch. D. 168. *Refd.* *Falcke v. Scottish Imperial Insce.* (1886), 34 Ch. D. 234; *Strutt v. Tippet* (1890), 62 L. T. 475; *The Ripon City*, [1898] P. 78; *Re McKerrell, McKerrell v. Gowans* (1912), 82 L. J. Ch. 22; *Re Phillips*, [1914] 2 K. B. 689; *Re Jones' Settlement, Stunt v. Jones*, [1915] 1 Ch. 373. *Mentd.* *Leigh v. Dickeson* (1883), 12 Q. B. D. 194; *Kenrick v. Mountstevens* (1899), 48 W. R. 141; *Re Fitzgerald, Surman v. Fitzgerald* (1904), 90 L. T. 266; *Re Pearce*, [1909] 2 Ch. 492; *Re Stokes, Ex p. Mellish*, [1919] 2 K. B. 256.

455. ———.]—*Effect of covenant by mortgagee to pay.*—An employee was indebted to his firm, & by way of security for the debt he assigned a life policy to a member of the firm, in which assignment the mtgee. covenanted to pay the premiums on the policy with a proviso that the premiums so paid were to be debited to the mtgor. in the books of the business:—*Held*: the covenant by the mtgee. to pay the premiums did not deprive him of the right to add the premiums to the debt.—*SHAW v. SCOTTISH WIDOWS' FUND ASSURANCE SOCIETY* (1917), 87 L. J. Ch. 76; 117 L. T. 697.

(d) Sureties.

456. Directors guaranteeing debt of company—*Debt secured by charge on proceeds of calls.*—

Between the presentation of a petition to wind up an insurance co. & the winding-up order, the directors, being in negotiation for the transfer of the co.'s business & liabilities to another co., & being pressed by the co.'s bankers for payment of their overdrawn account, passed a resolution giving the bankers a charge on the proceeds of calls made before the presentation of the petition, & gave their own promissory note for the amount of the debt as sureties for the co.:—*Held*: the charge on the calls having, under the circumstances, been given with the *bona fide* intention of preventing the ruin of the co., ought to be confirmed by the ct. in the exercise of the discretion given to it by Cos. Act, 1862 (c. 89), s. 153; & the directors, having paid the debt of the bankers, were entitled to a lien on the proceeds of the calls.

—*Re INTERNATIONAL LIFE ASSURANCE SOCIETY, GIBBS & WEST'S CASE* (1870), L. R. 10 Eq. 312; 39 L. J. Ch. 667; 23 L. T. 350; 18 W. R. 970.

Annotations:—*Mentd.* *Re Liverpool Civil Service Supply Assocn., Ex p. Greenwood* (1874), 22 W. R. 636; *Re International Life Assoc. Soc.* (1876), 34 L. T. 782; *Re Whitehouse* (1878), 9 Ch. D. 595; *Re Hamilton's Windsor Ironworks, Ex p. Pitman & Edwards* (1879), 12 Ch. D. 707; *Re West of England & South Wales District Bank, Ex p. Branwhite* (1879), 48 L. J. Ch. 463; *English Channel S.S. Co. v. Rolt* (1881), 17 Ch. D. 715; *Wheatley v. Silkstone & Haigh Moor Coal Co.* (1885), 29 Ch. D. 715; *General Auction Estate & Monetary Co. v. Smith*, [1891] 3 Ch. 432.

See, generally, GUARANTEE, Vol. XXVI., pp. 134, 135.

(e) Trustees, Committees, etc.

Trustee.—*See, generally*, TRUSTS & TRUSTEES.

457. ———.]—*Of literary institution—For necessary repairs.*—If the trustees of an institute of the kind provided for by Literary & Scientific Institutions Act, 1854 (c. 112), expend money of their own on necessary repairs of the building, they are, apart from the statute, entitled to a lien on the property of the institute for the money so spent.—*Re BADGER, MANSELL v. COBHAM (VISCOUNT)*, [1905] 1 Ch. 568; 74 L. J. Ch. 327; 92 L. T. 230; 21 T. L. R. 280.

See, generally, LITERARY & SCIENTIFIC INSTITUTIONS.

458. ———.]—*In belief that owner.*—*COOPER v. PHIBBS*, No. 424, *ante*.

Committee of lunatic.—*See* LUNATICS.

Next friend of infant.—*See* No. 408, *ante*.

(f) West Indian Consignees, Managers, etc.

See RECEIVERS.

(g) Other Persons.

459. *Solicitor acting for personal representative—Discharging claim on testator's estate.*—The solr. of the extrix. & devisee, paying a sum of money in exoneration of an adverse claim on part of testator's estate, does not, as against creditors of the testator, necessarily & by force of the transaction alone, acquire a lien upon the estate, or on the title deeds, for the sum which he so paid.

The solr. of the extrix. having paid a sum which was due to a third party, who had a lien on title deeds belonging to testator's estate for the amount, gave a receipt for the deeds in the name of the extrix., & as her solr., carried into the master's office her examination, in which the sum he had so paid was stated to have been paid by the

extrix., & was allowed accordingly:—*Held*: the solr. must, in such circumstances, be presumed to have made the payment on the behalf & on the personal security of his client; & he could not claim a lien upon the deeds for the amount.—*CHRISTIAN v. FIELD* (1842), 2 Hare, 177; 5 Jur. 1130; 67 E. R. 74; *sub nom.* *CHRISTIAN v. CHAMBERS*, *CHRISTIAN v. FIELD*, 11 L. J. Ch. 97.

Annotations:—*Reid. Re Hawkes*, *Ackerman v. Lockhart*, [1898] 2 Ch. 1. *Mentd. Re Rapid Road Transit Co.*, [1909] 1 Ch. 96.

460. Churchwarden—Money expended for use of parish.—A churchwarden has no lien on the parish books for moneys expended by him for the use of the parish.—*MOSS v. THORNILEY* (1856), 27 L. T. O. S. 101; 20 J. P. 660; 4 W. R. 514.

461. Trustee for benefit of creditors.—The trustee under a creditors' deed was empowered by the deed to carry on a business for the benefit of the creditors. In so doing he incurred debts, for which he was personally liable. Judgment having been obtained against him for one of these debts, goods which were assets of the business were taken in execution under that judgment. The trustee having become bkpt., these goods were claimed by his trustee in bkpcy. & an interpleader issue was directed to try the title to them. Upon the trial of the issue no evidence was given as to the state of the account as between bkpt. & the trust estate under the creditors' deed, & whether or not bkpt. was in default to the estate: *Held*: bkpt. being entitled to an indemnity out of the trust estate under the creditors' deed against liabilities incurred by him in carrying out the trusts of the deed, he had *prima facie* a right to a lien on the goods, which passed to his trustee in bkpcy., & therefore claimant was entitled to succeed on the issue as against the execution creditor, who had no right to have goods held by the execution debtor upon trust taken in execution.—*JENNINGS v. MATHER*, [1902] 1 K. B. 1; 70 L. J. K. B. 1032; 85 L. T. 396; 50 W. R. 52; 18 T. L. R. 6; 40 Sol. Jo. 27; 8 Mans. 329, C. A.

Annotation:—*Expld. Re Jones*, *Ex p. Official Receiver* (1910), 55 Sol. Jo. 30.

462. —.—A trustee under a deed of arrangement has no lien on the debtor's estate in respect of matters where he would not have had a lien before Deeds of Arrangement Act, 1914 (c. 47).—*Re GEEN*, *Ex p. PARKER*, [1917] 1 K. B. 183; 86 L. J. K. B. 175; 115 L. T. 837; [1917] H. B. R. 20.

Company director.—See COMPANIES, Vol. IX., pp. 472, 473, Nos. 3096–3104.

463. Cestui que trust — Income applied by trustees in payment of calls.—Where the calls on new shares, allotted to trustees of a marriage settlement, in respect of original railway shares, held by them upon the trusts of the settlement, had been paid out of the wife's separate income:—*Held*: stock, purchased with the proceeds of the sale of such new shares, was subject to the trusts

of the settlement as *corpus*, & the wife had a lien for the amount so paid for calls, by analogy to the case of tenant for life advancing money for fines payable on renewal of leaseholds.—*ROWLEY v. UNWIN* (1855), 2 K. & J. 138; 69 E. R. 726.

Annotations:—*Mentd. Edward v. Cheyne* (No. 2) (1888), 13 App. Cas. 385; *Re Malam*, *Malam v. Hitchens*, [1894] 3 Ch. 578; *Hood Barrs v. Heriot*, [1896] A. C. 174.

Party advancing money.—See Sub-sect. 12, *post*.

SUB-SECT. 9.—JUDGMENT OR EXECUTION CREDITORS.

See, now, Law of Property Act, 1925 (c. 20), s. 195.

464. Judgment creditor.—A judgment creditor registered his judgments under Judgments Act, 1835 (c. 110), & also in a register county: but neglected to re-register them within the five years prescribed by Judgments Act, 1839 (c. 11), s. 4. He subsequently re-registered them, & then, within a few days afterwards, filed a claim, & in a month's time got a decree for an account in this ct. The property sought to be affected by the judgments was leasehold property:—*Held*: the word "creditor" in Judgments Act, 1839 (c. 11), s. 4, means "creditor who has acquired an interest in lands, tenements & other hereditaments," but pltf. had not, as such creditor, any specific charge or lien on the leasehold property.—*SIMPSON v. MORLEY* (1855), 2 K. & J. 71; 26 L. T. O. S. 135; 69 E. R. 698; *sub nom.* *SIMPSON v. MORLEY*, 1 Jur. N. S. 1158.

Annotation:—*Mentd. Langhorne v. Harland* (1856), 28 L. T. O. S. 227.

465. — Trust fund created by parent for payment of son's debts—Trust discretionary.—A father conveyed real estates to trustees, upon trust to sell, & repurchase annuities granted by his son, & pay the son's debts at their discretion, & subject thereto, upon trust for the father for life, with remainder to his son in fee. An annuitant mentioned in a schedule to the deed, & stated to have entered up & docketed a judgment upon a warrant of attorney which accompanied his security, has no lien, by virtue of his judgment, upon the produce of the trust estates, when sold.—*FOSTER v. BLACKSTONE* (1833), 1 My. & K. 297; 2 L. J. Ch. 84; 39 E. R. 694; *on appeal, sub nom.* *FOSTER v. COCKERELL* (1835), 9 Bli. N. S. 332, H. L.

Annotations:—*Mentd. Peacock v. Burt* (1834), 4 L. J. Ch. 33; *Timson v. Ramsbottom* (1837), 2 Keen, 35; *Jones v. Jones* (1838), 8 Sim. 633; *Sheehy v. Muskerry* (1839), 7 Cl. & Fin. 1; *Meux v. Bell* (1841), 1 Hare, 73; *Meeke v. Kettlewell* (1842), 11 L. J. Ch. 293; *Bugden v. Bignold* (1843), 2 Y. & C. Ch. Cas. 377; *Etty v. Bridges* (1843), 2 Y. & C. Ch. Cas. 486; *Wiltshire v. Rabbits* (1844), 14 Sim. 76; *Wilmot v. Pike* (1845), 5 Hare, 14; *Re Plummer, Ex p. Plummer* (1853), 1 Bankr. & Ins. R. 83; *Rice v. Rice* (1854), 2 Eq. Rep. 341; *Warburton v. Hill*, *Stent v. Wickens* (1854), Kay, 470; *Rooper v. Harrison* (1855), 2 K. & J. 86; *Lee v. Howlett* (1856), 2 K. & J. 531; *Consolidated Investment & Insee. v. Riley* (1859), 1 Giff. 371; *Re Hughes' Trusts* (1864), 2 Hem. & M. 89; *Macleod v. Buchanan* (1864), 4 De G. J. & Sm. 265; *Ford v. Tynte*

PART V. SECT. 3, SUB-SECT. 9.

464 i. Judgment creditor.—The recording of a certificate of judgment gives the judgment creditor such a lien upon the land of the debtor as to enable him, without having issued an execution to proceed in Chancery to set aside a prior fraudulent conveyance of the land.—*CALDWELL v. KINSMAN* (1847), 2 N. S. R. (James) 398.—CAN.

464 ii. —.—*FRONTENAC LOAN CO. v. MORRICE* (1887), 4 Man. L. R. 442.—CAN.

464 iii. —.—*RAISTON v. GOODWIN* (1888), 21 N. S. R. 177.—CAN.

464 iv. —.—*GREAT EASTERN RY. CO. v. LAMBE* (1892), 21 S. C. R. 431.—CAN.

464 v. —.—The registration of a certificate of judgment under Judgments Act, s. 5, constitutes a lien & charge on the lands of the judgment debtor, even although he actually resides thereon.—*Re FROST & DRIVER & DICKSON* (1895), 10 Man. L. R. 319.—CAN.

464 vi. —.—*NURSING NARAIN SINGH v. ROGHOOBUR SINGH* (1884), 1 L. R. 10 Calo. 609.—IND.

464 vii. —.—*ALI AHMAD KHAN v. BANSIDHAR* (1909), 1 L. R. 31 All. 367.—IND.

464 viii. —.—*RAMIAH AIYAR v. GOPALIER* (1918), 1 L. R. 41 Mad. 1053.—IND.

464 ix. —.—*KENNEDY v. DALY* (1804), 1 Sch. & Lef. 355.—IR.

464 x. —.—*BARRETT v. BLAKE* (1813), 2 Ball & B. 354.—IR.

a. Execution creditor.—*MACDONELL v. BEST* (1903), 23 C. L. T. 282; 6 O. L. R. 18; 2 O. W. R. 459.—CAN.

land in the city of ... part of their purchase-money & were admitted into possession. At this time there were numerous registered judgments against them. Defts., before completing their purchases, became insolvent, & pltfs. filed their bill against them for specific performance, for payment of the balance of the purchase-money, & in default of such payment, that pltfs. might be declared to have a lien upon the premises & that the premises might be again sold. To this bill none of the judgment creditors of defts. were made parties. A decree was made according to the prayer of the bill, & upon default of payment by defts. the property was sold, when T. was declared purchaser of one of the lots. He objected to the title on the ground that as the judgment creditors were not parties to the suit, they ought to release their interests or enter up satisfaction upon their judgments, & he refused to accept the title until his requisition was complied with. Upon the summons being adjourned from the V.-C.'s chambers into the open ct., & being heard together with a motion by pltfs. that T. should pay his purchase-money into ct., the V.-C. decided that the objection was not tenable, & ordered the purchase-money to be paid in:—*Held*: the requisition was sustainable; the purchaser had a right to insist upon an undoubted title & conveyance & here, to say the least, there was a reasonable doubt. The original purchasers, by entering on possession, had accepted the title, & the property in equity belonged to them; their judgment creditors had therefore a lien upon it. It was ultimately ordered with the consent of the purchaser that he should be discharged from his contract in the usual way.—*GREY-COAT HOSPITAL (GOVERNORS) v. WESTMINSTER IMPROVEMENT COMRS.* (1857), 1 De G. & J. 531; 26 L. J. Ch. 843; 29 L. T. O. S. 339; 3 Jur. N. S. 1188; 5 W. R. 855; 44 E. R. 829, L. JJ.

467. — Debtor a municipal corporation.]—*Qu.*: whether a judgment is a lien on the property of a municipal corpn.—*BRECON CORPN. v. SEYMOUR* (1859), 26 Beav. 548; 28 L. J. Ch. 606; 5 Jur. N. S. 1069; 7 W. R. 380; 53 E. R. 1010.

See, generally, JUDGMENTS, Vol. XXX., pp. 158 et seq., 161 et seq., Nos. 288 et seq., 313 et seq.

468. Execution creditor — Debtor's interest equitable.]—A creditor having sued out execution on a judgment at law, & finding the interest of his debtor in a term of years to be an equitable interest, has a lien upon it in equity, without the aid of Judgments Act, 1838 (c. 110), & where, after such execution, the leasehold estate of the debtor had been sold:—*Held*: the execution creditor had a lien on the proceeds of the sale.—*GORE v. BOWSER*

Annotations:—Mentd. O'Brien v. Brodie (1866), L. R. 1 Exch. 302; *Birmingham Gas Co. v. Adams* (1870), 19 W. R. 123; *Re Norton, Ex p. Todhunter* (1870), L. R. 10 Eq. 425; *Re Haydon, Ex p. Halling* (1877), 7 Ch. D. 157; *Re Chiangetti, Ex p. Trustee* (1921), 91 L. J. K. B. 70.

See, generally, BANKRUPTCY, Vol. V., pp. 808 et seq.; EXECUTION, Vol. XXI., pp. 442 et seq.

470. — Increase in value between seizure & sale—Value increased at cost of debtor.]—An execution creditor seized a co.'s property before presentation of the winding-up petition. An order was made under the winding-up to delay the sale. The property was improved at the co.'s cost, & was sold at a higher price:—*Held*: the execution creditors had no lien on the increased value.—*Re HILL POTTERY Co.* (1866), 15 W. R. 97. *Annotation:—Mentd. Ex p. Milwood Colliery Co.* (1876), 24 W. R. 898.

— Proceedings at suit of Crown—Bankruptcy of debtor.]—*See BANKRUPTCY, Vol. V., pp. 828 et seq.*

SUB-SECT. 10.—LIEN ON COLLATERAL SECURITY.

471. Security for debt assigned by creditor—Collateral security not assigned.]—H. gave a warrant of attorney to confess a judgment for £2,000 to L., to secure the payment of four bills of exchange drawn the same day by him upon & accepted by H., & judgment was entered up & registered the next day. The bills were renewed, & the renewals were deposited by L. with a creditor of his own to secure a debt of £1,200, with a memorandum stating that the bills were secured by a judgment, but not making any mention of interest or the rate of interest. It was proved that interest was paid to the creditor by L. for ten years at the rate of £12 10s. per cent. *per annum*. L. subsequently became bkpt., & the creditor having died, his exors. presented their petition, praying to be declared entitled to an equitable lien on certain moneys then in the hands of the official assignee of L., such moneys being part of the produce of the sale of real estate belonging to H., on which L. was declared to have a lien by virtue of the judgment given to him by H.:—*Held*: as no interest was mentioned in the memorandum, it was to be taken to refer to the principal money alone, & the memorandum created a new contract. The exors. of the creditor were, therefore, declared to be entitled to a lien for the principal of the debt, but not for the interest.—*Re LANE, Ex p. HODGE* (1857), 26 L. J. Bcy. 77; 29 L. T. O. S. 350, L. JJ.

472. — —.]—*NORRIS v. CALEDONIAN INSURANCE Co., No. 449, ante.*

PART V. SECT. 3, SUB-SECT. 10.

471 i Security for debt assigned by creditor — Collateral security not assigned.]—Pltfs. had obtained a mtge. from one of defts. as collateral security for a debt, which they had assigned to a bank. The ct. directed that judgment for a declaration of lien for debt

& costs, & sale to realise it, was to be entered for pltf.—*SARNIA AGRICULTURAL IMPLEMENT MANUFACTURING Co., LTD. v. HUTCHINSON* (1889), 17 O. R. 676.—CAN.

b. Mortgage maturing after lien-note—Lien-note not postponed.]—Taking

from one of two conditional purchasers, as collateral security for a claim covered by lien-notes, a mtge. maturing at a date later than the date of maturity of the notes, does not postpone or suspend the right of action on the notes.—*CAMPBELL v. HEINKA* (1914), 28 W. L. R. 297; 17 D. L. R. 586.—CAN.

SUB-SECT. 11.—LOAN ON INVALID SECURITY.

473. Mortgage by trustees ultra vires.]—A suit being for foreclosure of a mtge. created by trustees under a trust to sell, a demurrer was put in on the ground that the trust did not authorise a mtge., & it was allowed; but pltf. was nevertheless allowed to amend his bill for the purpose of establishing a lien on the interest in the property of a *cestui que trust*, who was a party to the deed.—PAGE *v.* COOPER (1853), 16 Beav. 396; 20 L. T. O. S. 287; 1 W. R. 136; 51 E. R. 831.

474. Deposit note invalidly issued.]—L., a director, received from the co. a cheque, paid in one of his own for a like amount, & received in exchange a deposit note for the same amount. This transaction was never confirmed by a general meeting:—*Held*: L.'s mtgee. was entitled to an equitable lien on the sum secured by the deposit note.

From the time when the co. had notice that the right was transferred to pltf. they had nothing to do with the subsequent right; & if the co. had a set-off I can hardly imagine a more disgraceful or indeed dishonest defence than that set up by them, because, while having in their possession the moneys, they try to make out that it was an illegal transaction, under 7 & 8 Vict. c. 110, & when that fails they try to set off a claim as against the original depositor which was never mentioned to pltf. at all. The case is one in which pltf. has acted fairly. He has proved a debt against the co., & given the co. the benefit of the sum which he received from the estate of L. (STUART, V.-C.).—WOODHAMS *v.* ANGLO-AUSTRALIAN & UNIVERSAL FAMILY ASSURANCE SOCIETY (1861), 3 Giff. 238; 5 L. T. 628; 8 Jur. N. S. 148; 10 W. R. 290; 66 E. R. 397.

475. Unregistered debentures.]—Pltf., advanced moneys to a distillery co. on the security of manufactured whisky of the co. stored in a warehouse provided by the co. on the distillery premises in accordance with Spirits Act, 1880 (c. 24). Neither the co. nor the excise officer could obtain access to the warehouse without the assistance of the other, & the whisky could only be delivered out on presentation to the excise officer of a special form of warrant supplied by the Crown. On the occasion of each advance the co. entered the name of pltf., in pencil in their stock book opposite the particulars of the whisky intended to be pledged & delivered to pltf. (a) an ordinary trade invoice & (b) a document called a warrant, which described the particulars of the whisky & stated that it was deliverable to pltf. or his assigns & contained the words "free storage." No intimation of the transaction was given to the excise officer. Pltf. also advanced moneys to the co. upon second debentures issued to him by the co. in 1903, but forming part of an issue authorised by the co. in 1895 & secured by a trust deed of that year. Neither the warrants nor the debentures nor the trust deed were registered under s. 14 of Cos. Act, 1900 (c. 45). In an action by pltf. against the co. in liquidation & the trustees for the second debenture-holders to enforce his securities:—*Held*: (1) pltf. was not entitled to a valid pledge on the whisky comprised in the warrants; (2) assuming that a pledge was created, it was, within s. 14 (1) (c) of Cos. Act, 1900, a mtge. or charge created or evidenced by an instru-

ment in writing which if executed by an individual would require registration as a bill of sale, & was consequently void as against the liquidator, for want of registration; (3) pltf. was entitled to a valid lien on the debentures for the amount of his advances to the extent of the property comprised in the trust deed.—DUBLIN CITY DISTILLERY, LTD. *v.* DOHERTY, [1914] A. C. 823; 83 L. J. P. C. 265; 111 L. T. 81; 58 Sol. Jo. 413, H. L.

Annotations:—As to (2) *Consd.* Wrightson *v.* McArthur & Hutchisons (1919), Ltd., [1921] 2 K. B. 807; *Re Allester*, [1922] 2 Ch. 211.

See, further, MORTGAGE.

SUB-SECT. 12.—MONEY ADVANCED.

476. Advance to guardian of infant—To pay off incumbrance on infant's estate.]—A guardian borrows money of A. to pay off an incumbrance on the infant's estate, & promises to give A. a security for his money, but dies before it was done. Though A.'s money was applied to pay off the incumbrance, yet the ct. would not decree him a satisfaction of his debt out of the infant's estate.—HOOPER *v.* EYLES (1704), 2 Vern. 480; 1 Eq. Cas. Abr. 262; 23 E. R. 908.

477. Advance by regimental agent.]—An infant obtained an advancement out of a fund in settlement for the purchase of a commission in the Army, which was accordingly actually bought; the infant was gazetted, & reported himself at Headquarters, but never entered on his duties. Having procured leave of absence, he sold his commission, being very much embarrassed & threatened with arrest. Previous to the sale he had obtained from the Army agent of the regiment advances for the alleged purpose of an outfit, which he never bought, & also for certain regimental dues & stoppages. It was contended, but not proved, that the infant had never intended to join but had merely taken up his commission for the sake of the advancement:—*Held*: (1) Army agents have a lien on the proceeds of the sale of the commission still remaining in their hands, for such advances as aforesaid; (2) in the absence of fraud, the money, having been once actually advanced for the benefit of the infant, became his money, & could not now be restored to the trust fund.—LAWRIE *v.* BANKES (1858), 4 K. & J. 142; 27 L. J. Ch. 265; 32 L. T. O. S. 18; 4 Jur. N. S. 299; 6 W. R. 244; 70 E. R. 59.

Annotation:—As to (2) *Consd.* *Re Fox*, Wodehouse *v.* Fox, [1904] 1 Ch. 480.

478. Contract to finance undertaking—Partial default by lender.]—Where B. in consideration of a sum of money to be advanced to him by C., to enable him to complete a railway contract, agreed to give C. a share in the profits of the contract, & C. advanced a portion only of the stipulated sum, he & those claiming under him, were by one of the Vice-Chancellors declared to have a lien on the profits derived by B. under the contract for the amount of the money advanced & interest; but upon appeal, this decision was reversed, & the bill, which was filed by the assignee of C. was dismissed with costs.—TWINAM *v.* HUDSON (1862), 4 De G. F. & J. 462; 31 L. J. Ch. 577; 6 L. T. 702; 8 Jur. N. S. 685; 10 W. R. 653; 45 E. R. 1263, L. C.

PART V. SECT. 3, SUB-SECT. 12.

a. *Advance for paying off mortgage.]—*HILL *v.* ZIYMACK (1908), 7 C. L. R. 352.—AUS.

d. —.—.]—MATTLAND *v.* McLARTY

(1850), 1 Gr. 576.—CAN.

e. —.—.]—MACKLEM *v.* CUMMINGS (1859), 7 Gr. 318.—CAN.

f. *Advance on account of purchase.]—*ROBERTSON *v.* STRICKLAND (1868),

28 U. C. R. 221.—CAN.

g. *Advance for payment of rent—At request of limited owner.]—*ANGELL *v.* BRYAN (1845), 2 Jo. & Lat. 763.—IR.
h. *Redemption money advanced by*

Sect. 3.—Particular classes of cases: Sub-sects. 12, 13, 14, 15, 16 & 17.]

479. Advances applied in purchase of goods—No obligation on borrower to buy.]—A verbal agreement was entered into between D., a broker & commission agent at Sydney, & S., who speculated in sugars, in consequence of which two sums were advanced by D. to S. at different periods, the first for £3,000, & the second for £7,999 15s. 3d. S. undertaking to place in the hands of D., for sale, certain sugars to be imported from Mauritius & Batavia, D. taking the profits of the commission arising from the sale, & repaying his advances, with interest, out of the proceeds of the sale. Of the moneys thus borrowed, the sum of £3,000, with other moneys, was remitted by S. to H. & co., his agents at Batavia, for the purchase of sugars. From the state of the market H. & co. could not then purchase any sugar on S.'s account, who in the interim became insolvent, & executed a deed assigning his property to trustees for the benefit of his creditors. After S.'s insolvency H. & co. purchased Mauritius sugars with the money sent by S. to whom same was consigned & sold by the trustees. The exact time when H. & co. heard of S.'s insolvency did not appear, but they afterwards purchased Batavian sugars, & having heard of S.'s insolvency, consigned the sugars to S. as agent of the trustees. S. had deposited with D. promissory notes & acceptances of J. & J. & co. by way of security for D.'s advances to him. J. & C. were interested in the adventure of S. After S.'s insolvency J. & co. also became insolvent, & D. received from their estate the sum of £6,083 12s. on account of their bills, & applied £3,000 to the payment of the first advance, & the balance towards the other sum of £7,999 15s. 3d. D. claimed a lien on the sugars in respect of the sum of £4,916 11s. 1d. the remaining part of the sum of £7,999 15s. 3d.:—**Held:** (1) it was no part of the agreement that S. should invest the moneys lent him by D. in any particular way, & having assigned his property to trustees for the benefit of his creditors before the purchase by H. & co., the sugars consigned were for the benefit of the trustees & D. had no lien on the sugars; (2) S.'s trustees allowing H. & co. to purchase Batavian sugars on their account did not affect the trustees with any equity in favour of D. under his agreement with S.—**DEAN v. BYRNES** (1864), 3 Moo. P. C. C. N. S. 92; 11 L. T. 97; 13 W. R. 299; 16 E. R. 35, P. C.

480. Advance by executor—To residuary legatee—Subsequent bankruptcy of legatee.]—One of several residuary legatees, with the concurrence of the others, induced the exors. to sell out stock forming part of the residuary estate, & to lend him the proceeds, on his executing a warrant of attorney & depositing certain title deeds as a security for the replacement of the stock & payment of the dividends, but without any express lien upon or reference to his share in the residue:—the exors. had, on his bkpcy., a lien on the share.—**Re MAKINS, Ex p. MAKINS** (1842), 2 Mont. D. & De G. 508; 6 Jur. 468, Ct. of R.

See, generally, BANKRUPTCY, Vol. IV., pp. 416 et seq.; EXECUTORS, Vol. XXIII., pp. 397, 398, 435 et seq., Nos. 4686–4691, 5056 et seq.

481. Advance by trustee—To cestui que trust.]—A trustee advanced to A., one of his *cestuis*

*creditor—Disputed debt.]—*Redemption money advanced with the consent of the inheritor by the assignee of a disputed judgment is a lien upon the lands, & a good equitable incum-

brance.—**FETHERSTONE v. MITCHELL** (1847), 9 I. Eq. R. 480.—**IR.**

PART V. SECT. 3, SUB-SECT. 13.

k. Arrears of interest.]—During

que trust, a part of the trust funds, to enable him to purchase a real estate. A. died without having repaid the money, having devised the estate, & his personal estate was insufficient to pay his debts & legacies:—**Held:** there was a lien on the estate for the trust funds.—**BIRDS v. ASKEY** (No. 2) (1858), 24 Beav. 618; 53 E. R. 497.

Annotation:—Mentd. Lillford v. Powys Keck (1865), L. R. 1 Eq. 347.

See, generally, TRUSTS & TRUSTEES.

482. Loan to corporation applied ultra vires—In paying off mortgages.]—A corp'n. entitled to an old canal commenced improvements in it, & borrowed large sums of money for that purpose, which they secured by mtges., comprising the canal & other property. They afterwards obtained an Act, which authorised them to complete the works, & empowered them to raise money for that purpose by mtge. of the canal & its tolls without limit as to amount, & directed them to apply such money in completing the works, but did not, in the opinion of the ct., authorise them to apply any part of it in paying off existing mtges. The corp'n. raised money under this power, & applied part of it in paying off some of the old mtges.:—**Held:** (1) as between the statutory mtgees. & the corp'n., the other property comprised in the old mtges. was the primary fund for payment of those mtges; (2) the money borrowed from the statutory mtgees., beyond what was wanted for purposes authorised by the Act, ought to have been repaid to them, & such moneys were to be treated as moneys held by the corp'n. in trust for the statutory mtgees., & not as borrowed moneys; (3) accordingly, the statutory mtgees. had a lien upon the other property comprised in the paid off mtges. for the moneys borrowed from them which had been applied in paying off those mtges.—**TREVILLIAN v. EXETER CORPN.** (1854), 5 De G. M. & G. 828; 3 Eq. Rep. 896; 24 L. J. Ch. 157; 24 L. T. O. S. 149; 18 J. P. 806; 18 Jur. 1019; 3 W. R. 45; 43 E. R. 1091, L. JJ.

Solicitor paying claim on behalf of executor.]—**See No. 459, ante.**

Advance by director to company.]—**See COMPANIES, Vol. IX., pp. 472, 473, Nos. 3096–3104.**

Equitable mortgages.]—**See MORTGAGE.**

Remittances for specific purpose—To meet acceptances by bank.]—**See BANKERS, Vol. III., pp. 248 et seq.**

—Subsequent bankruptcy of remittee.]—**See BANKRUPTCY, Vol. V., pp. 700 et seq.**

Appropriation to meet advances—Whether valid against trustee in bankruptcy.]—**See BANKRUPTCY, Vol. V., pp. 706 et seq.**

—Bills accepted or discounted by bank—Against shipping documents.]—**See BANKERS, Vol. III., pp. 250 et seq.**

Advances by creditors to bankrupt—To continue trade.]—**See BANKRUPTCY, Vol. V., pp. 733 et seq.**

SUB-SECT. 13.—MORTGAGES.

By agreement to execute mortgage.]—**See MORTGAGE.**

Mortgage of benefice—Mortgage invalid for non-compliance with statute.]—**See ECCLESIASTICAL LAW, Vol. XIX., p. 500, No. 3572.**

Mortgage of property of statutory company.]—

the lifetime of a mtgor. the mtgee. has no lien on the mortgaged property for more than six years' arrears of interest.—**CARROLL v. ROBERTSON** (1868), 15 Gr. 173.—**CAN.**

See COMPANIES, Vol. X., pp. 1185, 1187, Nos. 8404–8406, 8420.

Equitable mortgage—By deposit of documents of title.]—See MORTGAGE.

—— **Share certificates.]—See COMPANIES,** Vol. IX., pp. 411 *et seq.*; Vol. X., pp. 1145, 1146.

SUB-SECT. 14.—ORDERS TO PAY OUT OF PARTICULAR FUND.

Apart from Judicature Acts.]—See, generally, CHOSER IN ACTION, Vol. VIII., pp. 445 *et seq.*

—— **Goods to be sold by creditor.]—See** CHOSER IN ACTION, Vol. VIII., p. 425, No. 39.

Under Judicature Acts.]—See, generally, CHOSER IN ACTION, Vol. VIII., pp. 442 *et seq.*

SUB-SECT. 15.—PARTNERSHIP.

See PARTNERSHIP.

SUB-SECT. 16.—PROMISE TO PAY OUT OF PARTICULAR FUND.

483. Proceeds of sale of property—When sold.]—A. agreed with B. for the sale of a copyhold estate, which had previously, by mistake, been surrendered to C. A. was afterwards arrested, & discharged under Insolvent Debtors' Act. Subsequently to A.'s discharge, the mistake being discovered, C. surrendered back the estate to A., who immediately surrendered to B., the purchaser; the consideration money being paid to debt., the attorney of A., to whom he had given a bond for £40 for money borrowed, which, together with the amount of the bill of costs due to him from A., it was agreed he should retain out of the produce of the estate. The assignee of A. sued debt. for the amount received by him, as money had & received to his use:—*Held*: although the legal estate in the copyhold was not in the insolvent at the time of his discharge, by reason of the erroneous surrender to C., he had still such an equitable interest in it as would pass by the assignment, but debt. had an equitable lien on the purchase-money in his hands, for the amount of the bond given to him by the insolvent, & also for his bill of costs.—*Twiss v. White* (1826), 3 Bing. 486; 11 Moore, C. P. 413; 4 L. J. O. S. C. P. 165; 130 E. R. 661.

484. Debts when recovered — Debts recovered but no payment made.]—A. being entitled to three debts, covenanted with B., that in case he received them in full, he would pay him £1,000, but in case he should receive part only, he would pay one-sixth of the sum recovered. A. received one of the debts, which he wholly retained. Afterwards, & within three months before A.'s imprisonment & taking the benefit of the Insolvent Act, he, without pressure, assigned one of the debts to B., to secure one-sixth of the debt, recovered & those still unpaid. It was set aside as fraudulent under the Act:—*Held*: also, B. had not, as against the insolvent's assignees, any lien on the remaining debts, for the one-third of the first debt improperly retained by A.—*Harries v. Lloyd* (1843), 6 Beav. 426; 49 E. R. 890.

SUB-SECT. 17.—PROPERTY OR FUNDS MIS-APPROPRIATED.

485. Settled land sold by tenant for life.]—A., tenant for life, with remainder to B. in tail, by

fraud gets B.'s authority to levy a fine, he sells the land & invests the purchase-money in the funds, where it is clearly identified; B. has no lien on this money against the other creditors of A.—*Newcomb v. Burdon* (1793), 2 Anst. 343; 145 E. R. 897.

486. Property purchased with embezzled funds—Assigned to party robbed—After act of bankruptcy by embezzler.]—If the servant of A. embezzle his property, & therewith purchase a lease, etc., & afterwards commit an act of bkpcy., & then assign the lease to A.; A. has not such an equitable lien as to be an answer to an action of trover against assignees.—*Bloxham v. Graham* (1795), Peake, Add. Cas. 3, N. P.

487. Deeds earmarked by solicitor as security for debt—Subsequently mixed with other deeds.]—A solr. deposited some of his own deeds as a security for a sum of money due to two clients in a box belonging to them. He retained the box, but after his death it was found that he had abstracted the deeds from it, & they could not be distinguished from the solr.'s other deeds:—*Held*: the clients had a lien on all the solr.'s deeds for their debt.—*Mason v. Morley* (No. 2) (1865), 34 Beav. 475; 34 L. J. Ch. 422; 12 L. T. 414; 11 Jur. N. S. 459; 13 W. R. 669; 55 E. R. 719.

488. Advance obtained by deposit of client's deeds—Invested in purchase of estate.]—A solr. having in his possession the title deeds of an estate mortgaged to his client, deposited the deeds with his banker as security for an advance, which he applied in the purchase of an estate on his own behalf. When the mtge was paid off, he applied that money in repaying the loan from his banker, & informed his client that he had re-invested the mtge. money upon other good security. His client thereupon executed a re-assignment of the mtge.; but in fact the solr. never re-invested the money, although he continued to pay interest upon it until his death:—*Held*: the client was entitled to a lien upon the estate so purchased by the solr.—*Hopper v. Conyers* (1866), L. R. 2 Eq. 549; 12 Jur. N. S. 328; 14 W. R. 628.

489. Settled funds of wife misapplied by husband.]—Upon a marriage it was agreed that a reversionary interest of the intended wife should be paid to the husband when it fell into possession, & other property of the wife was settled to her separate use; the settled funds, by reason of breaches of trust, came to the hands of the husband who afterwards became insolvent. When the reversionary interest fell into possession, it was paid into ct., & in a suit to make the trustee liable, or to have payment out of the fund in ct. of the amount of the settled property which had been lost:—*Held*: the wife had a lien on the fund to that amount, & the trustee was liable to make good the rest.—*Thorp v. Thorp* (1855), as reported in 24 L. T. O. S. 336.

490. —.]—Previously to his marriage the intended husband signed a memorandum in writing by which he agreed to the transfer of certain foreign bonds, belonging to the intended wife, into the names of her & her son by a former marriage, in trust for herself, "neither party having power to dispose of the said stocks" (so as the bonds were called in the memorandum) "without consent of both parties to such disposal." No settlement was ever made in pursuance of this agreement, & after the marriage the husband obtained possession of some of the bonds without the consent of his wife's son, & disposed of them:—*Held*: the husband was personally liable to make good the amount of the bonds disposed of by him, & the wife was entitled to a lien for the amount

Sect. 3.—Particular classes of cases: Sub-sects. 17 & 18, A. & B. (a).]

on such of her property as was not subject to the agreement.—*HASTIE v. HASTIE* (1876), 2 Ch. D. 304; 34 L. T. 747; 24 W. R. 564, C. A.

Following trust funds generally.]—See TRUSTS & TRUSTEES.

491. Purchase by partner—Paid for with partnership funds.]—A ship was purchased by a partner for himself, but was paid for out of the partnership assets. The firm became bkpt.:—*Held*: the firm had no interest in the ship, or any lien on it for the amount of the purchase-money.—*WALTON v. BUTLER* (1861), 29 Beav. 428; 54 E. R. 693.

Annotation:—*Reid. Hancock v. Heaton* (1874), 30 L. T. 592.

SUB-SECT. 18.—PURCHASER'S LIEN.

A. In General.

492. General rule.]—Where conveyance is made prematurely before money paid, the money is considered as a lien on the estate in the hands of the vendee. So, where money was paid prematurely, the money would be considered as a lien on the estate in the hands of the vendor (*CLARKE, M.R.*).—*BURGESS v. WHEATE, A.-G. v. WHEATE* (1759), 1 Eden, 177; 1 Wm. Bl. 123; 28 E. R. 652.

Annotations:—*Consd. Mackreth v. Symmons* (1808), 15 Ves. 329; *Wythes v. Lee* (1855), 3 Drew. 396. *Mentd. Middleton v. Spicer* (1780), 1 Bro. C. C. 201; *Barclay v. Russell* (1797), 3 Ves. 424; *Craufurd v. Hunter* (1798), 8 Term Rep. 13; *Williams v. Lonsdale* (1798), 3 Ves. 752; *Dolder v. Bank of England* (1805), 10 Ves. 352; *Cholmondeley v. Clinton* (1820), 2 Jac. & W. 1; *Gordon v. Gordon* (1821), 3 Swan. 400; *Langley v. Sneyd* (1822), 1 L. J. O. S. Ch. 14; *A.-G. v. Leeds* (1833), 2 My. & K. 343; *Doe d. Shelley v. Edlin* (1836), 4 Ad. & El. 582; *Downe v. Morris* (1844), 3 Hare, 394; *Taylor v. Haygarth* (1844), 14 Sim. 8; *Davall v. New River Co.* (1849), 3 De G. & Sm. 394; *Onslow v. Wallis* (1849), 1 Mac. & G. 506; *Beale v. Symonds* (1853), 16 Beav. 406; *Cox v. Parker* (1856), 25 L. J. Ch. 873; *Barrow v. Wadkin* (1857), 24 Beav. 1; *Haywood v. Cope* (1858), 25 Beav. 140; *Masulipatam, Collector v. Cavalry Vencata Narrainapah* (1861), 8 Moo. Ind. App. 529; *Sweeting v. Sweeting* (1863), 3 New Rep. 240; *Delacherois v. Delacherois* (1864), 4 New Rep. 501; *Brookman v. Vigor* (1871), L. R. 6 Exch. 291; *Re Gosman* (1880), 15 Ch. D. 67; *Re Van Hagan, Sperling v. Rochfort* (1880), 16 Ch. D. 18; *Bradlaugh v. Clark* (1883), 8 App. Cas. 354; *Gallard v. Hawkins* (1884), 27 Ch. D. 298; *Re Bond, Panes v. A.-G.* (1900), 82 L. T. 612; *Talbot v. Jevers*, [1917] 2 Ch. 363.

493. Application of rule—Purchase going off through default of vendor.]—Under a contract for the purchase of an estate where the money is to be paid in portions, every payment is a part performance of the contract by the vendee, & in equity transfers to him a corresponding portion of the estate.

A mtge. made subsequent to a contract for the sale of an estate conveys to the mtgees. only that which the vendor is entitled to under that contract. If the mtgee. gives no notice of an intention to interfere with the contract, its stipulations remain as before, & affect the mtgee. as they would have affected the mtgor.

The owner of an estate, part of which was then subject to a contract for sale, executed a mtge. upon it. The mtgee. gave to the vendee notice of the fact of the mtge., but in all other respects left matters as they were before the mtge. The vendee was bound by his contract to pay certain sums at stated intervals, together with interest on all that remained unpaid. He made several of these payments, but at length declined to com-

plete the purchase, on the grounds that the representations on which he had been induced to enter into the contract for purchase were unfulfilled. These representations having been adjudged to be sufficient to absolve him from liability to specific performance:—*Held*: he was entitled (1) so far as the payments extended to claim a lien on the estate for their amount; & (2) to enforce that claim against the assignees of the vendor; (3) he had acquired a lien on the land in respect of the interest which he had paid on the unpaid balance of the purchase money.—*ROSE v. WATSON* (1864), 10 H. L. Cas. 672; 3 New Rep. 673; 33 L. J. Ch. 385; 10 L. T. 106; 10 Jur. N. S. 297; 12 W. R. 585; 11 E. R. 1187, H. L.

Annotations:—*As to (1) Consd. Whitbread v. Watt*, [1902] 1 Ch. 835; *Re Stucley, Stucley v. Kekewich*, [1906] 1 Ch. 67. *Reid. Aberaman Ironworks v. Wickens* (1868), 4 Ch. App. 101; *Shaw v. Foster* (1872), L. R. 5 H. L. 321; *Torrance v. Bolton* (1872), 41 L. J. Ch. 643; *Lysaght v. Edwards* (1876), 2 Ch. D. 499; *Mycok v. Beatson* (1879), 13 Ch. D. 384; *Beddington v. Atlee* (1887), 35 Ch. D. 317; *Levy v. Stogdon*, [1898] 1 Ch. 478; *Cornwall v. Henson*, [1899] 2 Ch. 710; *Ridout v. Fowler*, [1904] 1 Ch. 658. *As to (2) Reid. Shaw v. Foster* (1872), L. R. 5 H. L. 321; *Fleming v. Loe* (1901), 70 L. J. Ch. 805. *As to (3) Reid. Cornwall v. Henson*, [1899] 2 Ch. 710; *Re Stucley, Stucley v. Kekewich*, [1906] 1 Ch. 67. *Generally, Mentd. McCreight v. Foster* (1870), 5 Ch. App. 604; *Dodson v. Downey*, [1901] 2 Ch. 620.

494. ———.]—It is settled law that, where a purchase goes off by reason of some default on the part of the vendor, the purchaser has a lien upon the property for any part of his purchase-money which has been paid (*COZENS-HARDY, J.*).—*CORNWALL v. HENSON*, [1899] 2 Ch. 710; 68 L. J. Ch. 749; 81 L. T. 113; 48 W. R. 42; 15 T. L. R. 544; *revsd.* on other grounds, [1900] 2 Ch. 298, C. A.

Annotation:—*Mentd. Von Freeden v. Hull* (1906), 75 L. J. K. B. 359.

495. ——— Rescission for misrepresentation.]—By the judgment in this action it was ordered that the contract entered into by pltf. co. with deft. co. for the purchase of certain buildings known as the Hop Exchange, & the business carried on there, should be set aside for misrepresentation, & the conveyance, which had been executed, should be cancelled, & that accounts should be taken of the moneys expended by pltf. co. in respect of the purchased property, & that an account should be taken of all moneys received by pltf. co., who were in possession, from the property, & that the two accounts should be set off against each other; & it was declared that pltf. co. were entitled to a lien for the purchase-money & interest & the balance of the accounts, & that deft. co. would be entitled to a reconveyance of the property on paying off the lien. Deft. co. was in liquidation & had no assets except the property. Pltf. co. took out a summons to stay the taking of the accounts, on the ground that it was a useless expense, because the amounts due to them must in any case exceed the value of the property:—*Held*: the accounts must be stayed till further order, deft. co. having liberty to proceed with the accounts at any time on giving security to abide by the judge's order as to costs & the order being without prejudice to any future application of deft. co. to proceed with the accounts.—*EXCHANGE & HOP WAREHOUSES, LTD. v. ASSOCN. OF LAND FINANCIERS* (1886), 34 Ch. D. 195; 56 L. J. Ch. 4; 35 W. R. 120; *sub nom. HOP EXCHANGE ASSOCN., LTD. v. ASSOCN. OF LAND FINANCIERS, LTD.*, 55 L. T. 611.

Annotation:—*Mentd. Stevens v. Theatres*, [1903] 1 Ch. 857.

PART V. SECT. 3, SUB-SECT. 18.—A.
1. *Effect of laches.]—*Lapse of time which would disentitle a purchaser to specific performance may not affect

his lien.—*CLARKE v. SCOTT* (1888), 5 Man. L. R. 281.—*CAN.*

m. *Contract falling through.]—CAN.*

----- *GAS POWER & LAUNCHES v. ORR BROTHERS* (1912), 22 O. W. R. 351; 8 O. W. N. 1362; 4 D. L. R. 641.—*CAN.*

496. — Rescission under provisions of contract—No default by either party.]—WHITBREAD & CO., LTD. v. WATT, No. 519, *post*.

497. — Rescission on compromise of suit—Default of purchaser.]—RIDOUT v. FOWLER, No. 523, *post*.

498. — Conveyance by undischarged bankrupt—Before intervention of trustee.]—(1) An undischarged bkpt. cannot, even before his trustee intervenes, convey real estate acquired after the bkpcy, so as to give a *bonâ fide* purchaser for value without knowledge of the bkpcy. a good title against the trustee.

(2) The purchaser is entitled to a lien [for the deposit, with interest at four per cent.], & also for his costs (CHITTY, J.).—*Re NEW LAND DEVELOPMENT ASSOCN. & GRAY*, [1892] 2 Ch. 138; *sub nom. Re NEW LAND DEVELOPMENT ASSOCN., LTD. & FAGENCE'S CONTRACT*, 61 L. J. Ch. 323; 66 L. T. 404; 40 W. R. 295; 36 Sol. Jo. 254; *on appeal*, [1892] 2 Ch. 146, C. A.

Annotations:—As to (1) Consd. Re Poppleton & Jones' Contract (1896), 74 L. T. 582; *Re Calcott & Elwin's Contract* (1898), 67 L. J. Ch. 327; *Official Receiver v. Cooke*, [1906] 2 Ch. 661. *Reid. Re Aillesbury S. E.* (1893), 9 T. L. R. 616; *Bird v. Philpott*, [1900] 1 Ch. 822; *London & County Contracts v. Tallack* (1903), 19 T. L. R. 156; *Re Kent County Gas Light & Coke Co.*, [1909] 2 Ch. 195. *Generally, Mentd. Re Clayton & Barclay's Contract*, [1895] 2 Ch. 212; *Hunt v. Fripp*, [1898] 1 Ch. 675; *Re Behrend's Trust, Surman v. Biddell*, [1911] 1 Ch. 687.

Expenditure by intending purchaser.]—See No. 427, *ante*.

499. Purchase of annuity—Annuity void for non-compliance with formalities.]—On bill of interpleader by the owner of an estate against the grantee of a rentcharge out of it, assigned to secure an annuity, & the annuitant, the annuity being void [for non-compliance with the statutory formalities], the arrears of the rentcharge in ct. were paid to the original grantee: & the annuitant was held not entitled to have the consideration repaid out of that fund, there being only a general debt at law & no lien.—*BOLTON (DUKE) v. WILLIAMS* (1793), 2 Ves. 138; 4 Bro. C. C. 297; 30 E. R. 561, L. C.

Annotations:—Consd. Aguilar v. Aguilar, Lousada, etc. (1820), 5 Madd. 414. *Reid. Jones v. Harris* (1804), 9 Ves. 486; *Angell v. Hadden* (1809), 16 Ves. 202; *Ex p. Wright* (1812), 19 Ves. 255; *Angell v. Hadden* (1817), 2 Mer. 164; *Johnson v. Gallagher* (1861), 3 De G. F. & J. 494. *Mentd. Clayton v. Adams* (1796), 6 Term Rep. 604; *Dalmer v. Barnard* (1797), 7 Term Rep. 248; *Glaspe v. Mount* (1797), 7 Term Rep. 390; *Angell v. Hadden* (1808), 15 Ves. 244; *Browne v. Rose* (1815), 6 Taunt. 124; *Gorton v. Champneys, Coventry v. Champneys* (1823), 1 Bing. 287; *Storton v. Tomlins* (1825), 10 Moore, C. P. 172; *Murray v. Barlee* (1831), 4 Sim. 82; *Swift v. Nash* (1837), 1 Jur. 557; *Moody v. Hebbard* (1848), 7 Hare, 182; *Tidd v. Lister* (1854), 3 De G. M. & G. 874; *Nelson v. Barter* (1864), 2 Hem. & M. 334.

See, generally, RENTCHARGES & ANNUITIES.

500. Purchase induced by fraud—Share of business.]—Pltf. was induced by the fraud of deft. to purchase a share of his business, & to enter into partnership with him. Judgment being given for the rescission of the agreement, & the dissolution of the partnership:—*Held*: pltf. was entitled, in respect of the purchase-money which he had paid, to a lien on the surplus of the partnership assets after satisfying the partnership debts & liabilities; & in respect of any sums which he had paid or might pay in satisfaction of partnership debts, he was entitled to stand in the place of the partnership creditors to whom he made the pay-

ments.—*MYCOCK v. BEATSON* (1879), 13 Ch. D. 384; 49 L. J. Ch. 127; 42 L. T. 141; 28 W. R. 319.

501. Against whom available—Assignee of vendor.]—*ROSE v. WATSON*, No. 493, *ante*.

502. Whether capable of registration—Under Yorkshire Registries Act, 1884 (c. 26).]—(1) A memorandum of agreement for the sale of land stated that, in consideration of £200 then paid by the purchaser, the vendor agreed to complete certain buildings on the land, & the purchaser agreed to purchase the same when completed at the price of £750, the above sum of £200 to be considered as in so much reduction of the purchase-money:—*Held*: such memorandum was not an "assurance" capable of registration within above Act.

(2) The lien suggested is not for vendor's unpaid purchase-money but in respect of money paid by the purchaser (*LOPES, L.J.*).

(3) If there be a lien for the purchase-money paid, when does that lien come into existence? Certainly not at the date of the contract. It cannot then be assumed that the contract will go off by default of the vendor. The purchaser's right then is to have the land itself (*KAY, L.J.*).—*RODGER v. HARRISON*, [1893] 1 Q. B. 161; 62 L. J. Q. B. 213; 68 L. T. 66; 41 W. R. 291; 9 T. L. R. 120; 37 Sol. Jo. 99; 4 R. 171, C. A.

Annotation:—As to (3) Dbtd. Whitbread v. Watt, [1901] 1 Ch. 911.

See, generally, SALE OF LAND.

B. What may be Claimed.

(a) Purchase-Money.

503. On subsequent eviction—By incumbrancer—Purchase without notice of incumbrance.]—A. purchases an estate of B. without notice of rent charges, etc., the vendor covenanting that there are no incumbrances; the purchase-money is laid out in the funds, & B., afterwards sells the dividends for his life, secured by letter of attorney, to C. who has no notice. A. is evicted by the grantee of the rent charges: he has no lien whatever on the funds purchased.—*CATOR v. PEMBROKE (EARL)* (1787), 2 Bro. C. C. 282; 29 E. R.

Annotations:—Reid. Small v. Attwood (1831), You.

Crompton v. Melbourne (1832), 5 Sim. 353.

504. — Defective title.]—*NEESOM v. CLARKSON*, No. 423, *ante*.

505. Void annuity—Less payments received.]—*BOSALQUET v. BATTIE* (1818), cited in 2 Wils. Ch. at p. 151; 37 E. R. 258.

Annotation:—Reid. Davis v. Marlborough (1819), 2 Wils. Ch. 130.

506. Escheat of trust estate—Trustee's lien to extent of purchase-money in hands of lord.]—Money due on mtge. & in the funds, the property of a lady, was esttled on her marriage for such purposes as she should, with her husband's consent, & during their joint lives, by deed attested by two witnesses, appoint, & after her death as she should by will appoint, & subject thereto to her for life, for her separate use, without power of anticipation, with certain trusts over. Very soon after the marriage, the husband, by his will, gave all his real & personal estate to his wife, & appointed her sole extrix. The trustees never acted, & the funds were never transferred to them, but remained in the lady's name. She

PART V. SECT. 3, SUB-SECT. 18.— 24 Gr. 451.—CAN.

B. (a).

*n. Failure to make good title.]—*HURD v. ROBERTSON (1859), 7 Gr. 142.—CAN.

*o. —.]—*BURNS v. GRIFFIN (1877),

*p. —.]—*Where the vendor could not make title:—*Held*: the purchaser was entitled to a lien for purchase-money paid on account, with interest, less an occupation rent.—

YOUNG v. DENIKE (1901), 22 C. L. T. 27; 2 O. L. R. 723.—CAN.

*q. —.]—*SNIDER v. WEBSTER (1911), 20 Man. L. R. 562.—CAN.

r. Rescission by purchaser—Condition for rescission in contract.]—A

Sect. 3.—Particular classes of cases: Sub-sect. 18, B. (a) & (b).]

executed powers of attorney attested, in the common form, by two witnesses, under which part of the funds were sold out, & the produce paid to the husband's bankers to his account. The mtge. money was paid in the same manner. There was thus about £8,000 placed in the name of the husband. All cheques for the expenses of the establishment were drawn at the written request of the wife, by the husband on her London bankers, out of moneys standing to her separate account. The husband permitted a legacy of £20,000, given to his wife to be paid to her separate account at his bankers. Eleven years after the marriage, the husband, at his wife's request, bought an estate of the tenure of ancient demesne, & same was conveyed to him to the ordinary uses to bar dower. The husband died without leaving an heir-at-law, & the lord of the fee claimed the estate by escheat. The surviving trustee of the settlement filed a bill against the parties claiming, under the lord, to establish a lien on the estate for the amount of the purchase-money:—*Held*: the estate was subject to the lien of the trustee, to the extent of the purchase money in the hands of the lord of the fee claiming by escheat.—*HUGHES v. WELLS* (1852), 9 Hare, 749; 20 L. T. O. S. 136; 16 Jur. 927; 68 E. R. 717.

Annotations:—*Mentd.* *Vaughan v. Vanderstegen* (1853), 2 Drew. 165; *Campbell v. Ingilby* (1857), 29 L. T. O. S. 287; *Johnson v. Gallagher* (1861), 3 De G. F. & J. 494; *Shattock v. Shattock* (1866), 14 L. T. 452; *London Chartered Bank of Australia v. Lemprière* (1873), L. R. 4 P. C. 572; *Re Harvey's Estate*, *Godfrey v. Harben* (1879), 13 Ch. D. 216; *Re Armstrong, Ex p. Gilchrist* (1886), 17 Q. B. D. 521; *Re Whitaker, Ainley v. Ainley* (1897), 41 Sol. Jo. 209.

507. Fixtures purchased by prospective tenant—Lease not granted.]—A. agreed to grant a lease of a mill to B., for a term of twenty-one years, with a proviso, that in case A. should not, within a certain period, grant, or procure to be granted, the lease, he should repay to B. a sum paid upon signing the agreement, in respect of fixtures, etc., & all moneys laid out by B. pursuant to the agreement, for rebuilding & repairs; if A. failed to grant the lease, the agreement to cease, except as regarded the right of B. to recover from A. the moneys thereby agreed to be paid. A. was unable to cure the defect in his title & grant the lease within the specified period. Upon bill by B. for specific performance by having the lease granted, or, alternatively, to have the moneys expended by him, pursuant to the agreement, repaid, claiming a lien on A.'s interest in the property for the amount:—*Held*: although B. could not obtain his lease, he was entitled, under the contract, which the ct. was able so far to perform, to a lien upon A.'s interest for the amount laid out by him, pursuant to the agreement, with consequential relief.—*MIDDLETON v. MAGNAY* (1864), 2 Hem. & M. 233; 10 L. T. 408; 12 W. R. 706; 71 E. R. 452.

Annotations:—*Appld.* *Turner v. Marriott* (1867), L. R. 3 Eq. 744. *Refd.* *Wilson v. Church* (1879), 13 Ch. D. 1. *Mentd.* *Hindley v. Emery* (1865), L. R. 1 Eq. 52.

508. Purchase going off through default of vendor.]—*ROSE v. WATSON*, No. 493, *ante*.

purchaser of land has an implied lien on the vendor's interest in the land for the purchase-money which he has paid, with interest thereon, where the contract of sale has been rescinded under a condition enabling the purchaser to rescind.—*Re INTERNATIONAL REALTY CO., LTD. (IN LIQUIDATION), WILSON'S CASE*, [1921] 2 W. W. R. 178.—CAN.

PART V. SECT. 3, SUB-SECT. 18.—B. (b).

511 i. General rule.]—When a purchaser pays a part of the purchase-money the vendor is a trustee for him to the extent of the payment, in other words he acquires a lien exactly in the same way as if upon payment of part

509. —.]—*CORNWALL v. HENSON*, No. 494, *ante*.

510. Pending action for rescission for misrepresentation.]—In ascertaining whether pl'tfs. in an action to rescind an executed contract for the purchase of £70,000 debentures on the ground of misrepresentation are barred by laches, consideration is to be paid to the magnitude & difficulty of the interests & questions involved, & to the time that must necessarily elapse after an inquiry is commenced before the truth of the facts can be sufficiently established to justify them in bringing forward serious charges. Pending such an action pl'tfs. have a lien on the debentures for the purchase-money, & are entitled to intervene in an action instituted by other debenture-holders for the protection of all the debentures, in order to do all that is reasonable to protect & prevent the purchased debentures from being injured, so long as they do not thereby injure them, & they are entitled to oppose the vendors in such proceedings, provided they do so in good faith, & in the interests of those entitled to the purchased debentures.—*IMPERIAL OTTOMAN BANK v. TRUSTEES, EXECUTORS & SECURITIES INSURANCE CORPN.* (1895), 13 R. 287.

Deposit.]—See Sub-sect. 18, B. (b), *post*.

(b) Deposit.

511. General rule.]—The lien of a vendor upon the land, & upon the title deeds, until the purchase money be paid to him, does not apply to a conveyance to the purchaser, executed by some but not all the parties, where the contract has gone off by the vendor's default; & if there be any lien on such conveyance, it is vested in the purchaser as a security for his deposit.—*OXENHAM v. ESDAILE* (1829), 3 Y. & J. 262; 148 E. R. 1177; *previous proceedings* (1828), 2 Y. & J. 493.

Annotation:—*Refd.* *Wythes v. Lee* (1855), 25 L. J. Ch. 177.

512. —.]—Where a person contracts to purchase an estate & pays the required deposit, & afterwards, from any defect of title or other cause, not the fault of the purchaser, the contract cannot be completed, the purchaser will be entitled to file a bill to establish a lien upon the estate for the amount of his deposit.—*WYTHES v. LEE* (1855), 3 Drew. 396; 25 L. J. Ch. 177; 26 L. T. O. S. 192; 2 Jur. N. S. 7; 4 W. R. 184; 61 E. R. 954; *on appeal* (1856), 25 L. J. Ch. 389, L. JJ.

Annotations:—*Appld.* *Whitbread v. Watt*, [1902] 1 Ch. 835. *Refd.* *Re Symons, Ex p. Sewell* (1860), 2 L. T. 576; *Aberaman Ironworks v. Wickens* (1868), 4 Ch. App. 101.

513. —.]—B. & B., shipbuilders, having entered into a contract with F. to build him a ship, by deed assigned the contract to A. as a security for £500 advanced to them by A. for the purpose of building the ship, & by the same deed gave A. a lien on the ship for the payment of the £500; the contract with F. was afterwards cancelled, & B. & B. entered into a new contract with A. to complete & sell him the ship for £1,150, of which the £500 was to be taken as part payment. B. & B. became bkpt. before the completion of the ship:—*Held*: the cancellation of the contract with F. deprived A. of his lien, if any, under the deed, but under the subsequent contract he was

of the purchase-money the vendor had executed a mtge. to him of the estate to that extent.—*BANNERMAN v. GREEN* (1908), 1 Sask. L. R. 394; 8 W. L. R. 441.—CAN.

t. Rescission—Misrepresentation by vendor.]—*CUMMINS v. TRUSTEES OF THE CONGREGATIONAL CHURCH* (1886), 4 Man. L. R. 374.—CAN.

entitled against the assignees in bkpcy. to a lien on the ship for the £500.

Qu.: whether, but for the cancellation, A. would not have had a lien under the deed, although the ship was not in existence at its date, & the deed was not registered as a bill of sale under 17 & 18 Vict. c. 36.—*SWAINSTON v. CLAY* (1863), 3 De G. J. & Sm. 558; 2 New Rep. 345; 32 L. J. Ch. 503; 8 L. T. 563; 11 W. R. 811; 1 Mar. L. C. 343; 46 E. R. 752, L. JJ.

514. —.]—Deft. agreed to sell to pltf. certain lands in New South Wales free from incumbrances, & the greater part of the purchase-money was paid. On investigation of the title it appeared that these lands were held, with other lands, under a Crown grant, containing various reservations & conditions, with a proviso for re-entry on breach of condition. Pltf. filed his bill for specific performance, with compensation on account of these reservations, offering to complete without compensation, if the ct. was of opinion that he was not entitled to it. An order was made on appeal, declaring him entitled to compensation, & directing a reference as to the amount. In answer to this inquiry it was found that the amount of compensation could not be ascertained. Pltf. then filed a supplemental bill, asking that if the compensation could not be ascertained deft. might be decreed to repay with interest the part of the purchase-money which he had paid, & that pltf. might be declared entitled to a lien on the land for it:—*Held*: as pltf. was not bound to take the property without compensation, & as the compensation could not be ascertained, he was entitled to the return of his purchase-money, with interest at £4 per cent.; & to a lien on the estate for the amount.—*WEST-MACOTT v. ROBINS* (1862), 4 De G. F. & J. 390; 45 E. R. 1234, L. JJ.

515. —.]—*TURNER v. MARRIOTT*, No. 531, *post*.

516. —.]—Pltf. purchased at a sale by auction for £2,500 certain property which was described in the particulars of sale as an "immediate reversion in fee simple." Shortly after signing the contract he discovered that by conditions of sale, which were produced for the first time & read aloud by the vendor's agent at the commencement of the sale, but which pltf. was prevented of by deafness from hearing distinctly, the purchaser was to take the property subject to the obligation of paying off mtgees. for £2,500 in addition to his purchase-money the real value of the reversion being considerably under £5,000:—*Held*: the purchaser was entitled to have the contract rescinded on the ground of common mistake & of misdescription in the particulars; & he was also entitled to have the deposit he had paid returned with interest at 4 per cent. & until payment to a lien for the amount on the vendor's interest in the property.—*TORRANCE v. BOLTON* (1872), L. R. 14 Eq. 124; 41 L. J. Ch. 643; 27 L. T. 19; 20 W. R. 718; *affd.* (1872), 8 Ch. App. 118, L. JJ.

Annotations:—*Mentd.* *Blalberg v. Keeves*, [1906] 2 Ch. 175; *Carlisle v. Salt*, [1906] 1 Ch. 335; *Nocton v. Ashburton*, [1914] A. C. 932.

517. —.]—*Re NEW LAND DEVELOPMENT ASSOCN. & GRAY*, No. 498, *ante*.

518. —.]—In 1886 a vendor contracted in writing to sell free from incumbrances a contingent reversionary interest in personalty to a purchaser who paid a deposit on the purchase-money. The reversion proved to be incumbered, & the purchaser insisted on a conveyance free from incumbrances, but was told that the incumbrances would be paid off, which was never done.

The vendor afterwards created further charges on the reversionary interest to persons who had notice of the contract, & was adjudicated a bkpt. in 1888. In the same year the bkpcy. was annulled, upon the acceptance of a composition by his creditors, & under the scheme of arrangement the whole of his property was sold by his trustee. In 1891 the purchaser became bkpt. having previously assigned his interest under the contract to P. who subsequently assigned same to B. No attempt having been made to enforce the contract, the reversion fell into possession in 1895, & B. shortly afterwards claimed specific performance, or in the alternative a lien for the deposit paid by the purchaser:—*Held*: the delay was a bar to any claim for specific performance, the purchaser was a secured creditor of the vendor in respect of the deposit, & the purchaser must under the circumstances be treated as having elected to rely on his security; & as no Stat. Limitations applied B. was entitled to enforce his lien.—*LEVY v. STODDON*, [1898] 1 Ch. 478; 67 L. J. Ch. 313; 78 L. T. 185; *affd.*, [1899] 1 Ch. 5, C. A.

Annotations:—*Refd.* *Cornwall v. Henson*, [1899] 2 Ch. 710; *Davies v. Thomas*, [1900] 2 Ch. 462.

519. —.]—The purchaser of real estate has a lien on the property for his deposit when the contract for purchase is determined without any default on his part, not only when it is determined by reason of the default of the vendor.

A contract for the purchase of land empowered the purchaser to rescind the contract on the happening of a specified event. In exercise of this power the purchaser rescinded the contract:—*Held*: the purchaser had a lien on the land for the deposit which he had paid.—*WHITBREAD & CO., LTD. v. WATT*, [1902] 1 Ch. 835; 71 L. J. Ch. 424; 86 L. T. 395; 50 W. R. 442; 18 T. L. R. 465; 46 Sol. Jo. 378, C. A.

Annotation:—*Refd.* *Ridout v. Fowler*, [1904] 1 Ch. 658.

520. —.]—*KITTON v. HEWERT*, [1904] W. N. 21.

521. Sub-purchaser's lien—On deposit repaid to purchaser.]—The owner of an estate agreed to sell it for £250,000, representing it to contain one thousand five hundred & thirty acres. The purchaser agreed to sell it to a co. for £350,000, of which £150,000 was paid to him, £75,000 in cash, & bonds for £75,000, & he paid the vendor of the estate £50,000 as a deposit. It appeared that the estate contained less than one thousand one hundred acres, & the co., having at the time only £1,536 in hand, complained to the purchaser of the deficiency, & he then wrote to the vendor declining to complete. The co. afterwards rescinded the contract, & the purchaser brought an action against the vendor for the deposit, which was compromised by the vendor repaying the deposit & rescinding the contract. The co. filed a bill against the purchaser & some other defts. who had agreed to share with him, for a return of the £75,000 & of the bonds:—*Held*: the co. were entitled to repayment of what they had paid, & to a return of the bonds, & they had a lien on a portion of the £50,000 repaid the purchaser, which had been paid into ct.—*ABERAMAN IRONWORKS v. WICKENS* (1868), 4 Ch. App. 101; 20 L. T. 89; 17 W. R. 211, L. C.

Annotations:—*Apld.* *Mycock v. Beatson* (1879), 13 Ch. D. 384. *Mentd.* *Fenwick v. Bulman* (1869), L. R. 9 Eq. 165; *Goodford v. Stonehouse & Nailsworth Ry.* (1869), 38 L. J. Ch. 307; *Torrance v. Bolton* (1872), L. R. 14 Eq. 124; *Fleming v. Loe*, [1901] 2 Ch. 594.

522. Rescission under provision of contract—No default by either party.]—*WHITBREAD & CO., LTD. v. WATT*, No. 519, *ante*.

Sect. 3.—Particular classes of cases: Sub-sect. 18, B. (b), (c), (d) & (e), & C.; sub-sects. 19 & 20.]

523. Default of purchaser.]—The relation of trustee & *cestui que trust* does not arise between a vendor & purchaser of land so long as the contract for sale is *in fieri*, but arises only when the contract is completed. Accordingly, a purchaser who has merely paid a deposit, & done nothing more towards completing the contract does not acquire any estate in the land upon which a receivership order obtained by his judgment creditor can operate by way of equitable execution. The appointment of a receiver at the instance of a judgment creditor, where the appointment is conditional upon the receiver's giving security, does not operate by way of equitable execution upon the debtor's personal estate until the security has been given. When the security is given, the order does not, as in the case of real estate, relate back to the date when it was made. The purchaser of a freehold house & premises belonging to deft. paid his deposit & entered into possession. He never completed, but refused to deliver up possession, & subsequently commenced an action against the vendor for return of the deposit, & the vendor counterclaimed for specific performance. While this action was pending, pltf. recovered judgment for £55, & costs against the purchaser, & a receiver was appointed "upon first giving security" to receive the rents, profit, & moneys receivable in respect of the purchaser's interest in the house & premises. Notice of this order was given to the vendor. Afterwards, the purchaser's action against the vendor was compromised, the purchaser delivering up possession of the premises on receiving £110 from the vendor. Pltf. then commenced this action for a declaration that he was entitled to a lien or charge on the premises for £155 7s., & for personal payment by the vendor. The receiver subsequently gave security:—*Held*: as regards real estate, the purchaser never acquired any estate upon which the receivership order could operate by way of equitable execution, & as regards personal estate, the appointment of the receiver was not effective until he had given security, & his delay in so doing constituted a fatal objection to pltf.'s claim; as the receivership order did not operate to charge the purchaser's lien, if any, notice of it to deft. could not make it a charge; the purchaser being in fact in default had no lien for his deposit; the £110 was paid as an inducement to him to go out, & not as a return of deposit; & deft. was not in any way liable to pltf.—*RIDOUT v. FOWLER*, [1904] 2 Ch. 93; 73 L. J. Ch. 579; 91 L. T. 509; 53 W. R. 42; 48 Sol. Jo. 571, C. A.

(c) Interest.

524. On purchase-money—Rescission for misrepresentation.]—*EXCHANGE & HOP WAREHOUSES, LTD. v. ASSOCN. OF LAND FINANCIERS*, No. 495, *ante*.

525. On deposit.]—*WESTMACOTT v. ROBINS*, No. 514, *ante*.

PART V. SECT. 3, SUB-SECT. 18.—
B. (c).

a. On purchase-money.]—*BANNERMAN v. GREEN* (1908), 1 Sask. L. R. 394; 8 W. L. R. 441.—CAN.

PART V. SECT. 3, SUB-SECT. 18.—
B. (d).

b. Suit to recover deposit.]—The costs of a suit at law to recover back a deposit paid on account of purchase-money, do not form any lien upon the

land, although the deposit itself does constitute such a lien.—*BURNS v. GRIFFIN* (1877), 24 Gr. 451.—CAN.

c. Action for breach of contract.]—*Held*: pltf. was entitled to a lien upon the proceeds of the judgment against deft. for one-half of the costs incurred by him in the action.—*CRAWFORD v. PATTERSON* (1907), 7 W. L. R. 183.—CAN.

d. Costs of forced sale.]—The costs mentioned in R. S. S. 1909, c. 51, do not prevent a vendor under a lien-note

from retaining reasonable & proper costs in respect of a seizure & the sale other than those mentioned in the statute.—*TOTH v. HILKEVICS*, [1915] 1 W. W. R. 905; 11 Sask. L. R. 95.—CAN.

PART V. SECT. 3, SUB-SECT. 18.—
B. (e).

e. Taxes paid with purchase-money—Invalid tax sale.]—*Re CAMERON* (1868), 14 Gr. 612.—CAN.

526. —.]—*TURNER v. MARRIOTT*, No. 531, *post*.

527. —.]—*TORRANCE v. BOLTON*, No. 516, *ante*.

528. —.]—*Re NEW LAND DEVELOPMENT ASSOCN. & GRAY*, No. 498, *ante*.

529. —.]—*KITTON v. HEWETT*, [1904] W. N. 21.

530. Interest paid under the contract.]—*ROSE v. WATSON*, No. 493, *ante*.

(d) Costs.

531. Action for specific performance—Action by vendor.]—Where, in a suit by a vendor for specific performance, it was certified that a good title was not deduced, the ct. ordered a return to deft. of his deposit money, with interest at 4 per cent., & declared deft. entitled to a lien on the estate for the same, & also for his costs, with liberty to apply; & subject thereto, dismissed the bill.—*TURNER v. MARRIOTT* (1867), L. R. 3 Eq. 744; 15 L. T. 607; 15 W. R. 420.

Annotations:—*Fold*. *Re New Land Development Asscn. & Fagence's Contract* (1892), 61 L. J. Ch. 323; *Kitton v. Hewett*, [1904] W. N. 21; *Re Furneaux & Aird's Contract*, [1906] W. N. 215.

532. —.]—*KITTON v. HEWETT*, [1904] W. N. 21.

533. Suit for declaration as to title—Purchaser's suit.]—*Re FURNEAUX & AIRD'S CONTRACT*, [1906] W. N. 215.

534. Of investigating title.]—On making an order, upon a summons by a purchaser under Vendor & Purchaser Act, 1874 (c. 78), declaring that the vendor has not shown a good title to the property, the ct. has jurisdiction to order the vendor to pay the purchaser's costs of investigating the title & to charge them upon the vendor's interest in the property.—*Re YEILDING & WESTBROOK* (1886), 31 Ch. D. 344; 55 L. J. Ch. 496; 54 L. T. 531; 34 W. R. 397.

Annotations:—*Refd*. *Re Hargreaves & Thompson's Contract* (1886), 32 Ch. D. 454; *Re Higgins & Percival* (1888), 59 L. T. 213; *Re Bryant & Cullingford to Barningham* (1889), 62 L. T. 53; *Re Furneaux & Aird's Contract*, [1906] W. N. 215. *Mentd*. *Re Jackson & Woodburn's Contract* (1887), 37 Ch. D. 44.

535. —.]—*KITTON v. HEWETT*, [1904] W. N. 21.

536. —.]—*Re FURNEAUX & AIRD'S CONTRACT*, [1906] W. N. 215.

537. Of getting possession.]—*THOMAS v. BUXTON*, No. 543, *post*.

538. Action by trustee in bankruptcy of vendor—For recovery of property sold.]—*Re NEW LAND DEVELOPMENT ASSOCN. & GRAY*, No. 498, *ante*.

(e) Other Cases.

539. Arrears of tithes—Paid by purchaser.]—*THOMAS v. BUXTON*, No. 543, *post*.

540. Compensation—For incumbrance—Purchase with notice.]—(1) A purchaser who, under the decree of the ct., having notice of an incumbrance, paid his money into ct. & accepted the conveyance to him, is afterwards in no better situation in reference to the fund he has paid into

ct. than a purchaser without the intervention of the ct., & he has no lien on such fund in ct., but only a right of action against the vendor upon his covenants, whatever they may be.

(2) Defts. to a suit dismissed at the hearing with costs, who have registered the decree as a judgment under Judgments Act, 1838 (c. 110), cannot afterwards, pl'tfs. not having paid their costs, come to the ct. & obtain a stay of the distribution of the funds, but must rely solely on their personal right against pl'tfs.—*MILLER v. PRIDDEN* (1856), 26 L. J. Ch. 183; 28 L. T. O. S. 244; 3 Jur. N. S. 78; 5 W. R. 171.

541. — For deterioration—Purchaser kept out of possession.]—*THOMAS v. BUXTON*, No. 543, *post*.

542. — For non-performance—Failure to convey part of interest—Funds in hands of trustees.]—A husband agreed to sell property which was settled as he & his wife should jointly appoint, & in default of appointment to the use of trustees during the life of the wife for her separate use, with remainder to the husband in fee. The purchase-money was invested in consols, & paid to the trustees of the settlement. On the death of the husband before completion, the wife refused to convey her life interest:—*Held*: the purchaser was entitled, by way of specific performance, to a conveyance of the property subject to the widow's life interest, with compensation in respect of such interest out of the husband's personal estate; & he was entitled to a lien on the consols in the hands of the trustees for such compensation.—*BARKER v. COX* (1876), 4 Ch. D. 464; 46 L. J. Ch. 62; 35 L. T. 662; 25 W. R. 138.

Annotation:—*Mentd.* *Naylor v. Goodall* (1877), 47 L. J. Ch. 53.

543. Occupation rent—Purchaser kept out of possession.]—A purchaser of real estate upon a sale by the ct. was kept out of possession for a year through the opposition of pl'tf. in the cause, who was himself in occupation of the estate; & was ultimately let into possession by virtue of a writ of assistance issued by the ct.:—*Held*: the purchaser was entitled to have paid to him out of the purchase-money in ct. sums in respect of the following items: (1) the costs of obtaining the orders under which he succeeded in getting possession; (2) an occupation rent for the time during which he was kept out of possession; (3) compensation for deterioration of the property

during the same period; (4) arrears of tithes which he had been compelled to pay.—*THOMAS v. BUXTON* (1869), L. R. 8 Eq. 120; 38 L. J. Ch. 709.

544. Incumbrance discharged by purchaser before completion—Title defective.]—*LUDLOW v. GRAYALL*, No. 427, *ante*.

Money expended—Under agreement to lease.]—*See* No. 507, *ante*.

C. Over What Property Claimable.

545. Purchase-money invested—Persons acquiring legal interest without notice.]—*CATOR v. PEMBROKE (EARL)*, No. 503, *ante*.

546. — Funds in hands of trustee.]—*BARKER v. COX*, No. 542, *ante*.

547. Purchase-money in court.]—*THOMAS v. BUXTON*, No. 543, *ante*.

548. — Claim in respect of known incumbrance.]—*MILLER v. PRIDDEN*, No. 540, *ante*.

549. Debentures.]—*IMPERIAL OTTOMAN BANK v. TRUSTEES, EXECUTORS & SECURITIES INSURANCE CORPN.*, No. 510, *ante*.

550. Deposit repaid to original purchaser—Sub-purchaser's lien.]—*ABERAMAN IRONWORKS v. WICKENS*, No. 521, *ante*.

551. Ship—Under construction.]—*SWAINSTON v. CLAY*, No. 513, *ante*.

SUB-SECT. 19.—SOLICITOR'S EQUITABLE LIEN.

See, generally, SOLICITORS.

Lien on costs awarded—Extinguishment—Whether by issuing execution against client.]—*See* CONTEMPT OF COURT, Vol. XVI., p. 78, No. 951.

Priority—As against judgment debtor—Obtaining charging order.]—*See* EXECUTION, Vol. XXI., p. 657, Nos. 2357, 2358.

—As against garnishee.]—*See* EXECUTION, Vol. XXI., pp. 643, 645, Nos. 2228–2236.

Right to charging order on property preserved.]—*See* EXECUTORS, Vol. XXIII., p. 274, No. 3382; *HUSBAND & WIFE*, Vol. XXVII., p. 546, No. 5971, & *generally, SOLICITORS.*

SUB-SECT. 20.—STATUTORY LIEN.

By deposit of land or charge certificate.]—*See* Land Registration Act, 1925 (c. 21), s. 66.

PART V. SECT. 3, SUB-SECT. 18.—C.

1. Land dedicated for school purposes—Knowledge of purchaser.]—Purchase of land by def't. with notice of dedication for school purposes:—*Held*: not entitled to a lien.—*WYOMING CORPN. & WYOMING PUBLIC SCHOOL BOARD v. BELL* (1877), 24 Gr. 564.—CAN.

PART V. SECT. 3, SUB-SECT. 20.

g. Lienholder—Definition.]—*BAINES v. CURLEY* (1917), 38 O. L. R. 301.—CAN.

h. Who entitled to woodman's lien—Timber driver.]—*SINCLAIR v. HOLLAND* (1885), 24 N. B. R. 529.—CAN.

k. — Saw-mill man.]—*DAVIDSON v. FRAYNE* (1902), 9 B. C. R. 369.—CAN.

l. — Person working with team hired by himself.]—*ROTHERY v. NORTHERN CONSTRUCTION Co., LTD.*, [1921] 2 W. W. R. 853.—CAN.

m. — Person employed at railway siding.]—*BORTH v. HIGGINS & THOMPSON & GREAT WEST LUMBER Co., LTD.*, [1922] 1 W. W. R. 1116.—CAN.

n. — Unenfranchised Indian.]—*DOUGLAS v. MILL CREEK LUMBER Co.*, [1923] 1 D. L. R. 895; 32 B. C. R. 13; [1923] 1 W. W. R. 529.—CAN.

o. — Assignee.]—*DEMPEY v. KUREK (B. C.)*, [1923] 3 W. W. R. 1007.—CAN.

p. — Contractor.]—*STEPHENS v. BURNS*, [1921] 2 W. W. R. 513.—CAN.

q. — —.]—*ROSS v. MCLEAN & PETERSON*, [1921] 1 W. W. R. 1108.—CAN.

r. — —.]—*MACFARLANE v. HIGGINS (Sask.)*, [1922] 1 W. W. R. 968.—CAN.

s. — —.]—*MCDONALD v. BRUNETTE SAW MILL Co., LTD. (B. C.)*, [1922] 1 W. W. R. 1163.—CAN.

a. — —.]—*DESAUTELS v. MCCLELLAN* (1915), 30 W. L. R. 486; 7 W. W. R. 1221.—CAN.

b. — —.]—*MILLS v. SMITH SHANNON LUMBER Co.* (1916), 34 W. L. R. 358; 10 W. W. R. 454.—CAN.

c. Who liable for woodman's lien—"Owner."—*YOUNG v. WEST KOOTENAY SHINGLE Co.* (1905), 11 B. C. R. 171; 1 W. L. R. 184.—CAN.

d. — —.]—*URE v. MAC-*

GREGOR, [1923] 3 D. L. R. 1025; 32 B. C. R. 122; [1923] 2 W. W. R. 415.—CAN.

e. Property to which woodman's lien attaches—Logs to be converted into cordwood.]—*HAHN v. SEIBEL* (1920), 2 W. W. R. 595.—CAN.

aa. Amount for which woodman's lien available.]—*ROTHERY v. NORTHERN CONSTRUCTION Co.* (1922), 70 D. L. R. 771; 30 B. C. R. 324; *affg.*, 30 B. C. R. 152.—CAN.

bb. Who entitled to mechanic's lien—Architect—Supervision of construction.]—A substantial performance of a contract to supervise the building of a house is sufficient to entitle an architect to a lien.—*SICKLER v. SPENCER* (1911), 17 B. C. R. 41.—CAN.

cc. — — Preparation of plans.]—An architect is not entitled to a mechanic's lien for preparing plans.—*FRIPP v. CLARK* (1913), 18 B. C. R. 216.—CAN.

dd. — Assistant architect.]—*READ v. WHITNEY* (1919), 45 O. L. R. 377; 16 O. W. N. 127; 48 D. L. R. 305.—CAN.

ee. — Miners.]—*WESTER v. JAGO*,

Sect. 3.—Particular classes of cases: Sub-sects. 20 & 21, A.]

[1917] 1 W. W. R. 1338; 33 D. L. R. 617; 11 Alta. L. R. 52.—CAN.

m. — "Labourer or workman."—*HENDERSON & GREEN v. ATHOL COAL CO. (N. S.), [1924] 3 D. L. R. 873.—CAN.*

n. — — — — —] — *WALKER v. MINUDIE COAL CO., HANWAY v. MINUDIE COAL CO. (N. S.), [1924] 2 D. L. R. 645.—CAN.*

o. — "Teamsters of sub-contractor — "Placing" material."—Teamsters employed by a sub-contractor in conveying material to the building have a lien for their wages.—*MYLNZYUK v. NORTH-WESTERN BRASS CO., LTD. (1913), 27 W. L. R. 508; 5 W. W. R. 483; 14 D. L. R. 486; 6 Alta. L. R. 413.—CAN.*

p. — "Labourer employed by contractor to clear land."—Deft. employed a contractor, under a written contract, to clear a quantity of land for the purpose of cultivation:—*Held*: pltf., a labourer who worked for the contractor upon the land, was not entitled to a lien for his work under British Columbia Mechanics' Lien Act, s. 4.—*BLACK v. HUGHES (1902), 22 C. L. T. 220.—CAN.*

q. — "Carter of material."—A person delivering upon the land material to be used in preparing such property is not a person who has done work or service upon the land within Mechanics' Lien Act so as to be entitled to a claim for lien.—*BAKER v. UPLANDS, LTD., VANNATTA v. UPLANDS, LTD. (1913), 18 B. C. R. 197.—CAN.*

r. — "Assignee of mechanic."—*KELLY v. MCKENZIE (1884), 1 Man. L. R. 169.—CAN.*

t. — "Retail merchant supplying material."—*DOMINION RADIATOR CO. v. PAYNE, [1917] 2 W. W. R. 974; 35 D. L. R. 410; 11 Alta. L. R. 532.—CAN.*

a. — "Person furnishing material to mechanic."—Mechanics' Lien Act, 1875, does not give a lien to persons who furnish materials to the mechanic for the purpose of executing the contract entered into by him with the owner of the land.—*CRONE v. STRUTHERS (1875), 22 Gr. 247.—CAN.*

b. — "Assignee of materialman."—*GRANT v. DUNN (1883), 3 O. R. 376.*

c. — "Contractor — Declaration that all wages paid."—*BROWN v. BATHURST LUMBER CO. (1915), 43 N. B. R. 527.—CAN.*

d. — "Sub-contractor supplying material to other sub-contractor."—*WOOD & MCBETH v. BANK OF MONTREAL (1901), 40 N. S. R. 317.—CAN.*

e. — "Fishery servant—On products of voyage."—*HANRAHAN v. BARRON & DOODY (1849), 3 Nfld. L. R. 102.—NFLD.*

f. "Work for which mechanic's lien attaches—Construction of building—Excavation of basement."—*FARR v. GROAT (1913), 24 W. L. R. 860; 4 W. W. R. 1097; 12 D. L. R. 575; 6 Alta. L. R. 259.—CAN.*

g. — "Digging well."—*SLOAN v. WASSON (Alta.), [1923] 2 W. W. R. 506.—CAN.*

h. — — — — —] — *JONES v. JARVIS (Sask.), [1923] 1 W. W. R. 1164.—CAN.*

k. — "Breaking farm land."—Under Mechanics' Lien Act, 1920, a person who breaks a quantity of land upon the farm of another, under a contract therefor with the owner, has a mechanics' lien upon the farm for the price of the work.—*STUCKEY v. GEORGE [1924] 2 D. L. R. 844; 1 W. W. R. 1193; 18 Sask. L. R. 225.—CAN.*

l. — "Boring for oil."—*HENSHAW*

v. FEDERAL CORPN., LTD. (1916), 34 W. L. R. 208; 10 W. W. R. 329.—CAN.

aa. — "Tunnelling in mineral claims."—*LEROY v. SMITH (1901), 8 B. C. R. 293.—CAN.*

bb. — "Work on submarine sewer."—A workman is entitled to a lien upon the part of a sewer extending below low-water mark into the ocean, upon which he worked.—*BAKER v. UPLANDS, LTD., VANNATTA v. UPLANDS, LTD. (1913), 18 B. C. R. 197.—CAN.*

cc. "Who liable for mechanic's lien—"Owner"—Who is.—*REGGIN v. MANES (1892), 22 O. R. 443.—CAN.*

RAY (1893), 23 O. R. 415.—CAN.

ee. — — — — —] — *GARING v. HUNT & CLARIS (1896), 27 O. R. 149.—CAN.*

ff. — — — — —] — *ANDERSON v. GODSAL (1900), 7 B. C. R. 404.—CAN.*

gg. — — — — —] — *GEARING v. ROBINSON (1900), 20 C. L. T. 302; 27 A. R. 384.—CAN.*

h. — — — — —] — *COLUMBIA TIMBER & TRADING CO. v. LEBERRY (1902), 22 C. L. T. 273.—CAN.*

kk. — — — — —] — *SCRATCH v. ANDERSON (1911), 18 W. L. R. 145; 2 Alta. L. R. 109.—CAN.*

ll. — — — — —] — *BRADSHAW v. SAUCERMAN (1913), 18 B. C. R. 41.—CAN.*

mm. — — — — —] — *PRENTICE v. BROWN (1914), 28 W. L. R. 226; 6 W. W. R. 989; 17 D. L. R. 36; 7 Alta. L. R. 454.—CAN.*

nn. — — — — —] — *NATIONAL MORTGAGE CO. v. ROLSTON (1915), 8 W. W. R. 630.—CAN.*

oo. — — — — —] — *MARSHALL BRICK CO. v. YORK FARMERS' COLONIZATION CO. (1916), 54 S. C. R. 569; 36 D. L. R. 420.—CAN.*

pp. — — — — —] — *MACDONALD v. HARTLEY (B. C.), [1918] 3 W. W. R. 910.—CAN.*

qq. — — — — —] — *BEAVER LUMBER CO., LTD. v. SASKATCHEWAN GENERAL TRUSTS CORPN., LTD., Re SOLOMON ESTATE (Sask.), [1922] 3 W. W. R. 1061; 70 D. L. R. 690; revsg., [1922] 3 W. W. R. 120; 67 D. L. R. 699.—CAN.*

rr. — — — — —] — *Lessee building on owner's instructions.*—*ORR v. ROBERTSON (1915), 8 O. W. N. 471; 34 O. L. R. 147; 23 D. L. R. 17.—CAN.*

tt. — — — — —] — *Work done with knowledge of owner.*—*ISITT v. MERRITT COLLIERIES, LTD. (1920), 1 W. W. R. 879.—CAN.*

uu. — — — — —] — *Work done at owner's request.*—*SLATTERY v. LILLIS (1905), 10 O. L. R. 697; 6 O. W. R. 543.—CAN.*

bbb. — — — — —] — *Owner disclaiming responsibility—Liability for work previous to disclaimer.*—*SUTHERLAND v. DAVISON, [1923] 1 W. W. R. 827; 19 Alta. L. R. 280; revsg., [1922] 3 W. W. R. 410; 70 D. L. R. 91.—CAN.*

ooo. — — — — —] — *Building erected by lessee—With landowner's permission.*—*LIMOGES v. SCRATCH (1910), 44 S. C. R. 86; 31 C. L. T. 256.—CAN.*

Material supplied to mere trespasser.—*Re BECK, [1921] 3 W. W. R. 150.—CAN.*

eee. — — — — —] — *Owners notified but not joined in proceedings.*—*DYMENT v. SMITH, [1923] 4 D. L. R. 211; affg. sub nom. SMITH v. PORT HOOD COLLIERIES, [1923] 1 D. L. R. 1094; 56 N. S. R. 147.—CAN.*

fff. "Property to which mechanic's lien attaches—School property held by school trustees."—*MOORE v. PROTESTANT SCHOOL DISTRICT OF BRADLEY, NO. 369 (1887), 5 Man. L. R. 49.—CAN.*

ggg. — — — — —] — *CONNELY v. HAVELOCK SCHOOL DISTRICT NO. 8*

TRUSTEES (1912), 11 E. L. R. 473; 41 N. B. R. 374.—CAN.

hhh. — — — — —] — *HAZEL v. LUND (1915), 32 W. L. R. 818; 9 W. W. R. 749; 25 D. L. R. 204; 22 B. C. R. 264.—CAN.*

kkk. — "Crown grant."—*DORRELL v. CAMPBELL (No. 2), [1917] 1 W. W. R. 500; 23 B. C. R. 500.—CAN.*

lll. — "Property of Dominion railway company."—*STIFFEL v. CORWIN & CANADIAN PACIFIC RY. CO. (1911), 1 W. W. R. 339.—CAN.*

mmm. — — — — —] — *JOHNSON & CAREY CO. v. CANADIAN NORTHERN RY. CO. (1919), 44 O. L. R. 533.—CAN.*

nnn. — "Works constructed under Dominion authority."—*WESTERN CANADA HARDWARE CO., LTD. v. FARRELLY BROTHERS, LTD. (Alta.), [1922] 3 W. W. R. 1017; 70 D. L. R. 480; revsg., [1922] 3 W. W. R. 289.—CAN.*

ooo. — "Occupied & enjoyed" with land on which building erected.—*REVELSTOKE SAWMILL CO., LTD. v. CABRI CONSOLIDATED SCHOOL DISTRICT NO. 1326, [1924] 1 D. L. R. 472; 1 W. W. R. 282; 18 Sask. L. R. 52.—CAN.*

ppp. — "Property of Dominion railway."—*CRAWFORD v. TILDEN (1907), 8 O. W. R. 548; 13 O. L. R. 169; affd., 9 O. W. R. 781; 14 O. L. R. 572.—CAN.*

qqq. — "Railway turntable & engine-house."—*KING v. ALFORD (1885), 9 O. R. 643.—CAN.*

rrr. — "Land on which public buildings erected."—*REVELSTOKE SAW MILL CO. v. ALBERTA BOTTLE CO. (1915), 30 W. L. R. 312; 7 W. W. R. 1002.—CAN.*

ttt. — "Materials not incorporated in building."—*LARKIN v. LARKIN (1900), 20 C. L. T. 256, 375; 32 O. R. 80.—CAN.*

aaaa. — "Material supplied under contract."—*RATHBONE v. MICHAEL (1910), 15 O. W. R. 639; 20 O. L. R. 503.—CAN.*

bbbbb. — "Material placed on land affected by lien."—*MCARTHUR v. DEWAR (1885), 3 Man. L. R. 72.—CAN.*

ccccc. — — — — —] — *MILTON PRESSED BRICK CO. v. WHALLEY (1918), 42 O. L. R. 369; 14 O. W. N. 27; 42 D. L. R. 395.—CAN.*

ddddd. — "Material supplied to one person—Building on land of another—No lien on land."—*BRAVER LUMBER CO., LTD. v. JUVEN, [1923] 1 D. L. R. 170; 16 Sask. L. R. 136; [1922] 3 W. W. R. 774.—CAN.*

eeeee. — "Separate buildings—Whether lien claims consolidated."—*CURRIER v. FRIEDRICK (1875), 22 Gr. 243.—CAN.*

ffff. — — — — —] — *FAIRCLOUGH v. SMITH (1901), 13 Man. L. R. 509.—CAN.*

gggg. — — — — —] — *BOOTH v. BOOTH (1902), 22 C. L. T. 131; 3 O. L. R. 294; 1 O. W. R. 49.—CAN.*

hhhhh. — — — — —] — *DUNN v. MCCALLUM (1907), 9 O. W. R. 33, 315, 756; 14 O. L. R. 249.—CAN.*

kkkk. — — — — —] — *ONTARIO LIME ASSOCN. v. GRIMWOOD (1911), 2 O. W. N. 51; 22 O. L. R. 17.—CAN.*

llll. — — — — —] — *SECURITY LUMBER CO. v. PLESTED (1916), 34 W. L. R. 352; 10 W. W. R. 280.—CAN.*

mmmm. — — — — —] — *O'BRIEN v. FRASER GALLAGHER (N. B.) (1918), 41 D. L. R. 324.—CAN.*

nnnn. — "Clearance of designated portions of company's land—Lien on whole of land."—*BESELOFF v. WHITE ROCK RESORT DEVELOPMENT CO. & PHILLIPS (1915), 32 W. L. R. 73.—CAN.*

oooo. "Registration of mechanic's lien—Necessity for."—*KIEVELL v. MURRAY (1884), 2 Man. L. R. 209.—CAN.*

—] — *CURTIS v. RICH-*

SUB-SECT. 21.—VENDOR'S LIEN.

A. In General.

552. General rule.]—BURGESS v. WHEATE,
A.-G. v. WHEATE, No. 492, ante.

553. —.]—I consider it clearly settled, that the vendor has a lien for the purchase money, while the estate is in the hands of the vendee; I except the case, where upon the contract evidently that lien by implication was not intended to be

ARDSON (1909), 18 Man. L. R. 519; 10 W. L. R. 310.—CAN.

h. —.]—*Re WALLIS & VOKES* (1889), 18 O. R. 8.—CAN.

k. — *Materialman's lien — Within statutory period—From time when material placed on land.]—* LUDLAM-AINSLIE LUMBER CO. v. FALLIS (1909), 14 O. W. R. 273; 19 O. L. R. 419.—CAN.

l. —.]—*HURST v. MORRIS* (1915), 7 O. W. N. 370; 32 O. L. R. 346.—CAN.

m. —.]—*KALBFLEISCH v. HURLEY* (1915), 8 O. W. N. 584; 34 O. L. R. 268.—CAN.

n. —.]—*POLSON v. THOMSON* (1916), 34 W. L. R. 745; 10 W. W. R. 865.—CAN.

o. —.]—*On completion of contractor's work.]—Re MOOREHOUSE & LEAK* (1887), 13 O. R. 290.—CAN.

p. —.]—*Materials supplied from time to time—Separate agreements.]—* CHADWICK v. HUNTER (1884), 1 Man. L. R. 39.—CAN.

q. —.]—*MORRIS v. THARLE* (1893), 24 O. R. 159.—CAN.

r. —.]—*Contractor's lien — During progress of work.]—* HYNES v. SMITH (1879), 27 Gr. 150; 8 P. R. 73.—CAN.

t. —.]—*Within thirty days of completion.]—* NEILL v. CARROLL (1880), 28 Gr. 30.—CAN.

a. —.]—*SUMMERS v. BEARD* (1894), 24 O. R. 641.—CAN.

b. —.]—*MERRICK v. CAMPBELL* (1914), 27 W. L. R. 836; 6 W. W. R. 722; 17 D. L. R. 415; 24 Man. L. R. 446.—CAN.

c. —.]—*ANDERSON v. FORT WILLIAM COMMERCIAL CHAMBERS, LTD.* (1915), 9 O. W. N. 131; 34 O. L. R. 567.—CAN.

d. —.]—*Contractors named as owners by mistake—Validity of lien.]—* NOBBS v. CANADIAN PACIFIC RY. CO. (1914), 27 W. L. R. 664.—CAN.

e. —.]—*Failure to register within statutory period—Effect of.]—* DALE v. INTERNATIONAL MINING SYNDICATE, KOSCH v. INTERNATIONAL MINING SYNDICATE (B. C.), [1917] 2 W. W. R. 1031.—CAN.

f. —.]—*Omission of name & residence of person for whom work done—Effect of.]—* WALLIS v. SKAIN (1892), 21 O. R. 532.—CAN.

g. —.]—*Vacation of registration.]—Re MECHANICS' LIEN ACT, FOSTER v. SPENCER (ELLIS & ANDERSON, LIENHOLDERS),* [1923] 3 D. L. R. 96; 16 Sask. L. R. 517; [1923] 1 W. W. R. 1235.—CAN.

aa. —.]—*Time for filing mechanic's lien claim—Within statutory period—When period begins.]—* WHITLOCK v. LONEY (Sask.), [1917] 3 W. W. R. 971; 38 D. L. R. 63.—CAN.

bb. —.]—*LACROIX v. CARRUSS* (Sask.), [1923] 4 D. L. R. 947; 3 W. W. R. 1319.—CAN.

cc. —.]—*Otherwise priority lost.]—* IMPERIAL LUMBER YARDS, LTD. v. SEXTON, [1921] 3 W. W. R. 524.—CAN.

dd. —.]—*Last day Sunday.]—* REVELSTOCK SAW MILL CO. v. ALBERTA BOTTLE CO. (1915), 30 W. L. R. 312; 7 W. W. R. 1002.—CAN.

ee. —.]—*Filing mechanic's lien—Requisites of affidavit.]—* SMITH v. MCINTOSH (1893), 3 B. C. R. 26.—CAN.

ff. —.]—*BARRINGTON v.*

MARTIN (1908), 12 O. W. R. 324; 16 O. L. R. 635.—CAN.

gg. —.]—*When mechanic's lien attaches.]—* SMITH CO. v. SISSIBOO PULP & PAPER CO. (1905), 35 S. C. R. 93.—CAN.

hh. —.]—*MCCAULEY v. POWELL* (Alta.) (1908), 7 W. L. R. 443.—CAN.

kk. —.]—*On completion of work—Sub-contract for lump sum.]—* NEPAGE v. PINNER (1915), 30 W. L. R. 729; 8 W. W. R. 322; 21 D. L. R. 315.—CAN.

ll. —.]—*CHAMPION v. WORLD* (1916), 34 W. L. R. 317; 10 W. W. R. 470.—CAN.

mm. —.]—*Expiry of time for mechanic's lien claim—Action brought in the meantime—Definition of "in the meantime."]* EADIE-DOUGLAS v. HITCH & CO. (1913), 27 O. L. R. 257; 4 O. W. N. 147; 9 D. L. R. 239.—CAN.

nn. —.]—*Contract providing for payment at later date.]—* RITCHIE v. GRUNDY (1891), 7 Man. L. R. 532.—CAN.

oo. —.]—*Notice of mechanic's lien claim—Necessity for—Materialman.]—* COUGHLAN v. CARVER (1914), 29 W. L. R. 791; 7 W. W. R. 457; 20 D. L. R. 533.—CAN.

pp. —.]—*DOMINION RADIATOR CO., LTD. v. CALGARY CITY* (Alta.), [1918] 1 W. W. R. 137; 40 D. L. R. 65.—CAN.

qq. —.]—*What is sufficient notice.]—* CRAIG v. CROMWELL (1900), 21 C. L. T. 13; 27 A. R. 585.—CAN.

rr. —.]—*CROWN LUMBER CO. v. HICKLE & O'CONNOR*, [1925] 1 D. L. R. 626; 1 W. W. R. 279; 21 Alta. L. R. 128; *revsq.*, [1924] 1 D. L. R. 657; 1 W. W. R. 399.—CAN.

tt. —.]—*Sub-contractor supplying material.]—* IRVIN v. VICTORIA HOME CONSTRUCTION & INVESTMENT CO. (1913), 25 W. L. R. 79; 4 W. W. R. 1251; 12 D. L. R. 637; 18 B. C. R. 318.—CAN.

aaa. —.]—*FITZGERALD v. WILLIAMSON* (1913), 25 W. L. R. 82; 4 W. W. R. 1308; 12 D. L. R. 691; 18 B. C. R. 322.—CAN.

bbb. —.]—*Reserve of percentage of contract price—Mechanic's lien.]—* It is the duty of the owner to retain out of the payments to be made to the contractor, as the work progresses, a percentage of the value of the work done & materials provided, to form a fund for the payment of the lien-holders.—*RUSSELL v. FRENCH* (1898), 28 O. R. 215.—CAN.

ccc. —.]—*BRICKETT v. BREWDER* (1902), 22 C. L. T. 93; 1 O. W. R. 62.—CAN.

ddd. —.]—*RICE LEWIS & SON, LTD. v. GEORGE RATHBONE, LTD.* (1913), 27 O. L. R. 630; 4 O. W. N. 602.—CAN.

eee. —.]—*FULLER v. TURNER & BEACH* (1913), 21 W. L. R. 391; *varied*, 23 W. L. R. 170; 4 W. W. R. 161; 18 B. C. R. 69.—CAN.

fff. —.]—*BURTON v. HOOKWITH* (1919), 45 O. L. R. 348; 16 O. W. N. 102; 48 D. L. R. 339.—CAN.

ggg. —.]—*Effect of failure to retain.]—* JENNINGS v. WILLIS (1892), 22 O. R. 439.—CAN.

hhh. —.]—*Re SEAR & WOODS* (1893), 23 O. R. 474.—CAN.

kkk. —.]—*TORRANCE v. CRATCHLEY* (1900), 20 C. L. T. 74; 31 O. R. 546.—CAN.

lll. —.]—*An owner is required to retain a percentage of the contract price whether he has notice of a sub-contract or not, & he pays it at his own peril, if there is a sub-contractor in existence who is prejudiced by the payment.]—* DOMINION RADIATOR CO. v. CANN (1904), 37 N. S. R. 237.—CAN.

mmm. —.]—*CARROLL v. MCVICAR* (1905), 15 Man. L. R. 379.—CAN.

nnn. —.]—*PHELAN v. FRANKLIN* (1905), 15 Man. L. R. 520.—CAN.

ooo. —.]—*MCARTHUR v. MARTINSON* (1906), 16 Man. L. R. 887.—CAN.

ppp. —.]—*BROOKS v. MUNDY* (1913), 25 O. W. R. 687; 5 O. W. N. 795.—CAN.

qqq. —.]—*CUSSON v. MYRTLE SCHOOL DISTRICT*, [1921] 3 W. W. R. 479; 31 Man. L. R. 341.—CAN.

rrr. —.]—*STAFFORD v. MCKAY* (Sask.), [1919] 2 W. W. R. 280.—CAN.

ttt. —.]—*DOIG v. STEHN*, [1924] 2 D. L. R. 627; 1 W. W. R. 1169; 18 Sask. L. R. 217.—CAN.

aaaa. —.]—*Parties entitled to be paid out of.]—* McDONALD v. DOMINION IRON & STEEL CO. & HIGGS (1903), 40 N. S. R. 465.—CAN.

bbbb. —.]—*PEART v. PHILLIPS* (1915), 31 W. L. R. 956; 23 D. L. R. 193; 8 Sask. L. R. 305.—CAN.

ccccc. —.]—*COLE v. PEARSON* (1908), 12 O. W. R. 111; 17 O. L. R. 46.—CAN.

dddd. —.]—*Amount for which mechanic's lien available—Amount payable by owner to contractor.]—* TRUAX v. DIXON (1889), 17 O. R. 366.—CAN.

eeee. —.]—*Payment of mechanic's lien claim improperly withheld—Interest payable.]—* LUMBER MANUFACTURERS' YARDS, LTD. v. WEISGERBER, [1925] 3 D. L. R. 40; 1 W. W. R. 1026; 19 Sask. L. R. 397.—CAN.

PART V. SECT. 3, SUB-SECT. 21.—A.

552 i. General rule.]— MASON v. AGRICULTURAL MUTUAL ASSURANCE ASSOCN. OF CANADA (1868), 18 C. P. 19.—CAN.

552 ii. —.]—Where an agreement is for the sale of an interest in land, *prima facie* the vendor is entitled to a lien for unpaid purchase-money.—*SUMMERS v. COOK* (1880), 28 Gr. 179.—CAN.

552 iii. —.]—MOSES v. BIBLE (1907), 5 W. L. R. 520.—CAN.

552 iv. —.]—HIGH RIVER MEAT MARKET v. ROUTLEDGE (1908), 8 W. L. R. 259; 1 Alta. L. R. 405.—CAN.

552 v. —.]—The doctrine of vendor's lien for unpaid purchase-money is applicable to every sale of personal property over which a ct. of equity assumes jurisdiction.—*LADLAW v. VAUGHAN-RHYS* (1911), 44 S. C. R. 458.—CAN.

552 vi. —.]—YELLAPPA BIN BASAPPA v. MANTAPPA BIN BASAPPA (1866), 3 Bom. A. C. 102.—IND.

552 vii. —.]—SUBRAHMANIA AYYAR v. POOVAN (1902), 1. L. R. 27 Mad. 28.—IND.

552 viii. —.]—No cash consideration.]—In the absence of agreement or circumstances operating to the contrary a vendor's lien arises whenever land is conveyed in consideration of acts to be done by the grantee; the right is

Sect. 3.—Particular classes of cases: Sub-sect. 21, A.]

reserved (LORD ELDON, C.).—AUSTEN v. HALSEY (1801), 6 Ves. 475; 31 E. R. 1152, L. C.

*Annotations:—*Consd. Selby v. Selby (1828), 4 Refd. Mackreth v. Symmons (1808), 15 Ves. 329; Sproule v. Prior (1836), 8 Sim. 189. *Mentd.* Wythe v. Henniker (1833), 2 My. & K. 635; King v. King (1857), 3 Jur. N. S. 609.

554. —.].—A. by his will, devised real estates to B. & C. in trust to sell & divide the proceeds among his six brothers & sisters, with directions that his heir-at-law, B., should be at liberty to purchase at a definite price. All parties interested joined in conveying to a trustee for B., in consideration of a stipulated sum to each. Three received their money, & the other accepted promissory notes payable after the death of certain persons. B. became bkpt., before the notes were paid:—*Held*: the parties had a lien upon the estate for the money due upon the promissory notes & the estate passed to the assignees clothed with the trust.—*Re* DAVIS, *Ex p.* LATEY (1836), 1 Deac. 557; 2 Mont. & A. 609; 5 L. J. Bcy. 27; 6 L. J. Bcy. 13, Ct. of R.

555. —.].—The delivery of a cheque, on which the place where it is drawn is not stated, & which is not stamped, does not amount to a payment. B. sold an estate to A. B., who lived three miles from L., met A. at L. on Apr. 20, & A. gave B. a cheque drawn on a bank at L., in respect of the purchase money, at 5 p.m., after the L. bank had closed for the day. B. sent the cheque to B., which is distant from L. about six miles, & it was paid into a bank at R. employed by him on the morning of Apr. 21. The bank at R. sent the cheque by the post that day to the bank at L., & it was delivered at the bank at L. early in the morning of Apr. 22. At 1.30 p.m. on Apr. 22 the L. bank stopped payment; the ordinary banking hours extending to 4 p.m.:—*Held*: B. was authorised to employ a bank to cash the cheque; the distance of the bank employed by him from L. was not unreasonable; the bank at R. acted with due diligence; & the delivery of the cheque not amounting to a payment, B. had a lien on the estate in respect of the unpaid purchase-money.—BOND v. WARDEN (1845), 1 Coll. 583; 14 L. J. Ch. 154; 4 L. T. O. S. 351; 9 Jur. 198; 63 E. R. 553.

556. —.].—A firm of solrs. were employed in May, 1853, by trustees to sell some copyhold estates. The purchaser also employed them to complete the purchase. They had money of his in their hands, more than sufficient to pay the purchase-money, & the purchaser directed the solrs. to apply it & pay the purchase-money. The purchaser was let into possession in Oct. 1853. In Dec. the vendors executed a deed of covenant to surrender the estates purchased, & they signed the receipt for the purchase-money indorsed thereon; the title-deeds were retained by the solrs., who deposited them in a box containing other title-deeds & documents of the purchaser. The steward of the manor was one of the firm of solrs., & in June, 1854, he admitted the purchaser to the land purchased. The purchase-money was not actually paid by the solrs. as directed by the purchaser, but they settled accounts with the vendors, the trustees, & gave

them credit for the purchase-money as received by them, & after allowing costs & charges, there was a balance due to the trustees. Four-fifths of this balance were paid to four of the five *cestuis que trust* entitled to the proceeds of the sale. The solrs. retained the other one-fifth in their hands, & upon the remaining *cestui que trust* requiring payment of his share, the solr. stated that the purchaser had not paid the purchase-money, & that they had retained the deeds, which the trustees required them to hold as security. The solrs. did not pay the purchase-money, & in Feb. 1856, became bkpt. Upon a bill by the vendors:—*Held*: they were entitled to a lien upon the estate for the balance of the purchase-money remaining unpaid.—WROUT v. DAWES (1858), 25 Beav. 369; 27 L. J. Ch. 635; 31 L. T. O. S. 261; 4 Jur. N. S. 396; 53 E. R. 678.

*Annotations:—**Mentd.* Wall v. Cockerell (1860), 29 L. J. Ch. 816; Bradford v. Price (1923), 92 L. J. K. B. 871.

557. —.].—A. signed a subscription contract binding himself to take one hundred shares of £10 each in a railway co. He also executed a written contract with the co. for the sale to them of certain lands for a sum of £1,800. Subsequently he made a verbal arrangement with the contractor & solr. of the co., by which he agreed to accept a rentcharge of £72 a year instead of a gross sum of £1,800, on condition of being relieved of all liability in respect of eighty out of the hundred shares; & shortly afterwards he conveyed the lands agreed upon to the co. for a yearly rentcharge of £72. The co. repudiated the agency of their contractor & solr., & continued to hold A. liable for calls on one hundred shares. On bill filed by A. (*inter alia*) for specific performance of the original agreement:—*Held*: as the co. had repudiated the arrangements entered into by their agents, A. was entitled to a specific performance of the original agreement, to be relieved from the conveyance he had executed, to have the amount due in respect of calls set off as against his purchase-money, & to have a lien upon the lands sold for the surplus.—PRICE v. DENBIGH, RUTHIN & CORWEN RY. CO. (1869), 38 L. J. Ch. 461; 17 W. R. 572.

558. —.].—The moment you have a valid contract for sale the vendor becomes in equity a trustee for the purchaser of the estate sold, & the beneficial ownership passes to the purchaser, the vendor having a right to the purchase-money, a charge or lien on the estate for the security of that purchase-money, & a right to retain possession of the estate until the purchase-money is paid, in the absence of express contract as to the time of delivering possession. In other words, the position of the vendor is something between what has been called a naked or bare trustee, or a mere trustee, *i.e.* a person without beneficial interest, & a mtgee. who is not, in equity, any more than a vendor, the owner of the estate, but is, in certain events, entitled to what the unpaid vendor is, viz., possession of the estate & a charge upon the estate for his purchase-money. Their positions are analogous in another way. The unpaid mtgee. has a right to foreclose, that is to say, he has a right to say to the mtgor., "Either pay me within a limited time, or you lose your estate," & in default of payment he becomes absolute owner of it. So, although there has

not limited to cases of conveyance for a money consideration.—WARD v. WILBUR (1898), 25 A. R. 262.—CAN.

D. —.].—JOHN ABELL Co. v. HORNBY (1905), 15 Man. L. R. 450; 1 W. L. R. 3.—CAN.

q. —.].—MCCOY v. HOP (Sask.), [1923] 3 D. L. R. 873; [1923] 2 W. W. R. 801.—CAN.

r. *Nature of lien—Whether a "charge."*—CHATILLON v. CANADIAN MUTUAL FIRE INSURANCE CO. (1877),

27 C. P. 450.—CAN.

t. —.].—ARMSTRONG v. FARR (1885), 11 A. R. 186.—CAN.

a. —.].—A vendor's lien is not an interest in land, it is only a remedy for a debt, & is neither a right

been a valid contract for sale, the vendor has a similar right in a Ct. of Equity; he has a right to say to the purchaser, "Either pay me the purchase-money, or lose the estate." Such a decree has sometimes been called a decree for cancellation of the contract; time is given by a decree of the Ct. of Equity, or now by a judgment of the High Ct. of Justice; & if the time expires without the money being paid, the contract is cancelled by the decree or judgment of the ct., & the vendor becomes again the owner of the estate (JESSEL, M.R.).—LYSAGHT v. EDWARDS (1876), 2 Ch. D. 499; 45 L. J. Ch. 554; 34 L. T. 787; 24 W. R. 778; 3 Char. Pr. Cas. 243.

Annotations:—*Consd.* *Re Thomas*, Thomas v. Howell (1886), 34 Ch. D. 166; Allen v. I. R. Comrs. (1914), 83 L. J. K. B. 649. *Refd.* *Re Colling* (1886), 32 Ch. D. 333; Leppington v. Freeman (1891), 65 L. T. 145; Rodger v. Harrison, [1893] 1 Q. B. 161; Plews v. Samuel, [1904] 1 Ch. 464; Dale v. Hatfield Chase Corpn., [1922] 2 K. B. 282. *Mentd.* St. Thomas' Hospital v. Richardson (1909), 101 L. T. 771; Re Marlay, Rutland v. Bury, [1915] 2 Ch. 264.

559. —.]—BARKER v. STICKNEY, No. 704, *post*.

560. — Effect of running account.]—N. & co., commission agents, employed defts. who were sworn brokers to buy eighteen chests of indigo for them at one of the East India co.'s sales. N. & co. dealt on behalf of another party, the pltf., but this was not mentioned. Defts. paid for the chests & kept the India warrants, & the goods remained in the co.'s warehouses. The principal, being informed of the purchase paid N. & co. the amount. They afterwards directed defts. to sell the indigo & apply the proceeds in reduction of a balance due to them from N. & co., which was done; defts. not knowing that any other party had a claim to the goods & never having been paid, specifically, for the advance which they had made in respect of them. There had been a running account between N. & co. & defts. for some time during which the latter held a number of warrants for indigos purchased by them for N. & co. & for which defts. had made advances. N. & co. occasionally withdrew the warrants & at or near the same time paid in money to their account with defts. to about the value. There was no express agreement as to this, but an understanding that the warrants were not to be taken away upon credit. The payments were made & entered generally. Between the time of purchasing the eighteen chests & that of the direction to re-sell them N. & co. had paid in this manner more than the value of the eighteen chests, but had also during all that time been indebted to defts. in a larger amount. On trover brought by the principal against defts.:—*Held*: the above payments on account could not be considered as appropriated to the discharge of defts.' claim on the eighteen chests, & they consequently had a lien upon these at the time of the sale, which, under the circumstances, was an answer to the present action.—TAYLOR v. KYMER (1832), 3 B. & Ad. 320; 1 L. J. K. B. 114; 110 E. R. 120.

Annotations:—*Refd.* Bonzi v. Stewart (1842), 4 Man. & G. 295. *Mentd.* Cole v. North Western Bank (1875), L. R. 10 C. P. 354; Shenstone v. Hilton, [1894] 2 Q. B. 452.

561. Independent of possession.]—GOODE v. BURTON, No. 395, *ante*.

562. —.]—THAMES IRON WORKS CO. v. PATENT DERRICK CO., No. 90, *ante*.

563. —.]—BARKER v. STICKNEY, No. 704, *post*.

564. — Unauthorised allowance by trustee on sale—Claim by cestui que trust.]—A purchaser of property insured against fire does not by the mere fact of purchase acquire a right to the insurance moneys.

A contract was entered into with a trustee for sale for the purchase of a house which was insured against fire in the trustee's name, after which, & before completion of the purchase, the house was burnt down. The insurance co. paid the insurance money to the trustee, who, without the concurrence of his *cestuis que trust*, allowed the purchaser to deduct the amount from the purchase-money upon completion of the sale. The trustee having become bkpt., & a bill having been filed by the *cestuis que trust* against the purchaser:—*Held*: in the absence of any provision in the contract the purchaser was not entitled to the benefit of the money received from the insurance co., & the *cestuis que trust* were entitled to a lien upon the property for the amount deducted, as being unpaid purchase-money.—POOLE v. ADAMS (1864), 4 New Rep. 9; 33 L. J. Ch. 639; 10 L. T. 287; 28 J. P. 295; 12 W. R. 683.

Annotations:—*Mentd.* Rayner v. Preston (1881), 18 Ch. D. 1; Sinnott v. Bowden, [1912] 2 Ch. 414.

565. Effect of default by vendor.]—OXENHAM v. ESDAILE, No. 511, *ante*.

566. Claim by purchaser against sub-purchaser—For voluntary payment—Balance paid to original vendor by sub-purchaser.]—(1) A. entered into an agreement with B.'s agent C., for the purchase of an estate belonging to B., by the terms of which agreement A. was to pay down a deposit of £220, & pay the remainder of the purchase-money on a future fixed day; but before that day arrived, A., at the request of C., who acted in this respect without any authority from B., paid C. a further sum of £500 in respect of the purchase-money:—*Held*: such payment by anticipation on the part of A. was in his own wrong, & that he, nevertheless, continued liable to B.

(2) Subsequently A., by a memorandum in writing, signed by him, transferred all his interest under the agreement to D., who had notice of the payment to C., & that B. refused to recognise it. D. paid over to A. the £220, but declined paying him any part of the £500, & the memorandum between them did not provide for the payment of the purchase-money by D. to A. D. paid the remaining part of the purchase-money, including the £500, to B., upon receiving a bond of indemnity from him, & he thereupon obtained a conveyance of the estate from B. Upon a bill filed by A. against D. to establish a lien for the £500 on the estate:—*Held*: A. was not entitled to it.—COTMAN v. ORTON (1840), as reported in 10 L. J. Ch. 18; 5 Jur. 142, L. C.

567. Claim by sub-contractor—For goods supplied—On fund paid into court by purchaser.]—Deft. co. contracted with C. to provide an electrical installation, including (*inter alia*) a storage battery, at her house for £1,363. Deft. co. then sub-contracted with pltf. for the supply of the battery to be erected by them on C.'s premises at the price of £286, including erection. In accordance with the terms of the sub-contract pltf. sent the materials for the battery by rail

of property, an estate in lands, nor a charge on the land.—BANK OF MONTREAL v. CONDON (1896), 11 Man. L. R. 366.—CAN.

b. —.]—*Re* HARDAKER (1903), 7 Terr. L. R. 151; 1 W. L. R.

161.—CAN.

c. —.]—QUART v. EAGER (1909), 18 O. L. R. 181; 12 O. W. R. 735.—CAN.

d. —.]—*Re* HARRIS (1919), 43 O. L. R. 476.—CAN.

e. —.]—A vendor's lien for unpaid purchase-money is in the nature of a charge or trust imposed upon the legal estate which has passed to the purchaser. DENNY v. NOZICK, [1919] 2 W. W. R. 792.—CAN.

Sect. 3.—Particular classes of cases: Sub-sect. 21, A.]

to a specified station, whence they were to be carted by deft. co. to C.'s premises & there erected by pltf's. Deft. co. carted the goods, but pltf's. did not proceed with the erection of the battery, which was ultimately completed by deft. co. who went into liquidation. In an action against C., to which the co. was added as a deft., C., in pursuance of an order, made by the master upon a summons for directions, paid into ct. the sum of £269, part of the balance owing by her to deft. co., & upon that proceedings were stayed as against her:—*Held*: (1) upon construction of the sub-contract, it was not a contract for the sale of a completed article, but of the component parts of the battery, with a supplemental contract that after delivery they should be erected on C.'s premises; the delivery of the parts was an unconditional appropriation to the contract of goods in a deliverable state within Sale of Goods Act, 1893 (c. 71), s. 18, r. 5, & the property therein passed to deft. co.; & (2), assuming that the property in the goods did not pass, pltf's. had no lien upon the money in ct., which represented a portion of the consideration payable by C. to deft. co. under the principal contract.—*PRITCHETT & GOLD & ELECTRICAL POWER STORAGE CO. v. CURRIE*, [1916] 2 Ch. 515; 85 L. J. Ch. 753; 115 L. T. 325, C. A.

Annotation:—*Generally*, *Mentd.* *Pole-Carew v. Western Counties & General Manure Co.*, [1920] 2 Ch. 97.

568. Fictitious sale—To raise money for vendor.]—By a deed, purporting to be executed in consideration of £400 a son conveyed certain lands to his father; in fact, the conveyance was intended only to facilitate the raising of money for the son's use; but there was no declaration of trust in writing. The father died, & the lands thus conveyed passed by general words to his devisees:—*Held*: (1) parol evidence would not be received to show that the father was a trustee for the son; (2) the son was not entitled to a reconveyance from the devisees; (3) he had a lien on the estate for the purchase-money mentioned in the deed.—*LEMAN v. WHITLEY* (1828), 4 Russ. 423; 6 L. J. O. S. Ch. 152; 38 E. R. 864.

Annotations:—*As to* (1) *Consd.* *Re Marlborough*, *Davis v. Whitehead*, [1894] 2 Ch. 133. *Reid.* *Hughes v. Seanor* (1869), 18 W. R. 108. *As to* (2) *Reid.* *Re Marlborough*, *Davis v. Whitehead*, [1894] 2 Ch. 133. *As to* (3) *Consd.* *Re Marlborough*, *Davis v. Whitehead*, [1894] 2 Ch. 133.

569. No cash consideration—Sale of insurance business—Agreement by purchaser to take on liabilities.]—The W. Assurance Society transferred all its property & business to the A. co., in consideration of the A. co. taking on itself all the liabilities of the W. society. Among the property transferred by the W. society were several policies of reinsurance, effected by them in other cos. Both the A. & the W. cos. were ordered to be wound up. The official liquidator of the W. co. claimed to be entitled to the reinsurance policies, on the ground that, by the failure of the A. co., the W. society were still liable to the risks, to meet which the reinsurance had been effected:—*Held*: the consideration for the transfer of the property of the W. society to the A. co. being the agreement of the latter co. to indemnify the former, & not the performance of that agreement, the former co. had no lien upon the reinsurance policies, & therefore the application must be refused with costs.

It is impossible to infer from the nature of the transaction that it was the intention of the parties that any lien on the assets transferred should

exist; & further by the very terms of the contract not only is such inference excluded, but the true construction of the contract is that the consideration for which the transfer was made was not the payment of any price . . . but simply & solely the agreement that the co. should take upon itself the debts & engagements of the W. Society (*BACON, V.C.*).—*Re ALBERT LIFE ASSURANCE CO.*, *Ex p.* *WESTERN LIFE ASSURANCE SOCIETY* (1870), L. R. 11 Eq. 164; 40 L. J. Ch. 166; 23 L. T. 726; 19 W. R. 321.

Annotation:—*Mentd.* *Davies v. Thomas*, [1900] 2 Ch. 462.

570. Vendor of cargo also shipowner—Purchase price to include freight.]—Pltf., being the owner of a ship called the *K.*, loaded her with wheat at P.; as the cargo was taken on the ship's account, freight at the nominal rate of 1s. per ton was inserted in the bill of lading, which contained the usual exceptions of perils of the seas. He sold the cargo whilst afloat to H. upon the terms that "freight" should be paid at the rate of 60s. per ton. H. sold his interest in the cargo, & it ultimately vested in the deft., who bought the cargo on the same terms on which it had been sold to H. The *K.* on her arrival was ordered to Y., where she commenced to discharge her cargo: deft. received it & paid large sums on account. The quantity delivered was less than that mentioned in the bill of lading by about 70 quarters. Pltf. claimed "freight" at the rate of 60s. per ton upon all the cargo delivered; deft. claimed to deduct £193 on account of short delivery. At the trial the jury were of opinion that the short delivery arose from the excepted perils, & found for pltf. for the total sum claimed by him:—*Held*: although pltf. might not have a lien as shipowner, the cargo being taken on ship's account, nevertheless he had a lien as unpaid vendor; from deft.'s conduct a contract by him might be implied to pay freight at the rate of 60s. per ton upon all cargo delivered, & the finding of the jury for pltf. was right.—*SWAN v. BARBER* (1879), 5 Ex. D. 130; 49 L. J. Q. B. 253; 42 L. T. 490; 28 W. R. 563; 4 Asp. M. L. C. 264, C. A.

Shipowner's lien for freight.]—*See, generally*, *SHIPPING*.

571. Nature of lien—Whether a "charge"—Within local Act.]—The special Act incorporating a co. for the purpose (*inter alia*) of draining & reclaiming land, empowered the "owner of a limited interest in land" to contract with the co. for the execution of drainage & reclamation works, & for that purpose to charge on the land, in the manner provided by the Act, the cost of executing the works. The Act defined the term "owner of a limited interest in land," as including "any person entitled to any land subject to any mtge. or charge thereon, provided such person shall be in possession of the land mtged. or charged":—*Held*: this definition included a purchaser in possession of land upon which the vendor had a lien for unpaid purchase-money.

The Act provided that, "from & after the due execution of the works mentioned in any contract," between the co. & an owner of land, "or of any part of any such works, such execution, together with the amount due in respect of the same, being duly certified by three directors of the co. under the seal of the co., the co. shall be entitled to, & shall have a lien & charge upon the lands so drained, etc., for the moneys or money mentioned in such certificate as aforesaid . . . & such lien or charge shall have priority over every other charge or incumbrance affecting the same land," except ground rents & tithe commu-

tation rentcharge:—*Held*: the certificate of the directors was not conclusive, but only *prima facie* evidence of the due execution of the works mentioned in it, & if, notwithstanding the certificate, it was shown that the works had not been duly executed according to the contract, the co. would not be entitled to the statutory charge on the land as against a prior incumbrancer, or even as against the equitable owner.

A second mtgee. who is in possession of the mtged. property & expends money in permanently improving or preserving it, is not entitled as against the first mtgee. to any charge on the property for the money so expended.—*LAND-OWNERS' WEST OF ENGLAND & SOUTH WALES LAND DRAINAGE & INCLOSURE CO. v. ASHFORD* (1880), 16 Ch. D. 411; 50 L. J. Ch. 276; 44 L. T. 20; *subsequent proceedings* (1884), 33 W. R. 41.

Annotations:—*Mentd.* *Re Romford Canal Co., Pocock's Claim, Trickett's Claim, Carew's Claim* (1883), 24 Ch. D. 85; *Re Patent Ivory Manufacturing Co., Howard v. Patent Ivory Manufacturing Co.* (1888), 38 Ch. D. 156; *Re Mersey Ry.* (1895), 64 L. J. Ch. 625.

572. — *Right in equity.*—*BARKER v. STICKNEY*, No. 704, *post*.

573. — *Distinguished from mortgage.*—Testator, who at the date of his will in 1912 was the owner of several freehold properties, one of which was subject to a mtge., & of leasehold & other personal estate, gave & bequeathed all the freehold & leasehold properties of which he might die possessed upon trusts in favour of certain of his grandchildren & great-grandchildren, & the residue of his estate upon trust for sale & conversion; he then directed that his trustees should out of the moneys thereby produced pay (*inter alia*) his debts & legacies, & should out of the residue of such moneys pay & discharge "any sums of money secured on mtge. of any of my said freehold & leasehold properties," & should stand possessed of the residue of such moneys in trust to divide the same as therein mentioned. After the date of his will testator paid off the mtge. & took a reconveyance of the mtged. property. Shortly before his death, in June & Oct. 1917, testator contracted to purchase certain freehold properties, in respect of which he paid deposits, leaving balances of the purchase moneys owing to the respective vendors. On Dec. 23, 1917, testator made a final codicil, by which, after revoking the appointment of one of his executors & bequeathing a legacy, he confirmed his will in all other respects. Testator died on Dec. 26, 1917, without having completed the purchase or paid the balances of the purchase moneys; & shortly after his death his exors. completed the purchases & paid the balances of the purchase moneys; whereupon the question arose whether, as between the persons claiming under testator's will, those balances ought to be borne by the freehold properties of testator in respect of which same were payable, or ought to be satisfied out of his residuary estate:—*Held*: (1) inasmuch as a vendor's lien for unpaid purchase money differs essentially from a "mtge.," even in the modern & wider sense of that term, in that the former is created by operation of law & is merely incident to a contract & a contract which does not constitute the relationship of mtgor. & mtgee., while the latter is the creature of contract, upon the true construction of the will in the absence of any context enlarging the meaning of the term "mtge.," the balances of the unpaid purchase moneys owing at testator's death were not "sums of money secured on mtge.," & therefore, no contrary intention was signified by the direction in the will to pay & discharge such sums out of

testator's residuary estate, so as to exclude the operation of Real Estate Charges Act, 1854 (c. 113), which by virtue of Real Estate Charges Act, 1867 (c. 69), s. 2, extends to a vendor's lien for unpaid purchase-money; with the result that the balances in question ought to be borne by & satisfied out of the freehold properties in respect of which the same were payable & the devisees thereof were not entitled to have those balances discharged out of testator's residuary estate.

(2) The confirmation of the will by the last codicil thereto, although executed after the mtge. on testator's freehold property had been paid off & after vendors' lien had arisen, had not the effect of extending the meaning of the words, "any sums of money secured on mtge. of any of my said freehold & leasehold properties," so as to include the balances of unpaid purchase moneys in question.—*Re BEIRNSTEIN, BARNETT v. BEIRNSTEIN*, [1925] Ch. 12; 94 L. J. Ch. 62; 132 L. T. 251.

574. *Conveyance of share of real estate—As condition of receiving legacy—Legacies not paid.*—Testator gave a legacy to each of his daughters on condition that she should convey her share of certain real estate, to which the daughters were entitled, to the sons of testator; & in case of any daughter refusing or being unable to comply with the condition, the legacy bequeathed to her was to be forfeited & to form part of the testator's residuary personal estate. The testator gave his residuary personal estate to his sons; & he appointed one of them & two other persons executors. The daughters conveyed their shares of the real estate to their brothers, but did not obtain payment of the legacies:—*Held*: they were not entitled to any lien in the nature of a vendor's lien on the real estate conveyed by them for their legacies.—*BARKER v. BARKER* (1870), L. R. 10 Eq. 438; 39 L. J. Ch. 825.

575. *Sale of copyright.*—In the case of a copyright or patent it seems to me that the doctrine of a vendor's lien presents great embarrassment in its application. But, in view of the authorities, it must be taken that such a lien may exist, & I conceive again that no distinction can exist between a patent & a copyright (*MCCARDIE, J.*).—*BARKER v. STICKNEY*, [1918] 2 K. B. 356; 119 L. T. 72; 62 Sol. Jo. 536; *on appeal*, [1919] 1 K. B. 121, C. A.

Annotations:—*Mentd.* *Macdonald v. Eyles*, [1921] 1 Ch. 631; *The Lord Strathcona*, [1925] P. 143.

576. *Sale of patent.*—*BARKER v. STICKNEY*, No. 575, *ante*.

577. *Property sold by partner—Under agreement to account for proceeds—Bankruptcy of vendor before proceeds distributed.*—Applt. having claimed to be a partner with P. in gas works, which the latter had erected & was about to sell to a co. then about to be formed, it was agreed between them, for the purpose of ending their disputes respecting the ownership of the gas works, that P. should be at liberty to sell the works at such price as he pleased, upon accounting to applt. for the value of the works at a certain rate, & that P. should hold shares for applt. in the co. to the value of £2,000 for two years. The co. having been formed, & having purchased the gas works from P., applt. filed a bill against him, & obtained a decree for specific performance of their agreement. Before that decree was made, the co. was dissolved, & the gas works were sold to R. co. Applt. then filed a new bill against P., the R. co., the directors of the dissolved co., & the assignees of P., who had become bkpt., to

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establish a lien upon the gas works for what should be found due to him under the former decree, as well as to carry out the former decree against all these parties:—*Held*: the sale of the gas works by P. to the London co. was authorised by applt.'s agreement; he had no just claim against the co., or lien on the property, & the supplemental bill was properly dismissed, with costs, as against all defts., except P. & his assignees.—**PINKUS v. RATCLIFF GAS LIGHT & COKE CO.** (1847), 1 H. L. Cas. 309; 9 E. R. 775, H. L.; *affg.* (1844), 13 L. J. Ch. 244.

578. Effect of lien—Whether benefit confined to original vendor.]—General principle of marshalling; that a party, having two funds, his choice shall not have the effect of disappointing another, who has one only; but the latter shall stand in the place of the former. Upon that principle the benefit of the vendor's lien on the estate for the purchase money extended to third persons.—**TRIMMER v. BAYNE** (1803), 9 Ves. 209; 32 E. R. 582.

Annotations:—**Apprvd.** Selby v. Selby (1828), 4 Russ. 336. **Refd.** Wythe v. Henniker (1833), 2 My. & K. 635; Clarendon v. Barham (1842), 1 Y. & C. Ch. Cas. 688. **Mentd.** Sproule v. Prior (1836), 8 Sim. 189; Webb v. Smith (1885), 30 Ch. D. 192.

—*See, further*, EXECUTORS, Vol. XXIII., pp. 527, 528, Nos. 5939–5943, & generally, EQUITY, Vol. XX., pp. 499 *et seq.*

579. — On jurisdiction of Board of Trade—Under Patents, Designs & Trade Marks (Temporary Rules) Act, 1914 (c. 27).]—In 1907 an international assocn., called the Verband, was formed in Germany for the purchase from a co. incorporated in the United States of America of certain patents relating to machines for making glass bottles over a territory including the whole of Europe, & a contract was entered into by the Verband accordingly for the purchase of these patents, the purchase price being made payable to the vendors by instalments down to Mar. 1, 1917; & the vendors assigned the patents to a German co., called the Treuhand, on trust that they should assign the patents to the Verband upon payment in full of the purchase price, or re-assign them to the vendors in case of any default by the Verband. No default had in fact been made at the date of the order of the Board of Trade hereafter mentioned. National assocns. were formed in six European countries, including Germany & Great Britain, which took up the capital of the Verband in shares proportionate to the output of glass bottles in their several countries. Under an agreement entered into between the Verband & the British assocn., which resembled the agreements entered into by the Verband with the other national assocns., the British assocn. had the right to obtain machines manufactured under the patents,

& to enter into contracts with its members, granting them the right to be supplied with & use such machines, subject to certain restrictions on output. A licence was in fact granted by the British assocn. to (*inter alios*) their co-pltfs., an English co., which sued on behalf of themselves & all other licencees. In 1915 the Board of Trade made an order suspending the British patents in favour of one of defts., another English co., to which the Board granted a licence to make & use the inventions described in the patents. This order purported to be made under the above Act, which empowered the Board to avoid or suspend "any patent or licence the person entitled to the benefit of which is the subject of any State at war with his Majesty." Pltfs. brought this action for a declaration that the order of the Board of Trade & the licence granted by them were null & void:—*Held*: neither the interests of the British assocn. & their licencees, nor the lien of the vendors for unpaid purchase-money, operated to deprive the Board of Trade of jurisdiction to make the order suspending the patents & to grant the licence complained of.—**BRITISH ASSOCN. OF GLASS BOTTLE MANUFACTURERS, LTD. v. FORSTER & SONS, LTD.**, (1917) 86 L. J. Ch. 489; 116 L. T. 433; 33 T. L. R. 314; 61 Sol. Jo. 430; 34 R. P. C. 217, C. A.

See, generally, PATENTS, TRADE MARKS.

B. What may be Claimed.

(a) Unpaid Purchase-Money.

i. In General.

What amounts to payment, *see, generally*, CONTRACT, Vol. XII., pp. 454 *et seq.*

580. What is included—Subsequent advances to purchasers of building plots.]—A. being the owner of a plot of building land, & being in the habit of selling portions of it & allowing the purchase-money to remain secured thereon, & also being in the habit of advancing money for the purpose of enabling the purchasers to build thereon, such advances also remaining secured upon the land by a written acknowledgment or memorandum, devised his property to trustees, & authorised them to sell his building land, & to advance sums to the purchasers in the manner he had been accustomed to do, & as might seem expedient to them. The trustees sell a portion of this land, allowing the purchase-money to remain secured thereon; & afterwards make advances to the purchasers to enable them to build, but without taking any memorandum whereby the advances were secured upon the premises:—*Held*: upon the bkpcy. of the purchasers, the vendors', the trustees', lien extended to the subsequent advances.—*Re BAKER & HARLEY, Ex p. LINDEN* (1841), 1 Mont. D. & De G. 428; 10 L. J. Bcy. 22; 5 Jur. 57, Ct. of R.

578 i. Effect of lien—Whether benefit confined to original vendor.]—**MEAGHER v. PAULIN** (1875), 10 N. S. R. (1 R. & C.) 79.—CAN.

1. Relief not claimed—Power of court.]—**KRIENKE v. MOHR** (N. W. T.) (1905), 1 W. L. R. 254.—CAN.

g. Registration of lien—Whether necessary.]—**SMITH v. AMERICAN-ABELL ENGINE & TRUCK CO.** (1907), 17

v. RAY,

—**WATERLOO MANU- CO. v. BARNARD** (1915), R. 447; 9 W. W. R. 177, L. R. 605; 25 Man. L. R.

1. Conditional sale agreement—Duty to exercise right of re-possession.]—**MASSEY HARRIS CO. v. GRAHAM** (1909), 12 W. L. R. 593.—CAN.

m. Notice—Necessity for.]—**SCOTT v. BENEDICT** (1886), 14 S. C. R. 735; *affg.* (1884), 5 O. R. 1.—CAN.

n. —.]—**ANDREWS v. BROWN** (1909), 19 Man. L. R. 4.—CAN.

o. —.]—**PELEKAISE v. MCLEAN** (1909), 18 Man. L. R. 421.—CAN.

p. —.]—**CHECHIK v. FINN** (1913), 25 W. L. R. 897; 14 D. L. R. 705.—CAN.

q. —.]—**BLANCHETTE v. MASSEY-HARRIS CO.** (Alta.), [1919] 3 W. W. R. 870.—CAN.

r. —.]—**KALMAKOFF v. BANK OF MONTREAL**, [1922] 2 W. W. R. 408; 15 Sask. L. R. 364.—CAN.

t. Payment expressed in deed—Lien exists until actual payment.]—**SAUNDERS v. LESLIE** (1814), 2 Ball & B. 509.—IR.

PART V. SECT. 3, SUB-SECT. 21.—B. (a) i.

a. Effect of receipt in deed.]—The receipt of the consideration money in a deed is conclusive at common law, but a ct. of equity looks to the real character of the dealing, & gives the vendor a lien on the estate.—**NELSON v. CONNORS** (1863), 1 Old. 406.—CAN.

b. —.]—**DENNY v. NOZICK**, [1921]

581. — Unpaid premium on grant of lease.]—A lease is a sale *pro tanto*, & a premium reserved on a lease is in the nature of purchase-money, for which, if unpaid, there is a lien on the land; & consequently, unpaid premium is an interest in land within Charitable Uses Act, 1736 (c. 36), s. 111.—*SHEPHEARD v. BEETHAM* (1877), 6 Ch. D. 597; 46 L. J. Ch. 763; 36 L. T. 909; 25 W. R. 764.

Annotation:—Mentd. Re Pullen, Parker v. Pullen, [1910] 1 Ch. 564.

582. — Freight charged as part of price—By vendor shipowner.]—*SWAN v. BARBER*, No. 570, *ante*.

583. — Purchase-money of settled estate paid to incumbrancer—No receipt by trustees.]—When a purchaser buys settled land from the tenant for life, & by the direction of the tenant for life pays the purchase-money to an incumbrancer claiming in priority to the settlement, Settled Land Act, 1882 (c. 32), ss. 21, 22, require that he should get a discharge for the purchase-money from the trustees of the settlement. If he has no valid discharge either from the trustees or the ct., there may be a lien on the property for the purchase-money.—*Re NORTON & LAS CASAS' CONTRACT*, [1909] 2 Ch. 59; 78 L. J. Ch. 489; 100 L. T. 881.

— **Conditional legacy.]—***See* No. 574, *ante*.
— **Interest.]—***See* Sect. 3, sub-sect. 1, B. (b), *post*.

— **Costs.]—***See* Sect. 3, sub-sect. 18, B. (c), *ante*.

— **Unpaid royalties.]—***See* Sect. 3, sub-sect. 18, B. (d), *ante*.

584. Distinguished from loan.]—An argument has been founded on the supposed analogy to those cases, in which a vendor has been allowed to have a lien upon the estate sold for his purchase-money. There is this difference. In purchase, payment is an essential part of the contract. In loan, the contract is complete, & the relation of debtor & creditor attaches as firmly, whether there be any security or not. A mtge. or security is merely an accidental circumstance in a transaction concluded & complete by the mere advance of money (*LORD ELDON, C.*).—*Re HEWETT & HOPKINS, Ex p. HOOPER* (1815), 1 Mer. 7; 2 Rose, 328; 19 Ves. 477; 35 E. R. 580, L. C.

Annotation:—Mentd. Re Morrisson (1856), 27 L. T. O. S. 44.

585. —.]—A trustee purchased an estate on behalf of the trust. The vendor executed a conveyance to the trustee, which recited the trust, & that the trustee had called in trust moneys sufficient to pay the purchase-money, & it contained a receipt for the whole purchase-money. In fact, only part was paid, & the trustee gave his bond & a memorandum of deposit for the deficiency, the latter reciting that the vendor had lent the trustee that sum to enable him to complete:—*Held*: the vendor had no lien on the title deeds in his possession

for the unpaid purchase-money.—*MUIR v. JOLLY* (1858), 26 Beav. 143; 53 E. R. 851.

586. What amount—Whether for general balance of account—On series of transactions.]—*SMITH v. BEEMAN* (1843), 1 L. T. O. S. 233.

587. Effect of receipt in deed—As against volunteers.]—Vendor's lien for purchase-money unpaid against the vendee, volunteers & purchasers with notice or having equitable interests only, claiming under him, unless clearly relinquished; of which another security taken, & relied on may be evidence; according to the circumstances; the nature of the security, etc., the proof being upon the purchaser; & failing in part, upon the circumstances, another security being relied on, may prevail as to the residue.

The settled doctrine is, that, where the vendor conveys, without more, though the consideration is upon the face of the instrument expressed to be paid, & by a receipt, indorsed upon the back, if it is the simple case of a conveyance, the money, or part of it, not being paid, as between the vendor & the vendee & persons, claiming as volunteers, upon the doctrine of this ct., a lien shall prevail; in the one case for the whole consideration; in the other for that part of the money, which was not paid. . . . In those general cases in which there would be the lien, as between vendor & vendee, the vendor will have the lien against a third person; who had notice, that the money was not paid (*LORD ELDON, C.*).—*MACKRETH v. SYMMONS* (1808), 15 Ves. 329; 33 E. R. 778, L. C.

Annotations:—Expld. Re Lightoller, Ex p. Peake (1816), 1 Madd. 346. *Distd. Cood v. Cood & Pollard* (1822), 10 Price, 109. *Refd. Cowell v. Simpson* (1809), 16 Ves. 275; *Winter v. Anson* (1827), 3 Russ. 488; *Selby v. Selby* (1828), 4 Russ. 336; *Clarke v. Royle* (1830), 3 Sim. 499; *Wythe v. Henniker* (1833), 2 My. & K. 635; *Buckland v. Pocknell* (1843), 13 Sim. 406; *Rice v. Rice* (1854), 2 Eq. Rep. 341; *Wythes v. Lee* (1855), 3 Drew. 396; *Dixon v. Gayfer* (1857), 1 De G. & J. 655; *Re Stucley, Stucley v. Kekewich*, [1906] 1 Ch. 67; *Lloyds Bank v. Swiss Bankverein, Union of London & Smiths Bank v. Swiss Bankverein* (1913), 108 L. T. 143. *Mentd. Peacock v. Burt* (1834), 4 L. J. Ch. 33; *Sproule v. Prior* (1836), 8 Sim. 189; *Matthews v. Bowler* (1847), 9 L. T. O. S. 20.

588. — Note or bond in addition.]—A. agreed to sell an estate to B. for an annuity, & B. was to pay off a mtge. to which the estate was subject. Accordingly B. executed a deed, by which he granted the annuity to A. & covenanted to pay it; & by a conveyance of even date, but executed after the annuity deed, after reciting the agreement & the annuity-deed, A. & the mtgee., in pursuance of the agreement, & in consideration of the annuity having been so granted as aforesaid, & of the payment of the mtge. money, conveyed the estate to B. The annuity, afterwards, became in arrear:—*Held*: A. had no lien on the estate for the annuity.

Where the consideration is to be money paid down, & the money, in fact, is not paid, but a conveyance is made as if it had been paid, & that is all; or, if there be, in addition to it, the giving

2 W. W. R. 157; 56 D. L. R. 694; 60 S. C. R. 646.—CAN.

c. —.]—*TEHILRAM v. KASHIBAI* (1908), 1 L. R. 33 Bom. 53.—IND.

d. —.]—*CROLY v. CALLAGHAN* (1843), 5 I. Eq. R. 25.—IR.

e. *Payment deferred.]—**STUNTZ v. AUSTRALIAN JOINT STOCK BANK & JOHNSTON* (1891), 12 N. S. W. Eq. 325; 7 N. S. W. W. N. 153.—AUS.

f. *Land sold under execution.]—*Where the purchase-money of an estate was left unpaid, & a creditor of the purchaser, without notice, sued out an execution against lands, under which the premises in question were

sold to debt., who had notice:—*Held*: the vendor's lien for the unpaid purchase-money attached in debt.'s hands.—*STRONG v. LEWIS* (1850), 1 Gr. 443.—CAN.

g. *Exchange of properties—Incumbrance exceeding adjustment price—Lien on all properties.]—**FOSTER v. STIFFLER* (1910), 14 W. L. R. 178.—CAN.

h. — *Unpaid mortgage.]—**SENEY v. PORTER* (1866), 12 Gr. 546.—CAN.

k. *Goods supplied to sub-agent.]—**COREY & CARMICHAEL v. AMERICAN-ABELL CO.* (1912), 21 W. L. R. 940; 6 D. L. R. 103.—CAN.

l. *Balance of sale of threshing machine—Lien on purchaser's land.]—**GAAR SCOTT CO. v. MITCHELL* (1912), 22 W. L. R. 239; 22 Man. L. R. 474; 8 D. L. R. 129.—CAN.

m. *For coal supplied.]—**WORTMAN v. FRID-LEWIS CO.* (1915), 33 W. L. R. 119; 9 W. W. R. 812.—CAN.

n. *Land sold for taxes.]—*Where land which has been transferred, but not paid for, is sold for taxes, the unpaid vendor has a lien upon the proceeds in excess of the amount required for taxes.—*HETU v. MORINVILLE OIL CITY LAND CO.*, [1918] 1

Sect. 3.—Particular classes of cases: Sub-sect. 21, B. (a) i. & ii., (b), (c) & (d), & C.]

merely of a note or bond, still, in substance, the vendor has not that which, in point of justice, he ought to have; & therefore a ct. of equity considers the holder of the land by means of the conveyance, as a trustee of the money for the vendor, which is to be made good out of the land itself; because the land never would have been parted with, but for the sake of the money (*SHADWELL, V.C.*).—*BUCKLAND v. POCKNELL* (1843), 13 Sim. 406; 60 E. R. 157.

Annotation:—*Reid. Dixon v. Gayfere* (1857), 1 De G. & J. 655.

589. — Recital that deficiency is to be loan.]—*MUIR v. JOLLY*, No 585, *ante*.

See, generally, DEEDS, Vol. XVII., pp. 370 et seq.; ESTOPPEL, Vol. XXI., p. 265.

590. Purchase-money known to be trust money—Part wrongfully retained by one trustee.]—If a vendor who knows that the purchase-money is trust money suffers one of the trustees to retain part of it without the knowledge of the co-trustees or the *cestuis que trust*, he has no lien on the estate for the part so retained.—*WHITE v. WAKEFIELD* (1835), 7 Sim. 401; 4 L. J. Ch. 195; 58 E. R. 891.

Annotations:—*Reid. Rimmer v. Webster*, [1902] 2 Ch. 163. *Mentd. Holmes v. Powell* (1856), 8 De G. M. & G. 572; *Hunt v. Luck*, [1901] 1 Ch. 45; *Powell v. Browne* (1907), 97 L. T. 854.

ii. Where Particular Mode of Payment Provided.

591. Annuity.]—*TARDIFF v. SCRUGHAN* (1769), cited in 1 Bro. C. C. p. 423; 28 E. R. 1216; *sub nom. FORDIFF v. SCRUGHAM*, cited in Amb. p. 725, L. C.

Annotations:—*Distd. Fawell v. Heelis* (1773), Amb. 724; *Blackburn v. Gregson* (1785), 1 Bro. C. C. 420. *Dbtd. & Distd. Mackreth v. Symmons* (1808), 15 Ves. 329. *Distd. Winter v. Anson* (1827), 3 Russ. 488. *Dbtd. & Distd. Clarke v. Royle* (1830), 3 Sim. 499. *Consd. Buckland v. Pocknell* (1843), 13 Sim. 406. *Apld. Matthew v. Bowler* (1847), 6 Hare, 110. *Expld. Dixon v. Gayfere, Fluker v. Gordon* (1857), 1 De G. & J. 655.

592. — Secured by covenant.]—*Pltf.*, who was entitled to an equitable life interest in leasehold property, under the will of testator, assigned the same to *deft.*, in consideration of a weekly sum to be secured by the covenant of the purchaser; & by the same deed the purchaser covenanted for himself, his heirs, exors., & administrators, to pay the weekly sum, to insure & repair the premises, & to observe the covenants in the lease, & to indemnify *pltf.* in respect thereof:—*Held*: *pltf.* had a lien upon the premises for the annuity; & the arrears of the annuity & the costs of *pltf.* suing *in forma pauperis* were directed to be paid out of the rents of the premises.—*MATTHEW v. BOWLER* (1847), 6 Hare, 110; 16 L. J. Ch. 239; 9 L. T. O. S. 20; 11 Jur. 297; 67 E. R. 1102.

Annotations:—*Expld. Dixon v. Gayfere, Fluker v. Gordon* 1 De G. & J. 655. *Reid. Barker v. Stickney* 1 K. B. 356.

7. R. 666; 13 Alta. L. R. 115.—

o. Farm machinery.]—*CHURSENOFF*

PART V. SECT. 3, SUB-SECT. 21.—
B. (a) ii.

591 i. Annuity.]—*PAINE v. CHAPMAN* (1857), 6 Gr. 338.—CAN.

, 1 N. B. Eq. Rep. 116.—CAN.

591 iii. —.]—*DUGUAY v. LANTEIGNE* (1905), 25 C. L. T. 92; 3 N. B. Eq. Rep. 132.—CAN.

591 iv. —.]—When A. conveys land to B., in consideration of B.'s agreement to pay an annuity to C., the ct. will, upon default in payment, declare the annuity to be a charge upon the land, although no express charge has been created, & decree a sale of the land to realise the charge.—*SPENCER v. SPENCER* (1913), 24 W. L. R. 420; 4 W. W. R. 785; 11 D. L. R. 801; 23 Man. L. R. 461.—CAN.

592 i. — Secured by covenant.]—*KELAGHAN v. DALY*, [1913] 2 I. R. 328.—IR.

p. Payment by instalments.]—*Re CANADIAN CAMERA CO., Ex p. WILLIAMS MACHINE CO.* (1901), 30

593. — Secured by separate deed.]—*BUCKLAND v. POCKNELL*, No. 588, *ante*.

594. — “To be secured by bond.”]—(1) An agreement was entered into for the sale of an estate in consideration of an annuity to be granted to the vendor for three lives, to be secured by bond upon the estate being conveyed:—*Held*: the vendor had no lien on the estate in respect of the annuity, & was only entitled to have it secured by bond.

(2) If a person sells an estate for a certain sum of money which is not paid, the vendor has a lien on the estate for his purchase-money; & if he takes any other security for the payment thereof, he still has such lien. *Secus* in the case of an annuity.—*DIXON v. GAYFERE, FLUKER v. GORDON* (1857), 1 De G. & J. 655; 27 L. J. Ch. 148; 30 L. T. O. S. 162; 3 Jur. N. S. 1157; 6 W. R. 52; 44 E. R. 878, L. C.

Annotations:—*As to (2) Reid. Collins v. Collins* (No. 2), *Downes v. Downes* (1862), 31 Beav. 346. *Generally, Reid. Re Albert Life Assce., Ex p. Western Life Assce. Soc.* (1870), L. R. 11 Eq. 164; *Re Studley, Studley v. Kekewich* (1905), 75 L. J. Ch. 68; *Barker v. Stickney*, [1918] 2 K. B. 356.

595. — Covenant to pay as only consideration.]—A. conveyed an estate to B., in consideration of B. entering into the covenants contained in the deed for paying an annuity to A., & £3,000 to certain persons in the event of his, B.'s, marrying:—*Held*: the covenants did not create a lien on the estate.—*CLARKE v. ROYLE* (1830), 3 Sim. 499; 57 E. R. 1085.

Annotations:—*Consd. Buckland v. Pocknell* (1843), 13 Sim. 406. *Reid. Dixon v. Gayfere, Fluker v. Gordon* (1857), 1 De G. & J. 655; *Re Albert Life Assce., Ex p. Western Life Assce. Soc.* (1870), L. R. 11 Eq. 164.

596. Payment by instalments—Declaration as to instalments accrued due—Liberty to apply as to future instalments.]—In an action by a vendor whose purchase-money was to be paid by instalments, some of which were not yet due, for specific performance of his contract & a declaration of his lien, liberty was given to apply in respect of future instalments as they accrued due.—*NIVES v. NIVES* (1880), 15 Ch. D. 649; 49 L. J. Ch. 674; 42 L. T. 832; 29 W. R. 302.

597. Shares in company — Company subsequently wound up.]—*LONDON METALLURGICAL CO., LTD. v. COWPER COLES, SAME v. WALKER* (1895), 11 T. L. R. 377.

Reservation of royalties.]—*See* Sub-sect. 21, B. (d), *post*.

Payment by bond or negotiable instrument.]—*See* Part VII., Sect. 2, sub-sect. 1, A. (a) i.; & Part VII., Sect. 2, sub-sect. 1, B. (a) i., *post*.

(b) Interest.

598. From what time allowed—Commencement of lien.]—(1) The doctrine of vendor's lien for unpaid purchase-money is as applicable to a sale of personal estate, such as a reversionary interest in a trust fund, as to a sale of real estate; &

C. L. T. 341.—CAN.

q. —.]—*LES SŒURS DE LA CHARITÉ DE L'HÔPITAL GÉNÉRAL DE ST. BONIFACE v. FORREST* (1910), 16 W. L. R. 58; 20 Man. L. R. 301.—CAN.

r. Agreement to pay rent — & supply hay.]—*RICHARDSON v. M'CAUSLAND* (1817), Beat. 457.—IR.

PART V. SECT. 3, SUB-SECT. 21.—
B. (b).

598 i. From what time allowed—Commencement of lien.]—*OROLY v. CALLAGHAN* (1843) 5 I. Eq. R. 26.—IR.

accordingly an unpaid vendor of personal estate is entitled to all such remedies for enforcing payment of his purchase-money & interest as he would have been entitled to under an express mtge. or charge.

(2) No statute of limitations is applicable to a charge on personal estate, whether by way of vendor's lien or otherwise: consequently the right to the recovery of the debt is not barred by lapse of time, & interest is recoverable for the whole period from the date on which the debt was incurred.—*Re STUCLEY, STUCLEY v. KEKEWICH*, [1906] 1 Ch. 67; 75 L. J. Ch. 58; 93 L. T. 718; 54 W. R. 256; 22 T. L. R. 33; 50 Sol. Jo. 58, C. A. *Annotation*:—*As to* (1) *Refd. Re Beirnsstein, Barnett v. Beirnsstein*, [1925] Ch. 12.

599. Whether recovery barred by Statute of Limitations.—*Re STUCLEY, STUCLEY v. KEKEWICH*, No. 598, *ante*.

Where land compulsorily acquired.—*See* Sect. 3, sub-sect. 21, E., *post*.

Interest on purchase-money generally.—*See* SALE OF GOODS; SALE OF LAND.

(c) *Costs*.

Where land compulsorily acquired.—*See* Sub-sect. 21, E., *post*.

(d) *Unpaid Royalties*.

600. Sale of patent.—In 1904, pltf. agreed to sell S. some patents, & as the consideration for the sale, S. agreed to pay them a sum of £5,000 cash & certain royalties, & S. also guaranteed the payment of certain annual sums by way of minimum royalties during the continuance of the patents, the first payment to be made in June, 1906, & if defaults were made in payment of any minimum royalty the whole of the minimum royalties were to become immediately payable. S. paid the £5,000 & pltf. by two deeds in common form assigned the patents to him for a nominal consideration & without reference to the agreement or any reservation of royalties. In 1905, S. sold & assigned the patents for value to a co. with notice of the agreement of 1904, & the co. paid pltf. the minimum royalty that fell due in June, 1906. Subsequently S. wrongfully repudiated the agreement of 1904, & pltf. brought an action against him & the co., alleging that S. by his wrongful repudiation had committed a breach of the agreement which entitled them "to treat it as at an end & to sue him in damages for the breach," & claiming, as against S., the total sum of the unpaid minimum royalties by way of damages for the breach, & as against the co., a lien on the patents for the royalties as unpaid purchase-money. Subsequently S. became bkpt., & his trustee in bkpcy. was added as a deft., but declined to take any part in the action. The co. pleaded that pltf. having elected to treat the agreement as at an end, had no claim for royalties thereunder against them:—*Held*: (1) pltf. had not by their pleadings irrevocably elected to rescind the agreement, but could not sue both in damages for the breach & also for the consideration. (2) Pltf. had a vendor's lien on the patents in the hands of the co. for the unpaid minimum royalties.—*DANSK REKYLRIFTEL SYNDIKAT AKT.*

v. SNELL, [1908] 2 Ch. 127; 77 L. J. Ch. 352; 98 L. T. 830; 24 T. L. R. 395; 15 Mans. 184.

Annotation:—*As to* (2) *Consd. Barker v. Stickney*, [1919] 1 K. B. 121.

See No. 575, *ante*, & generally, PATENTS.

Sale of copyright.—*See* No. 575, *ante*; No. 704, *post*.

See, generally, COPYRIGHT, Vol. XIII., p. 198.

C. *Over What Property Claimable*.

601. Realty.—*Re STUCLEY, STUCLEY v. KEKEWICH*, No. 598, *ante*.

602. Leaseholds.—After judgment against the purchaser of a leasehold house & furniture, lien of the vendor upon the house & furniture, & proof under a commission of bkpcy., against the purchaser for the deficiency.—*Ex p. SEAFORTH (LORD)* (1812), 19 Ves. 235; 34 E. R. 505; *sub nom. Re WILKINSON, Ex p. SEAFORTH (LORD)*, 1 Rose, 306, L. C.

603. — Life interest.—*MATTHEW v. BOWLER*, No. 592, *ante*.

604. Personalty.—*Re STUCLEY, STUCLEY v. KEKEWICH*, No. 598, *ante*.

605. Furniture.—*Ex p. SEAFORTH (LORD)*, No. 602, *ante*.

606. Shares in company.—Where a bkpt. had contracted to buy some shares in the United States Bank, the certificates of which were left in the hands of the vendor, as a security for the payment of the greatest portion of the purchase-money:—*Held*: the vendor was entitled, as in the case of an equitable mtgee., to an order for the sale of the shares, in satisfaction of the unpaid purchase-money, with liberty to prove for the difference.—*Re BARLOW, Ex p. SHEPPARD* (1841), 2 Mont. D. & De G. 431, Ct. of R.

See, also, COMPANIES, Vol. IX., pp. 341 *et seq.*

607. Particular estate on which it attaches—Declaration of court as to incumbrances on devised estates.—Where the ct. had declared that certain devised estates were devised subject to incumbrances charged thereon, & a vendor had a lien for unpaid purchase-money on one of such estates, the ct. held, that, under the circumstances of the case, the vendor's lien stood precisely in the same position as any other incumbrance, & that it must be paid out of the particular estate on which it attached.—*BARNWELL v. IREMONGER* (1860), 1 Drew. & Sm. 242; 3 L. T. 462; 9 W. R. 88; 62 E. R. 372.

Annotations:—*Refd. Re Beirnsstein, Barnett v. Beirnsstein*, [1925] Ch. 12. *Mentd. Day v. Day* (1866), 14 W. R. 261; *Hughes v. Twisden* (1886), 34 W. R. 498.

608. Debt.—Upon a sale of a debt proved in an administration suit, the purchaser gave a bond for the purchase-money, payable by instalments:—*Held*: the vendor had not lost his lien on the debt for the payment of the unpaid purchase-money.—*COLLINS v. COLLINS* (No. 2), *DOWNES v. DOWNES* (1862), 31 Beav. 346; 54 E. R. 1172.

Annotation:—*Apprvd. Davies v. Thomas*, [1900] 2 Ch. 462.

609. Unfinished ship—For advances.—*SWAINSTON v. CLAY*, No. 513, *ante*.

610. Ship—For balance of price of engines.—*STEWART v. EAST & WEST INDIA DOCKS & DENNY* (1865), 3 Mar. L. C. Digest of Cases, p. 59.

PART V. SECT. 3, SUB-SECT. 21.—
B. (c).

t. *General rule.*—A vendor establishing a lien for unpaid purchase-money is entitled, in the absence of misconduct, to the general costs of the action & the costs of taking the

accounts.—*VALE v. BLAIR* (1887), 13 V. L. R. 502, 704.—AUS.

PART V. SECT. 3, SUB-SECT. 21.—C.

604 i. Personalty.—*Re McCALLUM, BAIRD v. McCALLUM* (1907), 7 S. R. N. S. W. 523; 24 N. S. W. W. N.

131.—AUS.

a. *Land in possession of surety.*—*HELLIWELL v. DICKSON* (1862), 9 Gr. 414.—CAN.

b. *Timber.*—*SMITH v. BELL* (1865), 11 Gr. 519.—CAN.

c. —.—*FORD v. HODGSON* (1902),

Sect. 3.—Particular classes of cases: Sub-sect. 21, C., D. & E.¹

611. Ship's engines.]—The deposit of the builder's certificate created a good equitable mtge. of the unfinished ship, including the engines which were being built for her but subject as to the engines to any lien for unpaid purchase-money to which the engine builders might be entitled.—*Re* **SOFTLEY, Ex p. HODGKIN** (1875), as reported in L. R. 20 Eq. 746.

Annotations:—Mentd. *Re* Wincham Shipbuilding Boiler & Salt Co., Poole, Jackson & Whyte's Case (1878), 26 W. R. 588; *Bulsteel & Colmore v. Parker & Bulsteel* (Trustee in Bankruptcy of) (1916), 32 T. L. R. 661.

See, generally, SHIPPING.

612. Trade machinery affixed to freehold.]—*Re* **VULCAN IRONWORKS, LTD.** (1888), 4 T. L. R. 312.

613. Purchase-money due under original contract—For chattels constructed by sub-contractor on purchaser's land.]—A. contracted with the B. co. to erect two specified tanks on C.'s premises, to be paid for after completion. The B. co. contracted with C. to erect the tanks specified, to be paid for after completion. When A. had partly constructed the tanks, a receiver of the property of the B. co. was appointed in a debenture-holder's action. The B. co. were insolvent. The tanks were not fixed to the soil, but were too heavy to move:—*Held*: the property in the incomplete tanks was in A., & he had a lien on the purchase-money that would be payable by C. for his purchase-money.—*BELLAMY v. DAVEY*, [1891] 3 Ch. 540; 60 L. J. Ch. 778; 65 L. T. 308; 40 W. R. 118; 7 T. L. R. 725.

Annotation:—Distd. *Prichett Co. v. Currie*, [1916] 2 Ch. 515.

614. Share of proceeds of sale—Of property bequeathed on trust for sale at future date.]—(1) The vendor of a share of the proceeds of sale of leasehold property bequeathed by will to trustees on trust for sale at a future date is entitled to a vendor's lien for unpaid purchase-money on the share of the proceeds of sale in the hands of the trustees.

(2) An order, made on an *ex p.* application under Lunacy Act, 1890 (c. 5), s. 116, directing a person in the name & on behalf of a lunatic not so found to receive & give a discharge for his property, does not affect the legal or equitable rights of other parties against that property as, for instance, a vendor's lien thereon for unpaid purchase-money.—*DAVIES v. THOMAS*, [1900] 2 Ch. 462; 69 L. J. Ch. 643; 83 L. T. 11; 49 W. R. 68; 44 Sol. Jo. 608, C. A.

Annotation:—As to (1) Apld. *Re Stucley, Stucley v. Kekewich*, [1906] 1 Ch. 67.

615. Rentcharge—Intestacy—Liability of next of kin.]—A rentcharge issuing out of leaseholds is a chattel real. A rentcharge of this kind contracted to be purchased by testator who died intestate in respect thereof is within Real Estate Charges Acts, 1854, 1867, & 1877, which are to be read together, & passes to his next of kin as persons claiming through him, subject, as between themselves & the other persons claiming through deceased, to a primary liability to payment of the vendor's lien for unpaid purchase-money, notwithstanding the absence of any reference to next of kin in the negating part of the Act of 1877, s. 1.—*Re FRASER, LOWTHER v. FRASER*,

[1904] 1 Ch. 726; 73 L. J. Ch. 481; 91 L. T. 48; 52 W. R. 516; 20 T. L. R. 414; 48 Sol. Jo. 383, C. A.

Annotations:—Mentd. *Re Joseph, Pain v. Joseph* (1908), 98 L. T. 392; *Re Taylor, Dale v. Dale*, [1909] W. N. 59; *Re Whiting, Ormond v. De Launay*, [1913] 2 Ch. 1; *Re Aynsley, Kyrle v. Turner*, [1914] 2 Ch. 422; *Re Wedgwood, Sweet v. Cotton*, [1914] 2 Ch. 245; *Re Smith, Prada v. Vandroy*, [1916] 1 Ch. 523; *Re Florence, Lydall v. Haberdashers' Co.* (1917), 87 L. J. Ch. 86; *Re Hardyman, Teesdale v. McClintock*, [1925] Ch. 287.

616. Reversionary interest in trust fund.]—*Re* **STUCLEY, STUCLEY v. KEKEWICH**, No. 598, *ante*.

617. Patent—For royalties.]—*DANSK REKYLRIFTEL SYNDIKAT AKT. v. SNELL*, No. 600, *ante*.

—*See, also*, No. 575, *ante*.

See, generally, PATENTS.

Copyright.]—*See* No. 575, *ante*, No. 704, *post*.

See, also, COPYRIGHT, Vol. XIII., pp. 189 et seq.

D. On Whom Binding.

618. Party claiming by descent—Widow.]—*HEARLE v. BOTELERS* (1604), Cary, 25; 21 E. R. 14, L. C.

Annotation:—Consd. *Mackreth v. Symmons* (1808), 15 Ves. 329.

619. — Heir.]—*HEARLE v. BOTELERS* (1604), Cary, 25; 21 E. R. 14, L. C.

Annotation:—Consd. *Mackreth v. Symmons* (1808), 15 Ves. 329.

620. — —.]—The contractor, who had been only paid half of the expenses of the building, having thereby the legal & equitable interest, is entitled to be paid his whole demand; & the parties interested or their estates must settle their proportions & rights between themselves.

If the conveyance had been made of land, the money not paid, as against vendee, his heir, or any claiming under him as purchaser, with notice of this equity, the land may be resorted to (*LORD HARDWICKE, C.*).—*WALKER v. PRESWICK* (1755), 2 Ves. Sen. 622; 28 E. R. 396, L. C.

Annotation:—Refd. *Mackreth v. Symmons* (1808), 15 Ves. 329.

Devisee—Right of legatee to have assets marshalled.]—*See* *EXECUTORS*, Vol. XXIII., pp. 527, 528, Nos. 5939–5943.

621. Assignees—Volunteers.]—*MACKRETH v. SYMMONS*, No. 587, *ante*.

622. — Purchaser for value without notice—Assignment of leaseholds.]—An assignment of leaseholds in consideration of natural love & affection is not voluntary. Leaseholds, on which there was a vendor's lien, were assigned by the purchaser to his son in consideration of natural love & affection. The son had no notice of the vendor's lien:—*Held*: there was sufficient consideration in the assignment to make the son a purchaser for value instead of a volunteer, & therefore, the vendor's lien did not hold against the son as assignee of the leaseholds.—*HARRIS v. TUBB* (1889), 42 Ch. D. 79; 58 L. J. Ch. 434; 60 L. T. 699; 38 W. R. 75.

See, generally, FRAUDULENT & VOIDABLE CONVEYANCES, Vol. XXV., pp. 232, 233, Nos. 597–601.

623. — Purchaser for value with notice.]—If A. sells an estate, & takes a promissory note for part of the purchase-money, & then the purchaser sells to B. who has notice that A. had not received all his purchase-money, the land in equity is chargeable in the hands of B. with the

22 C. L. T. 177; 3 O. L. R. 526; 1 O. W. R. 121.—*CAN.*

d. Assigned property.]—*VAN WAGNER v. FINDLAY* (1867), 14 Gr. 53.—*CAN.*

e. Manufactured goods.]—*WETT-*

LAUFER v. SCOTT (1893), 20 A. R. 652.—*CAN.*

f. Lands of railway company.]—An unpaid vendor is entitled to a lien on the lands of a railway co.—*KEANE*

v. ATHENRY & ENNIS JUNCTION RY. CO. (1870), 19 W. R. 318.—*IR.*

g. Sheep.]—*TESCHEMAKER v. MCLEAN* (1861), Mac. 1.—*N.Z.*

money due on the note.—**GIBBONS v. BADDALL** (undated), 2 Eq. Cas. Abr. 682; 22 E. R. 573.

Annotations:—**Consd.** Mackreth v. Symmons (1808), 15 Ves. 329; *Re* Lightoller, *Ex p.* Peake (1816), 1 Madd. 346.

624. ———.]—**WALKER v. PRESWICK**, No. 620, *ante*.

625. ———.]—A. having sold certain leasehold premises to B., assigned them by indenture, containing a proviso that B. should not assign over until the whole of the purchase-money should have been paid, & B. & C. covenanted for themselves, their exors., administrators & assigns for the payment of the money. The premises having been taken in execution for a debt of B. who had not paid the purchase-money, were sold by the sheriff to D., who paid down a deposit & agreed to complete the purchase on having a good title:—*Held*: the non-payment of the purchase-money by B. was a sufficient objection to the title, & D. might recover back his deposit in an action for money had & received.

Suppose a man having purchased an estate, assign it before the purchase-money has been paid, a ct. of equity will compel the assignee to pay that money, provided he knew at the time of the assignment that it had not been paid (**LORD ALVANLEY, C.J.**).—**ELLIOT v. EDWARDS** (1802), 3 Bos. & P. 181; 127 E. R. 100.

Annotation:—**Consd.** Mackreth v. Symmons (1808), 15 Ves. 329.

626. ———.]—**MACKRETH v. SYMMONS**, No. 587, *ante*.

627. ———.]—**Constructive notice.**—Pltfs. sold & conveyed a plot of land to the trustees of a building society. Though the conveyance contained a receipt for the whole purchase-money, a part only was paid, & the vendors retained the conveyance as an equitable security for the remainder. The land was divided into lots & sold, & conveyed by the trustees to the allottees, who resold them to other persons without notice of pltf.'s lien, but who neglected to require the production of the conveyance from pltfs.:—*Held*: the lien of pltfs. must prevail over the legal estate of the purchasers without notice, for it was their duty to require the production of the deed, & which would have led to a knowledge of the lien.—**PETO v. HAMMOND** (1861), 30 Beav. 495; 31 L. J. Ch. 354; 8 Jur. N. S. 550; 54 E. R. 981.

Annotations:—**Refd.** Oliver v. Hinton, [1899] 2 Ch. 264. **Mentd.** Morland v. Cook (1808), L. R. 6 Eq. 252.

628. Lessees—Joined as parties with purchaser.—A railway co. took lands under an agreement that they should have immediate possession, & should pay the purchase-money, with interest, within six months after the opening of the line. They then leased the line to another co., who took possession, & after the line was opened, worked it for public traffic. The purchase-money not being duly paid, the vendors filed their bill against both cos. The ct. decreed specific performance with payment of the purchase-money within three months, & declared pltfs. entitled as against both cos. to a lien upon the land for the purchase-money & interest, giving them, in case the purchase-money was not duly paid, liberty to apply in respect of the enforcement [by sale] of their lien or otherwise. Inasmuch as the bill sought relief, by way of injunction, & lien, which

affected the possession of the land:—*Held*: the lessees were properly made parties.

What I propose to do in this case is to give liberty to pltfs., in case the purchase-money should be unpaid, to apply in respect of the enforcement of their lien, & as to the injunction & appointment of a receiver (**STUART, V.-C.**).—**WINCHESTER (Bp.) v. MID-HANTS RY. CO.** (1867), L. R. 5 Eq. 17; 37 L. J. Ch. 64; 17 L. T. 161; 32 J. P. 116; 16 W. R. 72.

Annotations:—**Apld.** Drax v. Somerset & Dorset Ry. (1868), 38 L. J. Ch. 232; *Goodford v. Stonehouse & Nailsworth Ry.* (1869), 38 L. J. Ch. 307; *Marling v. Stonehouse & Nailsworth Ry.* (1869), 38 L. J. Ch. 306.

629. Equitable mortgagee in possession of title deeds.—Pltfs. having sold certain leaseholds to R., executed a deed of assignment of their interest, & acknowledged in the body of the deed the receipt of the purchase-money, part of which, however, only was paid. The title deeds were given to the purchaser, & he, on the succeeding day, handed them over to E., as a security for a debt due by him to E.:—*Held*: as against E., the vendors had no lien on the property for the unpaid purchase-money.—**RICE v. RICE** (1854), 2 Drew. 73; 2 Eq. Rep. 341; 23 L. J. Ch. 289; 22 L. T. O. S. 208; 2 W. R. 139; 61 E. R. 646.

Annotations:—**Apld.** Cave v. Cave (1880), 15 Ch. D. 639. **Distd.** Kettlewell v. Watson (1882), 21 Ch. D. 685. **Consd.** Rimmer v. Webster, [1902] 2 Ch. 163. **Apld.** *Re* Bourne, Bourne v. Bourne, [1906] 1 Ch. 113. **Refd.** Roberts v. Croft (1857), 24 Beav. 223; Cory v. Eyre (1862), 1 De G. J. & Sm. 149; Layard v. Maud (1867), L. R. 4 Eq. 397; Hunter v. Walters, Curling v. Walters, Darnell v. Hunter (1870), L. R. 11 Eq. 292; Shropshire Union Rys. & Canal v. R. (1875), L. R. 7 H. L. 496; Northern Counties of England Fire Insee. v. Whipp (1884), 51 L. T. 806; Bickerton v. Walker (1885), 31 Ch. D. 151; *Re* Vernon, Ewens (1886), 32 Ch. D. 402; Farrand v. Yorkshire Banking Co. (1888), 40 Ch. D. 182; Union Bank of London v. Kent (1888), 39 Ch. D. 238; Carritt v. Real & Personal Advance Co. (1889), 42 Ch. D. 263; Taylor v. Russell, [1891] 1 Ch. 8; *Re* Maskell & Goldfinch's Contract (1895), 13 R. 685; Lloyds Bank v. Bullock, [1896] 2 Ch. 192; *Re* Castell & Brown, Roper v. Castell & Brown, [1898] 1 Ch. 315; Capell v. Winter, [1907] 2 Ch. 376. **Mentd.** Keith v. Burrows (1876), 1 C. P. D. 722; Ortigosa v. Brown (1877), 47 L. J. Ch. 168; Spencer v. Clarke (1878), 9 Ch. D. 137; *Re* Eyton, Bartlett v. Charles (1890), 45 Ch. D. 458; Bateman v. Hunt (1904), 73 L. J. K. B. 782; Burgis v. Constantine, [1908] 2 K. B. 484.

630. Trustee in bankruptcy.—A. sells land to B. who afterwards becomes bkpt., part of the purchase-money not being paid.

A. shall not be bound to come in as a creditor under the statute, but the land shall stand charged with the money unpaid, though no agreement for that purpose.—**CHAPMAN v. TANNER** (1684), 1 Vern. 267; 23 E. R. 461.

Annotations:—**Distd.** Fawell v. Heelis (1773), Amb. 724. **Consd.** Mackreth v. Symmons (1808), 15 Ves. 329; *Re* Lightoller, *Ex p.* Peake (1816), 1 Madd. 346. **Refd.** Blackburn v. Gregson (1785), 1 Bro. C. C. 420.

631. ———.]—**BOWLES v. ROGERS** (1800), 6 Ves. 95, n.; 1 Cooke's Bankrupt Laws 8th ed., p. 146; 31 E. R. 957, L. C.

Annotation:—**Refd.** *Ex p.* Gwynne (1806), 12 Ves. 379.

E. Land Compulsorily Acquired.

632. Over what property—Land taken—For unpaid purchase-money.—(1) The owner of land taken by a railway co. is entitled to a lien upon the land so taken for the amount both of the purchase-money, & of the compensation for severance, etc.

(2) Entry by the co., under Lands Clauses

PART V. SECT. 3, SUB-SECT. 21.—E.

632 i. Over what property—Land taken—For unpaid purchase-money.—**PATERSON v. BUFFALO & LAKE**

HURON RY. CO. (1870), 17 Gr. 521 CAN.

632 ii. ———.]—Where a railway co. have taken lands for the

purposes of their line, but have never required the vendor to execute a conveyance, nor paid the sum agreed upon for purchase & compensation money, & the railway has been

Sect. 3.—Particular classes of cases: Sub-sect. 21, E., F. & G.; sub-sects. 22 & 23.]

Consolidation Act, 1845 (c. 18), s. 85, does not deprive the vendor of his lien.

(3) Payment of money as a security, under an agreement entered into before the price is determined, does not take away the lien.

(4) A vendor's lien for unpaid purchase-money in respect of land, is a right in equity that can only be taken away either by an Act of Parliament or the express contract of the parties.

(5) The Ct. of Ch. will enforce the lien by sale, although the railway has been made over the land, & opened for public use.—*WALKER v. WARE, HADHAM & BUNTINGFORD RY. CO.* (1865), L. R. 1 Eq. 195; 35 Beav. 52; 35 L. J. Ch. 94; 13 L. T. 517; 12 Jur. N. S. 18; 14 W. R. 158; 55 E. R. 813.

Annotations:—*As to (1) Consd. Pell v. Northampton & Banbury Ry.* (1868), 16 W. R. 1077. *Apprvd. Wing v. Tottenham & Hampstead Junction Ry.* (1868), 3 Ch. App. 740. *As to (5) Foll. Sedgwick v. Watford & Rickmansworth Ry.* (1867), 36 L. J. Ch. 379; *Raper v. Crystal Palace & South London Ry.* (1868), 16 W. R. 413. *Apprvd. Wing v. Tottenham & Hampstead Junction Ry.* (1868), 3 Ch. App. 740. *Refd. Sutton v. Hoylake Ry.* (1869), 20 L. T. 214. *Generally, Refd. Goodford v. Stonehouse & Nailsworth Ry.* (1869), 38 L. J. Ch. 307. *Mentd. Re Cambrian Ry.* (1867), 17 L. T. 374.

633. ————.]—WINCHESTER (BP.) v. MID-HANTS RY. CO., No. 628, ante.

634. ————.]—A vendor of land to a railway co. who have entered & used it for the purpose of their railway is entitled to the same lien on the land for the unpaid purchase-money, & the same remedies for enforcing it, as an ordinary vendor. Therefore where a landowner had sold land to a railway co., on some of which they had entered, under Lands Clauses Consolidation Act, 1845 (c. 18), s. 85, & on the rest under an agreement with the vendor, & the vendor had obtained a decree for specific performance & for payment of the purchase-money within three months:—*Held*: in default of payment the vendor was entitled to a sale of the land, although the railway was actually made, & ready for traffic.—*WING v. TOTTENHAM & HAMPSTEAD JUNCTION RY. CO.* (1868), 3 Ch. App. 740; 37 L. J. Ch. 654; 33 J. P. 99; 16 W. R. 1098, L. JJ.

Annotations:—*Appld. Jersey v. South Wales Mineral Ry.* (1868), 19 L. T. 446. *Consd. Sutton v. Hoylake Ry.* (1869), 20 L. T. 214; *Munns v. Isle of Wight Ry.* (1870), 5 Ch. App. 414; *Allgood v. Merrybent & Darlington Ry.* (1886), 33 Ch. D. 571.

635. ————.]—MARSHALL v. SCARBOROUGH & WHITBY RY. CO., [1889] W. N. 73.

636. ———— For compensation.]—WALKER v. WARE, HADHAM & BUNTINGFORD RY. CO., No. 632, ante.

637. ———— For interest.]—WINCHESTER (BP.) v. MID-HANTS RY. CO., No. 628, ante.

638. ————.]—MARSHALL v. SCARBOROUGH & WHITBY RY. CO., [1889] W. N. 73.

639. ———— For costs.]—MARSHALL v. SCARBOROUGH & WHITBY RY. CO., [1889] W. N. 73.

640. ———— Of action.]—MARSHALL v. SCARBOROUGH & WHITBY RY. CO., [1889] W. N. 73.

641. ———— Of award.]—When land is taken by a railway co. under Lands Clauses Consolidation Act, 1845 (c. 18), & the price is settled by arbn., the costs of the arbn. & award

constructed & opened for traffic, the vendor is entitled to a lien on the lands.—*KEANE v. ATHENRY & ENNIS JUNCTION RY. CO.* (1870), 19 W. R. 43.—**IR.**

h. ———— For compensation

money.]—LINCOLN PAPER MILLS CO. v. ST. CATHERINES & NIAGARA CENTRAL RY. CO. (1890), 19 O. R. 106.—**CAN.**

PART V. SECT. 3, SUB-SECT. 21.—F. k. Transfer after action brought.]

payable to the vendor under sect. 84 of the Act do not stand on the same footing as the purchase-money & the vendors have no lien on the land for such costs.—*FERRERS (EARL) v. STAFFORD & UTTOXETER RY. CO.* (1872), L. R. 13 Eq. 524; 41 L. J. Ch. 362; 26 L. T. 652; 20 W. R. 478.

Annotation:—*Mentd. Capell v. G. W. Ry.* (1882), 9 Q. B. D. 459.

642. ————.]—MARSHALL v. SCARBOROUGH & WHITBY RY. CO., [1889] W. N. 73.

643. ———— Lien on sum in court—For costs.]—A railway co., in order to enter upon land under Lands Clauses Consolidation Act, 1845 (c. 18), s. 85, gave to the owners a bond, & deposited the estimated value of the land according to the provisions of that Act. They afterwards paid the amount found by a jury to be the value of the land, & obtained a conveyance from the owners, & thereupon petitioned for the payment out to them of the sum deposited. The owners opposed the petition, on the ground that the costs of ascertaining the value, & of the conveyance, & of a suit occasioned by the co., had not been satisfied:—*Held*: upon the construction of Lands Clauses Consolidation Act, 1845 (c. 18), ss. 80, 81, the co. were entitled to the payment out to them of their deposit, & the owners of the land had no lien on the deposit for such costs.—*Ex p. GREAT NORTHERN RY. CO.* (1848), 16 Sim. 169; 5 Ry. & Can. Cas. 269; 11 L. T. O. S. 285; 12 Jur. 885; 60 E. R. 837, L. C.

644. ———— Effect of performance of condition of bond.]—The sum deposited by a railway co. in ct. under Lands' Clauses Act, 1845 (c. 18), s. 85, is not subject to any lien for the costs of the vendor; but upon due performance of the condition of the bond mentioned in the same sect., the co. are entitled to have the money paid out to them, notwithstanding the pendency of a question between them & the vendor with respect to such costs.—*Re LONDON & SOUTH WESTERN RAILWAY EXTENSION ACT, Ex p. STEVENS* (1848), 2 Ph. 772; 5 Ry. & Can. Cas. 437; 13 L. T. O. S. 338; 13 Jur. 2; 41 E. R. 1142, L. C.

Annotations:—*Foll. Re Neath & Brecon Ry.* (1874), 9 Ch. App. 263. *Mentd. Re Pollock, Ex p. Windsor, Staines, & South-Western Ry.* (1849), 13 Jur. 760; *Re Tottenham & Hampstead Junction Ry.* (1866), 14 W. R. 669; *Re Mutlow's Trusts* (1878), 27 W. R. 245.

645. ————.]—Where a co. has, under Lands Clauses Consolidation Act, 1845 (c. 18), s. 85, taken possession of land before agreement, upon giving a bond & depositing money in ct., it is entitled, upon fulfilling the conditions of the bond, to have the money repaid, & the ct. cannot, under sect. 80, order payment of costs out of it.—*Re NEATH & BRECON RY. CO.* (1874), 9 Ch. App. 263; 43 L. J. Ch. 277; 30 L. T. 3; 22 W. R. 242, L. JJ.

Annotation:—*Mentd. Re Mutlow's Estate* (1878), 10 Ch. D. 131.

646. Effect of entry by purchasers—Lien not lost.]—WALKER v. WARE, HADHAM & BUNTINGFORD RY. CO., No. 632, ante.

See, generally, COMPULSORY PURCHASE OF LAND, Vol. XI., pp. 230, 231.

F. Transfer of Lien.

647. By parol.]—*Semble*: the benefit of the vendor's lien for purchase-money unpaid may be

—*BRAITHWAITE v. BAYHAM* (1912), 21 W. L. R. 839; 2 W. W. R. 778.—**CAN.**
1. Assignment of agreement for sale.]—REGINA BROKERAGE & INVESTMENT CO. v. WADDELL (1911), W. L. R. 229; 10 W. W. R. 364.

assigned by parol to a third party.—*DRYDEN v. FROST* (1838), 3 My. & Cr. 670; 8 L. J. Ch. 235; 2 Jur. 1030; 40 E. R. 1084, L. C.

Annotations:—*Mentd. Woods v. Woods* (1848), 12 Jur. 994; *Hewitt v. Loosemore* (1851), 9 Hare, 449; *Watson v. Allcock* (1853), 4 De G. M. & G. 242; *Wilkes v. Saunton* (1877), 7 Ch. D. 188; *National Provincial Bank of England v. Games* (1886), 31 Ch. D. 582; *Wales v. Carr*, [1902]

648. Broker paying price as surety.—According to the usage of the London Dry Goods Market, a broker who contracts for the sale of goods without disclosing his principals is personally liable in default of his principal. On Mar. 3, certain goods belonging to Messrs. C., lying at the St. Katharine Dock, in the custody of the Docks co., were bought by D., as broker for buyers & sellers, for B. & co. without disclosing the names of his principals, & D. indorsed to them the delivery order he had obtained from the sellers, on the representation of B. & co. that the goods were wanted for immediate shipment. They, however, pledged their interest in the goods to pltf., & indorsed the order to them. On the prompt day, Mar. 18, pltf.' clerk lodged the order at the London office of the Docks co., with this memorandum: "Hold within to our order, & have warrants made out as soon as possible." He was told that the warrants would be ready with the goods on Mar. 20. Three hours later a messenger from the office reached the warrant office at the Dock House with a notice that the order had been lodged. Meanwhile B. & co. had stopped payment, & D. being so informed, & having no notice of pltf.' title, on the same day paid Messrs. C. for the goods & through a clerk, who reached the Dock House before the messenger had arrived, obtained at the warrant office a warrant for the goods in the name of Messrs. C., who indorsed the same to D., & gave him a second delivery order. The first delivery order was returned to pltf. by the Docks co., who refused to act upon it. In an action by pltf., claiming, as against the Docks co., Messrs. C., & D., to be entitled to the goods:—*Held*: D. was the surety & B. & co., the principal debtors; in the circumstances of the case, the unpaid vendors' lien had passed to D.; the title to the goods was in D.; & Messrs. C. were not necessary parties to the suit.—*IMPERIAL BANK v. LONDON & ST. KATHARINE DOCKS CO.* (1877), 5 Ch. D. 195; 46 L. J. Ch. 335; 36 L. T. 233.

649. Purchase-money advanced by building society.—An infant member of a building society purchased land, part of the purchase-money being paid for her by the society to the vendor. The land was conveyed to her on July 21, & the next day she executed a mtge. of it to the society to secure advances by them. She did not represent to the society that she was of full age, but they were in fact then ignorant that she was an infant. After the execution of the mtge. the society from time to time made advances to her which were applied in erecting buildings on the land. In Oct. the society discovered for the first time that mtgor. was an infant. They then discontinued making advances to her, took possession of the property & expended money in completing the houses on it. When the infant attained twenty-one she brought an action against the society to set aside the mtge. as being void against her, & claiming possession of the land & delivery up of the title deeds:—*Held*: the building society were entitled to a lien upon the property & the title deeds for the purchase-money which they had paid for pltf. to the vendor, with interest

thereon.—*THURSTAN v. NOTTINGHAM PERMANENT BENEFIT BUILDING SOCIETY*, [1902] 1 Ch. 1; 71 L. J. Ch. 83; 86 L. T. 35; 50 W. R. 179; 18 T. L. R. 135; 46 Sol. Jo. 102, C. A.; *on appeal*, *sub nom. NOTTINGHAM PERMANENT BENEFIT BUILDING SOCIETY v. THURSTAN*, [1903] A. C. 6, H. L.

J. Marshalling.

Against devisee of estate—In favour of legatees.—*See EXECUTORS*, Vol. XXIII., pp. 527, 528, Nos. 5939–5943.

650. As between devisee & residuary legatee.—*Re BEIRNSTEIN, BARNETT v. BEIRNSTEIN*, No. 573, *ante*.

—*See, generally, EXECUTORS*, Vol. XXIII., pp. 488, 489, Nos. 5561–5565.

651. Against indorsee of bill of lading.—An equitable right of quasi-stoppage *in transitu* remains in the vendor, notwithstanding an indorsement of the bill of lading by the vendee to a person who advances money on the security of such indorsement. But such right of the vendor is subject to the right of the indorsee to be repaid his advances.

The vendor had an equity to require the indorsee of the bill of lading to repay himself out of other property of the vendee in his hands, as far as such other property will extend, & if the indorsee apply the proceeds of the property so equitably stopped *in transitu* in payment of his debt, the vendor will have a lien upon the interest of the vendee in such other property.—*Re WESTZINTHUS* (1833), 5 B. & Ad. 817; 2 Nev. & M. K. B. 644; 3 L. J. K. B. 56; 110 E. R. 992.

Annotations:—*Appl. Broadbent v. Barlow* (1861), 3 De G. F. & J. 570. *Refd. Phillips v. Huth* (1840), 6 M. & W. 572; *Spalding v. Ruding* (1843), 6 Beav. 376; *The Marie Joseph* (1866), Brown. & Lush. 449; *Meyerstein v. Barber* (1866), L. R. 2 C. P. 38; *Rodger v. Comptoir d'Escompte de Paris* (1869), 21 L. T. 33; *Kemp v. Falk* (1882), 7 App. Cas. 573; *Sewell v. Burdick* (1884), 10 App. Cas. 74.

SUB-SECT. 22.—WASTE.

By executor.—*See EXECUTORS*, Vol. XXIII., pp. 445–447, Nos. 5158–5168

By tenant for life—Lien of remainderman.—*See*

By trustee.—*See TRUSTS & TRUSTEES.*

SUB-SECT. 23.—OTHER CASES.

652. Trust funds invested in name of tenant for life—Subsequent bankruptcy.—Trustees, with the consent of A., the tenant for life, had a power to sell the trust estate & invest the produce in other real estate. In 1810 A., with the concurrence of the trustees, sold the estate for £8,440, & received the purchase-money. About the same time, but whether with the concurrence of the trustees was not proved, A. purchased another estate for £17,400. Of the £8,440, £8,124 was paid by A., in part payment for the second estate; the remainder was paid partly out of A.'s moneys, & partly by money raised by a mtge. of the estate. The estate was conveyed to A. in fee. No acknowledgment or declaration of trust was ever made by A., & he retained possession of the estate till thirty years after, when he became bkpt. The ct., against A.'s assignees, presumed, under these circumstances, that the purchase had been made under the power for the benefit of the trust, &

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Sect. 4.]

held that there had been no such adverse possession, & no such acquiescence on the part of the trustees, as to preclude the ct. making a declaration that they had a lien on the estate to the extent of the trust moneys invested in its purchase.—*PRICE v. BLAKEMORE* (1843), 6 Beav. 507; 49 E. R. 922.

Annotation:—*Consd. Mathias v. Mathias* (1858), 3 Sm. & G. 552.

653. Claim of landlord for rent—Notice of claim given to receivers—No further steps taken.]—A receiver in a legatee's suit, advertised furniture, in a leasehold house, for sale. The superior landlord claimed rent, but took no other step, & the furniture was sold:—*Held*: the landlord had no lien on the proceeds of the sale, but must come in with the other creditors.—*Re SUTTON'S ESTATE, SUTTON v. REES* (1863), 1 New Rep. 464; 32 L. J. Ch. 437; 8 L. T. 343; 27 J. P. 388; 9 Jur. N. S. 456; 11 W. R. 413.

Annotation:—*Reid. Re Mayhew, Ex p. Till* (1873), L. R. 16 Eq. 97.

654. ——— Judge's order for payment.]—In an action in the Ch. Div., by one partner against another, for a dissolution of the partnership, judgment was given for a dissolution, & the appointment of a receiver of the assets of the partnership. Both the partners were afterwards adjudged bkpt.; the action was transferred to the Q. B. Div. in bkpcy., & the judge having jurisdiction in bkpcy. made an order under Solicitors Act, 1860 (c. 127), s. 28, charging the costs of pltf.'s solr. on the funds in the hands of the receiver. Before this order was made, the landlord of the premises in which the bkpts. had carried on their business had given notice to the receiver of a claim for rent due to him, but had not attempted to distrain. The judge was not informed of this claim before he made the order, & he subsequently made a further order, by which he directed the receiver to pay the rent due to the landlord, & to pay the balance in his hands to the solr.:—*Held*: (1) the landlord not having distrained, had no lien on the funds in the hands of the receiver in priority to the solr.; (2) the charging order was not made by the judge in the exercise of his bkpcy. jurisdiction, & he had consequently no power to rescind or vary it under Bankruptcy Act, 1883 (c. 52), s. 104.—*Re SUFFIELD & WATTS, Ex p. BROWN* (1888), 20 Q. B. D. 693; 58 L. T. 911; 36 W. R. 584; 5 Morr. 83, C. A.

Annotations:—*As to* (1) *Reid. Cole v. Eley* (No. 1) (1894), 38 Sol. Jo. 533; *Re Humphreys, Ex p. Lloyd-George* (1898), 67 L. J. Q. B. 412. *As to* (2) *Consd. Re Deakin, [1900] 2 Q. B. 489. Reid. Re Crown Bank* L. D. 634; *Preston Banking Co. v. Allsup*, [1895] 1 Ch. 141; *Re Wood, Ex p. Fanshawe*, [1897] 1 Q. B. 314.

655. Offer by debtor—To appropriate fund in satisfaction of debt of creditor.]—A partnership between solrs. was dissolved by the death of O. in 1831. A large sum was due to him for advances to the firm & for his share of profits. L., the surviving partner, received the assets of the firm until his death in 1834. A suit was then instituted for winding up the partnership accounts, & D. was appointed receiver, & the suit was not further prosecuted. D. was also employed by the administratrix of L. to collect the estate of L., & pay debts, etc. Various payments were made by him to O.'s exors. out of assets of the firm received by him, & out of the private estate of L. up to 1845, & in that year he, without the

authority of the administratrix, prevailed with them to accept a sum of money held in trust for her, & arising from arrears of annuity payable to her for the purchase of the goodwill of L.'s business, as a composition for the balance then due from L.'s estate to O.'s estate:—*Held*: (1) pltf's. having chosen to take the course of relinquishing the prosecution of the suit, & making no claim against the administratrix of L., the payments by D. did not revive the debt due from L.'s estate to O.'s estate, which was otherwise barred by the statute; (2) no claim for a lien on the mtge. fund was established.—*WHITLEY v. LOWE* (1858), 25 Beav. 421; 31 L. T. O. S. 5; 4 Jur. N. S. 197; 6 W. R. 236; 53 E. R. 697; *on appeal*, 2 De G. & J. 704, L. J.J.

656. Goods consigned to foreign factor for sale—Whether proceeds of sale appropriated to meet acceptances—Effect of running account.]—A cargo was consigned to a merchant for sale; the owner drew a bill on the merchant, who accepted it & sold the cargo, & the merchant subsequently dishonoured the acceptance, & suspended payment & went into liquidation:—*Held*: the goods were consigned by the owner subject to a custom that foreign merchants where bills are drawn on them against consignments pay the proceeds of such consignments to their own account with their bankers, & credit their correspondents in current account with the proceeds, & they do not apply the proceeds specifically in meeting the drafts drawn against the shipments, & the owner had no lien on the proceeds of the cargo as against the other creditors of the merchant.—*SPARTALI v. CRÉDIT LYONNAIS* (1885), 2 T. L. R. 178, C. A.

657. Annuitant under will—Annuity secured by bond.]—Testator, previous to the marriage of his daughter, gave to the trustee of her settlement a bond, whereby he bound himself, his heirs, exors. & administrators, in the sum of £3,000 the condition of the bond to become void upon payment of an annuity of £200 for the benefit of his daughter. Testator appointed another daughter his sole devisee. The annuity was duly paid. Upon bill by the daughter alleging that there were grounds for believing that the real estate of testator was being wasted, & praying to have the annuity secured:—*Held*: the daughter was entitled to a decree declaring that she had a lien on testator's real estate to the amount of the value of the annuity in the event of its falling into arrear, but that she must pay the costs of all parties to the cause.—*NORMAN v. JOHNSON* (1860), 29 Beav. 77; 2 L. T. 759; 6 Jur. N. S. 905; 8 W. R. 300; 54 E. R. 555.

Annotations:—*Reid. Burrell v. Delevante* (1862), 30 Beav. 550. *Mentd. Woolaston v. Woolaston* (1877), 37 L. T. 631; *Fane v. Fane* (1879), 13 Ch. D. 228; *Blackett v. Blackett* (1884), 51 L. T. 427.

658. Claim by receiver in bankruptcy for remuneration—Assets handed over to trustee.]—A receiver appointed under a liquidation petition handed over assets to the trustee who was afterwards appointed. When the receiver asked for payment of his charges, it appeared that the assets had been wasted by the trustee, & were insufficient for payment of the costs of the liquidation other than the receiver's charges:—*Held*: the receiver had no lien for his charges upon the assets he had handed over to the trustee, & no *locus standi* to impeach the management of the trustee, & therefore, the ct. could make no order against the trustee for the payment of his charges.—*Re MALTRY, Ex p. BROWNE* (1880), 16 Ch. D. 497; 43 L. T. 682; 29 W. R. 921, C. A.

SECT. 4.—PRIORITIES.

659. Loss of priority—Effect of concealment—After notice of second incumbrance.]—*Semble*: where a party who has a prior equitable lien upon a fund, receives notice of a second incumbrance made without any previous communication with or inquiry from him, but conceals his prior equity & makes payments to the second incumbrancer inconsistent with it, he will be postponed.—*MANGLES v. DIXON* (1849), 1 Mac. & G. 437; 1 H. & Tw. 542; 19 L. J. Ch. 240; 47 E. R. 1525, L. C.; *on appeal* (1852), 3 H. L. Cas. 702, H. L.

Annotations:—*Mentd.* *Rolt v. White* (1862), 3 De G. J. & Sm. 360; *Watson v. Mid Wales Ry.* (1867), L. R. 2 C. P. 593; *Higgs v. Assam Tea Co.* (1869), L. R. 4 Exch. 387; *Rodger v. Comptoir d'Escompte de Paris* (1869), L. R. 2 P. C. 393; *Leask v. Scott* (1877), 2 Q. B. D. 376; *Watts v. Driscoll*, [1901] 1 Ch. 294; *Stoddart v. Union Trust* (1911), 81 L. J. K. B. 140.

660. ——— Sufficiency of notice.]—Where an equitable lien exists a notice of such lien must be such as a mercantile man would act upon. Thus, where D. claimed such lien on a cargo, & when the legal title to the cargo was announced to be in H., D. merely said to H.'s clerk "the cargo is already mine" & D.'s clerk added "it's a regular swindle," but no formal letter or claim of lien was written or made to H., this notice was insufficient.—*HOARE v. DRESSER* (1859), 7 H. L. Cas. 290; 28 L. J. Ch. 611; 33 L. T. O. S. 63; 5 Jur. N. S. 371; 7 W. R. 374; 11 E. R. 116, H. L.; *reversg.* *S. C. sub nom. DRESSER v. HOARE* (1857), 26 L. J. Ch. 51, L. JJ.

661. Vendor's lien—As against party advancing fund to complete purchase—Effect of resale.]—*COOD v. COOD & POLLARD*, No. 725, *post*.

662. ——— As against mortgagee—Conveyance retained by vendor—Neglect by mortgagee to inquire.]—Pltfs. conveyed an estate, but retained the conveyance as security for unpaid purchase-money. The purchaser mortgaged the estate, but the mtgee. neglected to ask for the first conveyance:—*Held*: pltfs. had a lien upon the estate prior to that of the mtgee.—*WORTHINGTON v. MORGAN* (1849), 16 Sim. 547; 18 L. J. Ch. 233; 13 Jur. 316; 60 E. R. 987.

Annotations:—*Refd.* *Hewitt v. Loosemore* (1851), 9 Hare, 449; *Colyer v. Finch* (1856), 5 H. L. Cas. 905; *Herrick v. Attwood* (1857), 2 De G. & J. 21; *Hunter v. Walters, Curling v. Walters, Darnell v. Hunter* (1870), L. R. 11 Eq. 292; *Franklin v. Howes* (1871), 24 L. T. 348; *Dixon v. Muckleston* (1872), 42 L. J. Ch. 210; *Northern Counties of England Fire Insee. v. Whipp* (1884), 26 Ch. D. 482;

Garnham v. Skipper (1885), 53 L. T. 940; *Manners v. Mew* (1885), 29 Ch. D. 725; *Oliver v. Hinton*, [1899] 2 Ch. 264; *Berwick v. Price*, [1905] 1 Ch. 632; *Walker v. Linom*, [1907] 2 Ch. 104; *Manks v. Whiteley*, [1911] 2 Ch. 448.

663. ——— Representations of mortgagee.]—*SMITH v. EVANS*, No. 718, *post*.

664. ——— No receipt for purchase-money in deed—Neglect by mortgagee's solicitor to inquire.]—A person through his son, as solr., lent money on mtge. of certain property. The son did not inquire whether the purchase-money had been paid by the mtgor., & there was no receipt for it on the mtgor.'s purchase-deed. The money so lent was applied in paying off a mtge. held by a third person on the property, & the deeds were handed to the son by such third person, not as mtgee., but as solr. of the mtgor.:—*Held*: under the circumstances the representative of the vendor was entitled to his lien for unpaid purchase-money in priority to the mtgee.—*BOWEN v. COBB* (1870), 18 W. R. 911; *affd.* (1871), 19 W. R. 614, L. JJ.

Secured by mortgage—As against debentures.]—*See COMPANIES*, Vol. X., p. 759, No. 4740.

665. ——— As against carriers claiming general lien against purchasers.]—The vendors of goods, an American co., authorised their agents, on the arrival of the goods in England, to deliver the goods to a railway co., for carriage to the buyers upon the terms of a consignment note which contained a condition that all goods delivered to the co. would be received & held by them subject to a lien for money due to them for the carriage of & other charges upon such goods, & also to a general lien for any moneys due to them from the owners of such goods upon any account. The vendors' agents accordingly delivered the goods to the railway co. for carriage to the buyers. The vendors had paid all freight & charges in respect of the carriage of the goods. While the goods were still in the possession of the railway co. as carriers the vendors, being unpaid & having been informed that the buyers were insolvent, gave notice of stoppage *in transitu* to the railway co. The buyers, who had meanwhile become owners of the goods by indorsement & delivery of the bill of lading, were indebted to the railway co. in the sum of £1,170 on a general account. The co. claimed, under the condition in the consignment note, that they had a lien as against

PART V. SECT. 4.

m. Vendor's lien—As against judgment.]—A vendor's lien for unpaid purchase-money has priority over the lien created by a registered judgment against the vendee.—*HUGHSON v. DAVIS* (1853), 4 Gr. 588.—CAN.

n. ———.]—*BURGESS v. HOWELL* (1860), 8 Gr. 37.—CAN.

o. ——— As against heir of purchaser.]—*FOULDS v. POWELL* (1858), 6 Gr. 375.—CAN.

p. ——— As against owner of land—On which materials used.]—*GRAHAM v. WILLIAMS* (1885), 9 O. R. 458.—CAN.

q. ——— As against lien for work done.]—*FLACK v. JEFFREY* (1895), 10 Man. L. R. 514.—CAN.

r. ———.]—*HAYWARD LUMBER CO., LTD. v. HAMMOND (Alta.)*, [1922] 3 W. W. R. 1176; 70 D. L. R. 856.—CAN.

t. ——— As against voluntary conveyance.]—*ABELL v. MIDDLETON* (1902), 2 O. L. R. 209.—CAN.

a. As against execution creditor.]—*GURNEY v. JAMES* (1860), 10 U. C. R. 156.—CAN.

b. ———.]—*RAYMOND v. RICHARDS* (1881), R. E. D. 423.—CAN.

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c. ———.]—MARITIME WAREHOUSING & DOCK CO., MARITIME BANK OF DOMINION OF CANADA *v. NICHOLSON* (1884), 24 N. B. R. 170.—CAN.

d. ———.]—*GLOVER v. SOUTHERN LOAN & SAVING CO.* (1900), 20 C. L. T. 66; 31 O. R. 552.—CAN.

e. ———.]—*Re IBEX MINING & DEVELOPMENT CO. OF SLOCAN, LTD. LIABILITY* (1903), 9 B. C. R. 557.—CAN.

f. ———.]—*BEAVER LUMBER CO., LTD. v. QUEBEC BANK*, [1918] 2 W. W. R. 1052.—CAN.

g. ———.]—*IMPERIAL LUMBER YARDS, LTD. v. SAXTON*, [1921] 3 W. W. R. 524.—CAN.

h. ———.]—*KENNEDY LUMBER CO., LTD. v. BATKE (Sask.)*, [1922] 3 W. W. R. 404; 69 D. L. R. 283.—CAN.

k. Promissory notes taken for purchase-money—Priority of notes sold—Over notes retained.]—*O'DONOHUE v. HEMBROFF* (1871), 19 Gr. 95.—CAN.

l. Contractor's lien—As against mortgagee.]—*R. S. O.* 1877, c. 120, s. 7, gives a contractor a lien for work done & materials furnished upon land subject to a mtge., in priority to the mtgee., on the amount by which the selling value of the property has been

increased by the work & the materials of the party furnishing the same.—*DOUGLAS v. CHAMBERLAIN* (1877), 25 Gr. 288.—CAN.

aa. Under Mechanic's Lien Act—Assignment of contract money—Before registration of lien by sub-contractor.]—*ANLY v. HOLY TRINITY CHURCH* (1885), 2 Man. L. R. 248; 3 Man. L. R. 193.—CAN.

bb. ———.]—*ROBOCK v. PETERS* (1900), 13 Man. L. R. 124.—CAN.

cc. ———.]—*ST. PIERRE v. REKERT* (1915), 31 W. L. R. 909; 23 D. L. R. 592; 8 Sask. L. R. 416.—CAN.

dd. ———.]—*DUTTON-WALL LUMBER CO., LTD. v. FREEMANSON (Sask.)*, [1923] 4 D. L. R. 940; 3 W. W. R. 1317.—CAN.

ee. ——— As against mortgagee.]—*ANDERSON v. KOOTENAY GOLD MINES* (1913), 18 B. C. R. 643.—CAN.

ff. ———.]—*SECURITY LUMBER CO. v. DUPLAT* (1916), 34 W. L. R. 1131.—CAN.

gg. ———.]—*WARWICK v. SHEPPARD* (1917), 39 O. L. R. 99; 35 D. L. R. 98.—CAN.

hh. ———.]—*DURE v. RORD*

Sect. 4.—Priorities. Sect. 5: Sub-sect. 1.]

the vendors in respect of the £1,170, due from the buyers:—*Held*: the condition did not confer on the railway co. a right to assert a general lien on the goods in respect of the debt of the buyers in priority to the vendors' right of stoppage *in transitu*.—UNITED STATES STEEL PRODUCTS CO. v. GREAT WESTERN RY. CO., [1916] 1 A. C. 189; 85 L. J. K. B. 1; 113 L. T. 886; 31 T. L. R. 561; 59 Sol. Jo. 648; 21 Com. Cas. 105, H. L.

Annotations:—*Reid*. Booth S.S. Co. v. Cargo Fleet Iron Co., [1916] 2 K. B. 570. *Mentd.* Denholm v. Shipping Controller (1920), 124 L. T. 378.

666. Building owner's lien—As against execution creditor of builder.—By a building agreement it was provided that if the builder should neglect to proceed with due diligence in the performance of the work the building owner should be at liberty to give notice in writing to the builder requiring him to proceed with the work with reasonable despatch, & that from the date of such notice the builder should not be at liberty to remove from the premises any plant belonging to him placed there for the purposes of the works, & that the building owner should have a lien upon such plant thenceforward until the notice was complied with. A judgment having been recovered by a third person against the builder, the sheriff entered under a *fi. fa.*, & seized in execution of the judgment certain plant belonging to the builder which had been brought by him to the premises for the purposes of the work. After the seizure by the sheriff, & while the plant was still on the premises & unsold, the building owner gave to the builder, who had not proceeded with due diligence in the performance of the works, notice under the contract to proceed therewith, & he thereupon claimed as against the execution creditor a lien on the plant:—*Held*: the intervening seizure by the sheriff prevented the building owner's right of lien under the notice from taking effect.

After the notice [under the agreement] had been given, the sheriff, in execution of a judgment against the builder, could seize only subject to that lien. Here before notice was given the sheriff seized, & after a seizure by the sheriff it was no longer competent for the building owner to acquire a lien by giving notice (PHILLIMORE, J.).—BYFORD v. RUSSELL, [1907] 2 K. B. 522; 76 L. J. K. B. 744; 97 L. T. 104, D. C.

See, generally, BUILDING CONTRACTS, Vol. VII., pp. 415, 416.

667. Executor's lien for debt due by legatee—

[1917] 1 W. W. R. 1395; 34 D. L. R. 38; 27 Man. L. R. 417.—CAN.

b. —.—.]—DOMINION LUMBER & FUEL CO., LTD. v. PASKOV (Man.), [1919] 1 W. W. R. 657.—CAN.

c. —.—.]—CANADIAN LUMBER YARDS, LTD. v. DUNHAM (1920), 2 W. W. R. 1029; 53 D. L. R. 474.—CAN.

d. —.—.]—MCRAE v. PLANTA, [1924] 2 D. L. R. 408; 2 W. W. R. 323; 33 B. C. R. 395.—CAN.

e. —.—.]—Where material supplied before mortgage registered.]—O'BRIEN v. CLAUBON (Alta.), [1923] 2 W. W. R. 895.—CAN.

f. —.—.]—Lien registered between mortgages.]—WESTERN CANADA SAWMILLS, LTD. v. PORTZ (Sask.), [1923] 3 W. W. R. 1314.—CAN.

g. —.—.]—Mortgage registered between liens.]—SECURITY LUMBER CO., LTD. v. JOHNSON (Sask.), [1924] 4 D. L. R. 434; 3 W. W. R. 399.—CAN.

h. —.—.]—*Re* EMPIRE BREWING

& MALTING CO., ROURKE & CASS' CLAIM (1891), 8 Man. L. R. 424.—CAN.

k. —.—.]—WORTMAN v. FRIDLEWIS CO. (1915), 33 W. L. R. 119; 9 W. W. R. 812.—CAN.

l. *Lien for arrears of rent & damages for non-repair—As against agreement to pay for new building.*—AMBROSE v. FRASER (1887), 14 O. R. 551.—CAN.

m. *Dividend raised by lien less than debt—Apportioned pro rata.*—HOOD v. COLEMAN PLANING MILL & LUMBER CO. OF BURLINGTON (1900), 27 A. R. 203.—CAN.

n. *Assignment by contractor—Sub-contractor's priority.*—OTTAWA STEEL CASTINGS CO. v. DOMINION SUPPLY CO. (1904), 25 O. L. T. 58; 5 O. W. R. 161.—CAN.

o. *Effect of notice of sale to lienor.*—TASKAR v. CARRIGAN (1909), 11 W. L. R. 621.—CAN.

p. *As against distress by landlord.*—MILLER & RICHARD v. ANGUS (1911), 19 W. L. R. 548.—CAN.

As against mortgagee of legacy.—One of the residuary legatees mortgaged his share, after which a debt of the legatee for which testator was surety was paid out of his estate:—*Held*: the lien of the exors. had priority over the mtge.—WILLES v. GREENHILL (No. 1) (1860), 29 Beav. 376; 30 L. J. Ch. 808; 9 W. R. 217; 54 E. R. 673.

Annotations:—*Consd.* *Re* Melton, Milk v. Towers, [1918] 1 Ch. 37. *Mentd.* Newman v. Newman (1885), 28 Ch. D. 674; *Re* Palmer, Palmer v. Clarke (1894), 13 R. 220; *Re* Langham, Otway v. Langham (1896), 74 L. T. 611; *Re* Watson, Turner v. Watson, [1896] 1 Ch. 925; *Re* Goy, Farmer v. Goy, [1900] 2 Ch. 149; Lloyd's Bank v. Pearson, [1901] 1 Ch. 865; *Re* Brown & Gregory, Shephard v. Brown & Gregory, Andrews v. Brown & Gregory, [1904] 1 Ch. 627; *Re* Rhodesia Goldfields, Partridge v. Rhodesia Goldfields, [1910] 1 Ch. 239.

668. Innocent purchaser of goods bearing pirated trade mark—As against costs of owners of trade mark.—The owner of a trade mark obtained an injunction against a dock co. restraining them from parting with certain imported goods to which the trade mark had been fraudulently affixed. Subsequently it appeared that the dock warrants had been indorsed for value to a person innocent of the fraud. Upon motion by the holder of the warrants:—*Held*: upon his removing the trade mark he was entitled to have the injunction dissolved, without providing for pltf.'s costs of suit. The priorities of lien upon the goods were declared to be: (a) the charges of the dock co. including their costs of suit; (b) the moneys advanced by the holder of the warrants, including the costs of the motion which he was ordered to pay in the first instance; (c) pltf.'s costs of suit.—PONSARDIN v. PETO, *Ex p.* UZIELLI (1863), 33 Beav. 642; 3 New Rep. 237; 9 L. T. 567; 10 Jur. N. S. 6; 12 W. R. 198; 55 E. R. 518; *sub nom.* *Re* UZIELLI, PONSARDIN v. PETO, 33 L. J. Ch. 371.

Annotation:—*Reid*. Moet v. Pickering (1878), 47 L. J. Ch. 527.

As against execution creditor.—*See* EXECUTION, Vol. XXI., pp. 502, 503.

SECT. 5.—ENFORCEMENT.**SUB-SECT. 1.—IN GENERAL.**

669. Jurisdiction to enforce—Court exercising special statutory jurisdiction—No lien conferred by statute.—The ct., sitting upon railways, cannot give effect to an equitable lien on the fund in ct., where no equitable jurisdiction is given to the

q. *Several liens—Money paid into court in respect of one.*—MANITOBA BRIDGE & IRON WORKS, LTD. v. GILLESPIE (1914), 29 W. L. R. 394; 6 W. W. R. 1582; 20 D. L. R. 524.—CAN.

r. *As against contractor's surety.*—CROWN LUMBER CO., LTD. v. SMYTHE (Alta.), [1923] 3 D. L. R. 933; 2 W. W. R. 1019.—CAN.

t. *Rights of Crown.*—WALKER v. MINUDIE COAL CO., HANWAY v. MINUDIE COAL CO. (N. S.), [1924] 2 O. L. R. 645.—CAN.

u. *Consignee of West Indian estate—Priority over all other incumbrances.*—LOCKER v. EVANS (1849), 11 I. Eq. R. 62.—IR.

PART V. SECT. 5, SUB-SECT. 1.

aa. *Jurisdiction to enforce.*—SECORD v. TRUMM (1890-91), 20 O. R. 174.—CAN.

bb. —.—.]—JACOBS v. ROBINSON (1895), 16 P. R. 1.—CAN.

cc. —.—.]—CRAFTSMEN v. HUNTER

ct. by the Railway Acts.—*Re MANCHESTER & BOLTON RAILWAY ACT, Ex p. FORD* (1838), 2 Jur. 1037.

670. **Mode of enforcement—General rule—By sale.**—*NEATE v. MARLBOROUGH (DUKE)*, No. 403, *ante*.

671. ————.]—(1) Though an equitable charge or lien usually confers a right to have the property sold, the owner of an equitable charge or lien on an undertaking or business acquired under statutory powers & for public purposes is not entitled to a judicial sale of such undertaking for the payment of his debt, if the purposes for which the undertaking was acquired would be defeated or seriously affected thereby. A tramway co., like a railway co. & a waterworks co., is within this exception to the general rule.

(2) Right to have the appointment of a receiver & manager.

(3) Speaking generally, the owner of an equitable charge or lien on property as a security for money which is due & payable has a right to a judicial sale of that property in order to satisfy the charge or lien (*per CUR.*).—*MARSHALL v. SOUTH STAFFORDSHIRE TRAMWAYS CO.*, [1895] 2 Ch. 36; 64 L. J. Ch. 481; 72 L. T. 542; 43 W. R. 469; 11 T. L. R. 339; 39 Sol. Jo. 414; 2 Mans. 292; 12 R. 275, C. A.

Annotations:—As to (2) Refd. Bartlett v. West Metropolitan Tram. Co. (1893), 69 L. T. 560; *Pegge v. Neath District Tram. Co.*, [1895] 2 Ch. 508. *Generally, Mentd. Re St. Neots Water Co.* (1906), 22 T. L. R. 478; *Re Crystal Palace Co., Fox v. Crystal Palace Co.* (1911), 104 L. T. 251; *Re Woking Urban District Council (Basingstoke Canal) Act*, 1911, [1914] 1 Ch. 300.

672. ———— **Exceptions to rule—Where total destruction of object is involved—Trust estate.**—The rebuilding of a dissenting chapel was entrusted to three of the several trustees in whom the estate was vested. There being a deficiency of money, they borrowed, on a deposit of the title deeds of the chapel, £500, which they personally engaged to pay. Interest was, for a long time, paid out

of the chapel funds, but ultimately, the representatives of the trustees were compelled to pay the money. The legal estate was vested in new trustees:—*Held*: the representatives of the persons who had paid the £500 had a lien on the deeds, but they were not entitled to a decree for foreclosure or sale, as by granting such relief the trust would be altogether destroyed.—*DARKE v. WILLIAMSON* (1858), 25 Beav. 622; 32 L. T. O. S. 99; 22 J. P. 705; 4 Jur. N. S. 1009; 6 W. R. 824; 53 E. R. 774.

Annotation:—Refd. Grissell v. Money (1869), 38 L. J. Ch. 312.

673. ———— **Public undertaking—Tramway company.**—*MARSHALL v. SOUTH STAFFORDSHIRE TRAMWAYS CO.*, No. 671, *ante*.

674. ———— **Railway company.**—*MARSHALL v. SOUTH STAFFORDSHIRE TRAMWAYS CO.*, No. 671, *ante*.

675. ———— **Waterworks company.**—*MARSHALL v. SOUTH STAFFORDSHIRE TRAMWAYS CO.*, No. 671, *ante*.

See, also, No. 709, *post*.

676. ———— **By appointment of receiver.**—*WINCHESTER (BP.) v. MID-HANTS RY. CO.*, No. 628, *ante*.

677. ————.]—*MARSHALL v. SOUTH STAFFORDSHIRE TRAMWAYS CO.*, No. 671, *ante*.

See, generally, RECEIVERS.

678. ———— **By custody of title deeds—Realty purchased with advance by trustees of personalty.**—Testator gave real & personal property in trust to accumulate rents & profits during the minority of H., who was to be, & in fact was, let into possession on attaining twenty-one, as tenant for life. A private Act authorised land to be purchased by the ct. at the instance of a tenant for life of full age, & to be paid for out of the personalty. The moneys so paid were to be deemed a debt from the real to the personal estate, which was to be held by the trustees as part of the personalty & secured by a lien on the purchased

(1908), 7 W. L. R. 837; 1 Sask. L. R. 88.—CAN.

e. ————.]—*MCKENZIE v. MURRAY* (1909), 11 W. L. R. 123.—CAN.

f. ————.]—*MONARCH LUMBER CO., LTD. v. WALL* (Sask.), [1923] 3 W. W. R. 1117.—CAN.

g. ————.]—Entire & exclusive jurisdiction over actions to enforce mechanics' liens is vested in the district ct. of the judicial district wherein the property against which the lien is sought to be enforced is situated.—*RELiance LUMBER CO. v. HACKETT* (Sask.), [1924] 3 W. W. R. 605.—CAN.

670 i. **Mode of enforcement—General rule—By sale.**—*RUDY v. SONMORE* (1916), 34 W. L. R. 1122.—CAN.

670 ii. ————.]—*HILL v. BROWN* (1844), 6 I. Eq. R. 403.—IR.

674 i. ———— **Exceptions to rule—Public undertaking—Railway company.**—The Ct. of Ch. will not direct the sale of lands required for the use of a railway co., to enforce the payment of a mechanic's lien for work done on the property.—*BREEZE v. MIDLAND RY. CO.* (1879), 26 Gr. 225.—CAN.

h. ———— **By action—Mechanic's lien—Time for commencement of action.**—*BURRITT v. RENIHAN* (1877), 25 Gr. 183.—CAN.

k. ————.]—*MCCORMICK v. BULLIVANT* (1877), 25 Gr. 273.—CAN.

l. ————.]—*WALKER v. WALTON* (1877), 1 A. R. 579.—CAN.

m. ————.]—*BANK OF MONTREAL v. WORSWICK, Cass.* Dig., 2nd ed. 526.—CAN.

n. ————.]—*JOHNSON v. BRADEN* (1887), 1 B. C. R., pt. 2, 265.—CAN.

o. ————.]—*ROBERTS v. McDONALD* (1888), 15 O. R. 80.—CAN.

p. ————.]—*COLE v. HALL* (1891), 13 P. R. 100.—CAN.

q. ————.]—*DUNN v. HOLBROOK & BAIN* (1900), 7 B. C. R. 503.—CAN.

r. ————.]—*DEMPSTER v. WRIGHT* (circa 1901), 21 C. L. T. 88.—CAN.

t. ————.]—*CANADA SAND LIME BRICK CO. v. OTTAWAY* (1907), 10 O. W. R. 686, 788; 15 O. L. R. 128.—CAN.

a. ————.]—*BRUCE v. NATIONAL TRUST* (1913), 24 O. W. R. 688; 4 O. W. N. 1372; 11 D. L. R. 842.—CAN.

b. ————.]—*BOUCHER v. BELLE-ISLE* (1913), 41 N. B. R. 509; 14 D. L. R. 146.—CAN.

c. ————.]—*CHAMPION v. WORLD BUILDING, LTD.* (1914), 29 W. L. R. 299; 6 W. W. R. 233, 1469; 18 D. L. R. 555; 20 B. C. R. 156.—CAN.

d. ————.]—*KENDLER v. BERNSTOCK* (1915), 8 O. W. N. 122; 33 O. L. R. 351.—CAN.

aa. ————.]—*NORTH-EARN LUMBER MILLS, LTD. v. RICE* (1918), 41 O. L. R. 201; 13 O. W. N. 230; 40 D. L. R. 128.—CAN.

bb. ————.]—*EASSEN & CO. v. MURRAY* (1904), 23 N. Z. L. R. 802.—N.Z.

cc. ———— *Practice.*—*DOUGLAS v. CHAMBERLAIN* (1877), 25 Gr. 288.—CAN.

dd. ————.]—*MCLENNAN v. WINNIPEG CORPN.* (1882), 3 Man. L. R. 474.—CAN.

ee. ————.]—*HAGGARTY v. GRANT & DUCK* (1892), 2 B. C. R. 173.—CAN.

ff. ————.]—*ORR v. DAVIE* (1892), 22 O. R. 430.—CAN.

gg. ————.]—*HOLDEN v. BRIGHT PROSPECTS GOLD MINING & DEVELOPMENT CO.* (1899), 6 B. C. R. 439.—CAN.

hh. ————.]—*CRERAR v. CANADIAN PACIFIC RY. CO.* (1902), 23 C. L. T. 171; 5 O. L. R. 383; 2 O. W. R. 187.—CAN.

kk. ————.]—*SPEARS v. BANNERMAN* (1908), 1 Alta. L. R. 98.—CAN.

ll. ————.]—*HIGH RIVER TRADING CO. v. ANDERSON* (Alta.) (1909), 10 W. L. R. 126.—CAN.

mm. ————.]—*BRADSHAW v. SAUCERMAN* (Yuk.) (1912), 21 W. L. R. 65; 4 D. L. R. 476; 18 B. C. R. 41.—CAN.

nn. ————.]—*FOSTER v. BROCKLEBANK* (1915), 8 W. W. R. 464.—CAN.

oo. ————.]—*POLSON v. THOMPSON* (1916), 34 W. L. R. 745; 10 W. W. R. 865.—CAN.

pp. ————.]—*MUNDAY v. TRUMBLY & IMPERIAL ELEVATOR & LUMBER CO., LTD.* (Sask.), [1922] 3 W. W. R. 94; 67 D. L. R. 535.—CAN.

qq. ————.]—*BEAVER*

Sect. 5.—Enforcement: Sub-sects. 1 & 2, A.]

land. Subject to such lien the purchased land was to be settled on the trusts of the will:—*Held*: as to land so purchased, the trustees, so long as their lien existed, were entitled to the custody of the title deeds.—*WHEELER v. TOOTELL* (1903), 51 W. R. 693; 47 Sol. Jo. 710.

679. — By action—Claim must be consistent with continued existence of contract.]—*DANSK REKYLRIFTEL SYNDIKAT AKT. v. SNELL*, No. 600, *ante*.

680. Lien arising out of illegal contract.]—No play can lawfully be acted for hire, gain, or reward, within twenty miles of London, without the authority of letters patent from the King, or of a licence from the Lord Chamberlain; & no such letters patent or licence can be granted so as to authorise the performance of plays at any place, except within the city or liberties of Westminster, or where the King may happen to reside. An agreement, therefore, for a partnership in acting plays at a theatre situate within twenty miles of London, but not within the city or liberties of Westminster, or in the place of the King's residence, is one to which the ct. will not give effect.

It was urged that pltf. ought at least to recover the money he had advanced; & it was said that he had a lien for it upon the property purchased. If pltf. be entitled to recover back the money paid, & that right be a personal demand against deft., this is not the ct. in which such a demand can be enforced; & as to the alleged lien, it is sufficient to observe that no such case is made by the bill. If it had been, it is difficult to imagine how such a case could have been supported, consistently with the ground upon which the ct. declines to give to pltf. the benefit of his contract; for such, undoubtedly, would, to a certain extent,

be giving him the benefit of it. The mere payment of the money can give no lien. You must, therefore, look to the contract to raise the question of lien; & if pltf. be entitled to any lien, it must be upon or in consequence of the illegal contract; but I do not consider this question as before me. It is undoubtedly a case of great hardship upon the pltf. to have parted with his money, & now to be denied the fruits of it; but this hardship is common to all cases of contract which cannot be enforced, from their illegality (*LORD COTTENHAM, C.*).—*EWING v. OSBALDISTON* (1837), 2 My. & Cr. 53; *Donnelly*, 179; 6 L. J. Ch. 161; 1 Jur. 50; 40 E. R. 561, L. C.

Annotations:—Reid. Aberaman Ironworks v. Wickens (1868), L. R. 5 Eq. 485. *Mentd. Levy v. Yates* (1838), 8 Ad. & El. 129; *King of Two Sicilies v. Willcox* (1851), 1 Sim. N. S. 301.

See, generally, CONTRACT, Vol. XII., pp. 270, et seq.; SPECIFIC PERFORMANCE.

681. Right to interest.]—By orders of the ct., made in 1862 & 1863, certain costs to which a petitioner was entitled were directed "to be added to the moneys secured to him" by a deed, & it was ordered that the same should "stand as a charge upon" the property comprised in the deed. The deed referred to was a grant, in consideration of £400, of an annuity of £40 a year for lives to the petitioner, secured by the covenant of the grantor, & by a charge of the annuity upon certain specified real & personal estate. The order said nothing about interest:—*Held*: independently of Solicitors Act, 1860 (c. 127), inasmuch as the costs were an equitable charge, they bore interest at four per cent.—*LIPPARD v. RICKETTS* (1872), L. R. 14 Eq. 291; 41 L. J. Ch. 595; 20 W. R. 898.

Annotations:—Consd. Eardley v. Knight (1889), 41 Ch. D. 537; *Re Drax, Savile v. Drax*, [1903] 1 Ch. 781.

— **Vendor's lien.]—***See Sect. 3, sub-sect. 20, B. (b), ante.*

LUMBER CO., LTD. v. BURNS (Sask.), [1922] 3 W. W. R. 383; 69 D. L. R. 303.—CAN.

c. ————.]—SECURITY
LUMBER CO. v. THIELENS (Sask.), [1922] 3 W. W. R. 385; 70 D. L. R. 69.—CAN.

d. ————.]—Re
BOUTIN'S INSOLVENT ESTATE (1860), 4 Nfld. L. R. 519.—NFLD.

e. ————.]—Pleading.]—
SICKLER v. SPENCER (1911), 19 W. L. R. 557; 17 B. C. R. 41.—CAN.

f. ————.]—Sufficiency of claim.]—
CRAPPER v. GILLESPIE (1909), 11 W. L. R. 310.—CAN.

Uncompleted work.]—
TAYLOR HARDWARE CO. v. HUNT (1917), 39 O. L. R. 85; 90 D. L. R. 504.—CAN.

h. ————.]—Remedy confined to increased value.]—
DUFTON v. HORNING (1895), 26 O. R. 252.—CAN.

k. ————.]—Parties to action.]—
HAYCOCK v. SAPPHIRE CORUNDUM CO. (1904), 24 C. L. T. 56; 7 O. L. R. 21; 2 O. W. R. 1177.—CAN.

l. ————.]—
ABRAMOVITCH v. VRONDESSI (1913), 24 W. L. R. 439; 11 D. L. R. 352; 23 Man. L. R. 383.—CAN.

m. ————.]—
BROWN v. ALLAN (1913), 25 W. L. R. 128; 4 W. W. R. 1306; 13 D. L. R. 350; 18 B. C. R. 326.—CAN.

n. ————.]—CANADA
FOUNDRY CO., LTD. v. EDMONTON PORTLAND CEMENT CO., LTD. (Alta.), [1919] 2 W. W. R. 310.—CAN.

o. ————.]—
JOHNSON, [1924] 3 D. L. R. 563; 2 W. W. R.

769; 18 Sask. L. R. 360; *affg.*, [1924] 2 D. L. R. 192; 1 W. W. R. 942.—CAN.

p. ————.]—Costs.]—
HUMPHREYS v. CLEAVE (1904), 15 Man. L. R. 23.—CAN.

McDONALD DURE LUMBER CO. v. WORKMAN (1909), 18 Man. L. R. 419.—CAN.

r. ————.]—
PIONEER LUMBER CO. v. ROONEY (1911), 19 W. L. R. 913; 1 W. W. R. 111; 4 Alta. L. R. 1.—CAN.

t. ————.]—Form of judgment.]—
WILLIAM HEAD CO. v. COFFIN (1910), 13 W. L. R. 663.—CAN.

u. ————.]—Appeal.]—
PEARCY v. FOSTER (1921), 67 D. L. R. 245; 51 O. L. R. 354.—CAN.

v. ————.]—McMANUS
v. ROTHSCHILD (1911), 20 O. W. R. 469; 3 O. W. N. 291; 25 O. L. R. 138.—CAN.

w. ————.]—DICK
STANDARD UNDERGROUND CABLE CO. (1912), 23 O. W. R. 19; 4 O. W. N. 57; 7 D. L. R. 64.—CAN.

xx. ————.]—FLETT (J. A.), LTD. v. WORLD BUILDING, LTD. (1914), 26 W. L. R. 612; 5 W. W. R. 1127; 19 B. C. R. 73.—CAN.

yy. ————.]—Proceedings in rem.]—The whole scope of Mechanics' Lien Act has reference to proceedings in rem, which the term lien implies.—*LYNCH v. TRAINOR & AYLWARD* (1893), 7 Nfld. L. R. 744.—NFLD.

zz. ————.]—Woodman's lien—Time for commencement of action.]—
GUIMOND v. BELANGER (1896), 33 N. B. R. 589.—CAN.

aa. ————.]—
PETERSON v. DRABESON, SOHOLT v. DRABESON (1910), 15 W. L. R. 87.—CAN.

bb. ————.]—Practice.]—
OLSEN v. GOODWIN, BRANSON v. GOODWIN (1915), 43 N. B. R. 449.—CAN.

cc. ————.]—Effect of collusion.]—
MURCHIE v. FRASER (1903), 36 N. B. R. 161.—CAN.

dd. ————.]—Parties to action.]—
McNULTY v. CLARK (1915), 9 O. W. N. 58; 34 O. L. R. 434.—CAN.

ee. ————.]—Mechanics' lien—Equitable remedies.]—
POMERLAU v. THOMPSON (1914), 27 W. L. R. 254; 5 W. W. R. 1360; 16 D. L. R. 142.—CAN.

ff. ————.]—Remedies provided by statute.]—A mechanics' lien is the creature of statute & enforceable only as may be provided by the statute creating it.—*SHUTTLEWORTH v. SEYMOUR* (1914), 28 W. L. R. 282; 6 W. W. R. 1100; 7 Sask. L. R. 74.—CAN.

gg. ————.]—JONES v. COWDEN & FRASER (1874), 34 U. C. R. 345.—CAN.

hh. ————.]—Thresher—Seizure of grain & sale.]—The right of a thresher is not merely a passive lien; he may seize & sell the grain to realise his claim.—*HILL v. STAIT* (1913), 25 W. L. R. 475; 5 W. W. R. 225; 14 D. L. R. 158; 23 Man. L. R. 832.—CAN.

ii. ————.]—BELL v. CROSS, [1917] 3 W. W. R. 242; 36 D. L. R. 459; 10 Sask. L. R. 286.—CAN.

jj. ————.]—
Co., LTD. v. YOUNGLOVE, [1917] 3 W. W. R. 453.—CAN.

SUB-SECT. 2.—IN PARTICULAR CASES.

A. Unpaid Vendor.

682. Mode of enforcement—By sale—Under express power in conditions of sale.]—*Ex p. HUNTER* (1801), 6 Ves. 94; 31 E. R. 955, L. C.

Annotations:—Mentd. Re Bulmer, Ex p. Johnson (1853), 3 De G. M. & G. 218; *Re Johnson & Gillman, Ex p. Cornell* (1861), 5 L. T. 695; *Re Fox & Jacobs, Ex p. Discount Banking Co. of England & Wales*, [1894] 1 Q. B. 438.

683. ——— Under order of court—Right to prove for deficiency in bankruptcy of purchaser.]—*Re HART, Ex p. GYDE* (1823), 1 Gl. & J. 323, L. C. *Annotations:—Reid. Hope v. Booth* (1830), 9 L. J. O. S. K. B. 21; *Re Peters* (1845), 5 L. T. O. S. 222.

684. ——— ——— ———.]—A. agreed with B. by deed that he, A., would, on payment of £900, as thereafter mentioned, grant, sell, & convey to B. the messuage, lands, & premises therein mentioned; & B. covenanted to pay the said sum on or before Jan. 1, then next, or whenever a good title to the said messuage, etc., should be tendered to him; but it was agreed that if B. should, on or before Jan. 1, be desirous that that sum should remain a charge on the premises, then B. might require the same, so that upon the completion by A. of the conveyances, B. should execute to A. proper conveyances for securing the sum of £900 on the premises, with interest. B. gave due notice that he would require the purchase-money to remain a charge on the premises for five years; he was let into possession & received the rents, & in July, 1828, became bkpt., & half a year's interest being in arrear for more than thirty days, A. distrained on the tenants then in possession of the premises. The assignees paid the amount of the distress. On Oct. 16, 1828, after the bkpt. had obtained a certificate, another half-year's interest became due, & an action of covenant was brought against the bkpt. to recover the same. He pleaded the bkpcy. generally:—*Held*: the unpaid vendor was entitled to have the estate resold, & the produce & interest applied in payment of the purchase-money, & to prove against the estate for the residue.—*HOPE v. BOOTH* (1830), 1 B. & Ad. 498; 9 L. J. O. S. K. B. 21; 109 E. R. 872.

Annotation:—Reid. Re Peters (1845), 5 L. T. O. S. 222.

685. ——— ——— ——— Death of purchaser.]—Vendor of an estate obtained a decree for specific performance, with a declaration that, if the purchase-money was not paid by a given day, the estate should be sold, the proceeds paid to the vendor, & the purchaser be made personally liable in the event of any deficiency. The master fixed the day of payment, but the purchaser died before that day insolvent, & a creditors' suit was instituted for the administration of his assets. Upon a bill of revivor & supplement filed by the vendor, praying to have the benefits of the creditors' suit as well as his own:—*Held*: he was not entitled to prove against the general assets of testator, & at the same time to reserve his lien on the estate contracted to be sold; in case of a deficiency in the general assets.—*ROME v. YOUNG* (1838), 3 Y. & C. Ex. 199; 2 Jur. 963; 160 E. R. 980; *subsequent proceedings* (1840), 4 Y. & C. Ex. 204.

See, generally, BANKRUPTCY, Vol. IV., pp. 388, 389, Nos. 3554–3557.

686. ——— ——— ——— Subsequent Act affecting land.]—The vendor's title & the contract being admitted, decree will be made for sale, & satisfaction to the vendor out of the moneys, & for payment of the deficiency, if any, by the purchaser, notwithstanding an Act of Parliament has dealt with the lands in question since the date of the contract.—*NASH v. WORCESTER IMPROVEMENT COMRS.* (1855), 1 Jur. N. S. 973.

Annotation:—Reid. Haynes v. Haynes (1861), 1 Drew. & Sm. 426.

Land compulsorily required.]

See COMPULSORY PURCHASE OF LAND, Vol. XI., pp. 230, 231.

687. ——— ——— ——— Land used for construction of railway.]—*WALKER v. WARE, HADHAM & BUNTINGFORD RY. CO.*, No. 632, *ante*.

688. ——— ——— ———.]—*WINCHESTER (BP.) v. MID-HANTS RY. CO.*, No. 628, *ante*.

689. ——— ——— ——— Effect of statutory provision for arbitration.]—By a railway Act, amongst the matters referred to arbitrators were the legal & equitable rights & interests of cos. whose lines were worked by the co., the rights of any persons having or claiming any lien upon any lands in which the co. were interested, & all matters in question in all suits in which the co. were parties; & it was enacted that the powers of the arbitrators should extend to ascertain & determine the matters aforesaid. It was also enacted that the Crystal Palace Ry. should be "worked & maintained" by the co. "as an integral part of the co.'s undertaking"; that certain half-yearly payments should be made to the Crystal Palace Ry. co., & that such payments, & the property of the Crystal Palace Ry. co., should be subject, "as respected the creditors of that co., to the same rights & remedies as could now be enforced against the tolls & property of that co." At this date the London, Chatham, & Dover Ry. co. were working the Crystal Palace Ry. line under a resolution of their own directors, without any lease or agreement; & a suit was pending against both companies by an unpaid vendor of lands of which possession had been taken by the Crystal Palace co. in 1864 & 1865, & upon part of which the line had been constructed. In this suit the London, Chatham, & Dover co., who were made co-defts. by amendment, had answered, pleading that they were unnecessary parties; but at the hearing, in Mar. 1868, it was declared that, upon default of payment within one month by the Crystal Palace co. of what should be certified to be due, plffs. would be entitled to a lien on the lands against both cos. Default was made by the Crystal Palace co., & shortly afterwards proceedings in the suit were, by the arbitrator's first award, stayed as against the London, Chatham, & Dover co. only. Upon petition by plffs., praying that the amount due under the above order for principal, interest, & costs, might be raised by a sale of the lands, & in the meantime for an injunction & receiver, & other relief:—*Held*: the above mentioned Act did not interfere with the rights of the petitioners; & order made as prayed.—*ST. GERMAN (EARL) v. CRYSTAL PALACE RY. CO.* (1871), L. R. 11 Eq. 568; 24 L. T. 288; 19 W. R. 584.

PART V. SECT. 5, SUB-SECT. 2.—A.

687i. Mode of enforcement—By sale—Under order of court—Land used for construction of railway.]—An unpaid vendor is entitled to a lien on the lands of a railway co., & in default of specific performance & payment, to a sale, but is not entitled to an in-

junction.—*KEANE v. ATHENRY & ENNIS JUNCTION RY. CO.* (1870), 19 W. R. 318.—*IR.*

t. ——— ——— ———.]—A vendor who has conveyed without receiving the purchase money, is entitled against the vendee to a decree for the sale of the property & payment of any

deficiency.—*SANDERSON v. BURDETT* (1869), 16 Gr. 119.—*CAN.*

a. ——— ——— ———.]—*ANGLO-AMERICAN TRUST CO. v. LONGWORTH* (1915), 31 W. L. R. 950; 24 D. L. R. 222.—*CAN.*

b. ——— By seizure—Judgment for larger sum remaining unsatisfied.]—

Sect. 5.—Enforcement: Sub-sect. 2, A., B. & C. Sect. 6.]

690. — By injunction—Against liquidator of vendor company—Restraining sale of fixed machinery & plant.]—Where a bill was filed against a co. in liquidation to enforce an alleged lien for unpaid purchase-money against the property of the co., part of which property consisted of fixed machinery & plant, an injunction was granted to restrain the official liquidator from selling that fixed plant & machinery.—**BLAKELY v. DENT, Re BLAKELY ORDNANCE CO., LTD. (1867), 15 W. R. 663, L. JJ.**

— By restraint of user—Land compulsorily acquired—Statutory company for public purpose.]—See **COMPULSORY PURCHASE OF LAND, Vol. XI., pp. 230, 231, Nos. 1185–1192.**

691. — By order for possession — After attempted sale.]—After an order has been made for enforcing the lien of an unpaid vendor to a railway co., who have made their line & are running trains over the land, by a sale by public auction, if no bid has been made at such sale, the ct. will not make an order to let pltf. into possession, since he must be taken to have elected his remedy by asking for a sale; nor will it discharge the order for sale in order to get rid of the assumption that the legal title to the land had passed to the co. In such a case the ct. ordered a resale by public auction, or by private contract.—**WILLIAMS v. AYLESBURY & BUCKINGHAM RY. CO. (1873), 28 L. T. 547; 21 W. R. 819, L. C.**

Annotations:—Consd. **Allgood v. Merrybent & Darlington Ry. (1886), 33 Ch. D. 571.** Refd. **Ware v. Aylesbury & Buckingham Ry. (1873), 21 W. R. 819.**

692. — By rescission of contract.]—**LYSAGHT v. EDWARDS, No. 558, ante.**

693. — —.]—**HUDSON v. WILLIAMS (1891),** cited in 62 L. J. Ch. at p. 316; 68 L. T. at p. 634; 41 W. R. at p. 375.

Annotation:—Folld. **Baker v. Williams (1893), 62 L. J. Ch.**

694. — —.]—A vendor of freehold property obtained a decree for specific performance of the contract entered into by him for the sale of the property, which decree contained a declaration that he was entitled to a lien upon the property in respect of the balance of purchase-money due to him from the purchaser, with liberty to apply to enforce such lien in case of default on the part of the purchaser in payment of such balance. The purchaser made default in payment of the balance, & the vendor moved for a rescission of the agreement in lieu of attempting to enforce the lien:—**Held: the agreement might be rescinded.—BAKER v. WILLIAMS (1893), 62 L. J. Ch. 315; 68 L. T. 634; 41 W. R. 375; 3 R. 305.**

695. — Where land subject to incumbrances—Decree for specific performance—But no declaration of lien made.]—Where a decree had been obtained by a vendor against a railway co. for specific performance of a contract for sale, in which inquiries were directed to ascertain the amount due for damages & costs, & the amount, when found due, together with the purchase-

money, was ordered to be paid, but was not declared to be a charge on the land:—**Held: the vendor was not entitled, under the liberty to apply, to enforce by petition a lien on the land for the sums due, especially as there were incumbrancers not parties to the suit, whose rights would be affected by such lien.—A.-G. v. SITTINGBOURNE & SHEERNESS RY. CO. (1866), L. R. 1 Eq. 636; 35 Beav. 268; 35 L. J. Ch. 318; 14 L. T. 92; 14 W. R. 414; 55 E. R. 899.**

696. By whom enforceable—Party advancing purchase-money — Building society.]—Building Societies Act, 1874 (c. 42), s. 38, which enables an infant to become a member of a society constituted thereunder, does not enable an infant to borrow money from the society on mtge. of his property, borrowing not being a necessary element of membership, & such a mtge. is void under Infants' Relief Act, 1874 (c. 62), s. 1. But a building society advancing the purchase-money of land to an infant is entitled to stand in the place of the vendor & enforce the vendor's lien on such land.—**NOTTINGHAM PERMANENT BENEFIT BUILDING SOCIETY v. THURSTAN, [1903] A. C. 6; 72 L. J. Ch. 134; 87 L. T. 529; 67 J. P. 129; 51 W. R. 273; 19 T. L. R. 54, H. L.; affg. S. C. sub nom. THURSTAN v. NOTTINGHAM PERMANENT BENEFIT BUILDING SOCIETY, [1902] 1 Ch. 1, C. A.**

— — — Personalty advanced by trustees for purchase of realty.]—See No. 678, ante.

Marshalling as between personalty & realty.]—See **EXECUTORS, Vol. XXIII., pp. 527, 528, Nos. 5939–5943.**

B. Equitable Mortgagee.

See **MORTGAGE.**

C. Other Cases.

697. Holder of bills of exchange—Deposit of short bills—To cover drawing account.]—The drawer of bills of exchange deposits short bills with the acceptor to cover his drawing account. The drawer & acceptor become bkpts. The holder of the acceptances can call upon the assignees of the acceptor to apply the short bills in discharge of the acceptances to the extent of the lien, which the acceptor had upon them at the time of his bkpcy. To ascertain that lien an inquiry directed.—**Re BRICKWOOD & Co., Re LEIGH, Ex p. PARR (1818), Buck, 191.**

Annotations:—Refd. **Re Neville, Ex p. Perfect (1830), Mont. 25; Re Thompson & Mildred, Re Evans, Ex p. Prescott (1834), 3 Deac. & Ch. 218; Re Mundy, Ex p. Hobhouse, Re Glass, Ex p. Gower (1837), 2 Deac. 291; Inman v. Clare (1858), John. 769.**

698. Lender of money—On security of unfinished ship.]—**SWAINSTON v. CLAY, No. 513, ante.**

Lien of company on shares.]—See **COMPANIES, Vol. IX., pp. 346, 347.**

Debenture-holders.]—See **COMPANIES, Vol. X., pp. 791 et seq., 793 et seq.**

Purchaser.]—See No. 680, ante.

SECT. 6.—EXCLUSION.

699. By agreement—Agreement implied.]—**AUSTEN v. HALSEY, No. 553, ante.**

The property covered by a lien agreement may be seized for default in payment of the amount due notwithstanding that a judgment for a larger sum recovered by the maker against the holder for breach of warranty in the sale of the property remains unsatisfied.—**THOMSON v. DUNN, [1893] 2**

a suit to enforce by sale a vendor's lien is instituted against the heirs-at-law of the purchaser, the widow of the vendee is a necessary party in respect to her right to dower.—**PAINE v. CHAPMAN (1859), 7 Gr. 179.—CAN.**

PART V. SECT. 6.

— — — Agreement implied.]—On a bill filed by indorsees of notes, purchasers, claiming a lien upon land:—**Held: the mode of sale**

& the circumstances showed it to be the intention of the parties that no lien should exist.—**WILSON v. DANIELS (1862), 9 Gr. 491.—CAN.**

699 ii. — —.]—**FORHAN v. LALONDE (1880), 27 Gr. 600.—CAN.**

699 iii. — —.]—**FAHLMAN v. MACLEAN, [1924] 3 D. L. R. 558; 2 W. W. R. 905; 18 Sask. L. R. 465.—CAN.**

d. Credit given after work finished.]—**SAIRANEN v. FORTIN (1909), 11 W. L. R. 456.—CAN.**

700. Payment as security—Before price settled.]—*WALKER v. WARE, HADHAM & BUNTINGFORD RY. Co.*, No. 632, *ante*.

701. Retention of title deeds.]—After deft. has answered the original bill, he cannot demur to the amended bill, on the ground that the pltf.'s title being the same as was stated in the original bill is not such as to give him a right to any answer.

Semble: a vendor by retaining, under a special agreement, possession of the title deeds of the estate, does not waive or exclude his lien.—*WREFORDE v. LETHERN* (1824), 2 L. J. O. S. Ch. 173.

702. Conduct enabling third party to acquire counter-equity.]—G. & H. were mtgees. for £1,000 on property of S. Their solrs., D. & P., who had the deeds in their custody, applied to deft., who was also a client of theirs saying that they believed he had £1,000 to invest on mtge., & that G. & H. wanted £1,000 on a transfer of S.'s mtge. Deft. inspected the property, & being satisfied, he, on June 19, 1878, sent the £1,000 to D. & P. who gave him a receipt for it. In July, D. & P. fraudulently induced G. & H. to execute a deed of transfer to deft. with a receipt indorsed, which deed they stated to G. & H. to be a deed of reconveyance to S. on his paying off the mtge. D. & P. shortly afterwards handed this deed with the title deeds to deft., & went on paying him interest as if they had received it from S., who was in fact paying his interest to the agents of G. & H. G. & H. made no inquiry as to the mtge., & this went on till 1883, when D. & P. became bkpts., & the £1,000 received from deft. which had never been handed over to G. & H., was lost. G. & H. then brought their action against deft., asserting a right against the property in the nature of an unpaid vendor's lien:—*Held*: as pltfs. by the deed of transfer & receipt which they handed to D. & P. enabled them to represent to deft. that the £1,000 which he had previously handed to D. & P. had come to the hands of pltfs., they had raised a counter-equity which prevented their claiming a vendor's lien, though this would not have been the case if, D. & P., having no authority to receive money for pltfs., defts. had paid the £1,000 to D. & P. at the time when the deeds were delivered to him, since he would then have known that pltfs. had not received the money.—*GORDON v. JAMES* (1885), 30 Ch. D. 249; 53 L. T. 641; 34 W. R. 217, C. A.

Annotations:—*Consd. Coupe v. Collyer* (1890), 62 L. T. 927. *Mentd. National Provincial Bank of England v. Jackson* (1886), 33 Ch. D. 1; *London Freehold & Leasehold Property Co. v. Suffeld*, [1897] 2 Ch. 608.

703. Where special mode of payment provided—Must be express.]—A special contract for the payment of purchase-money must be explicit to deprive a vendor of his lien upon the estate sold; & though a contract is stated in the conveyance of the estate, evidence may be given to show the real nature of the transaction, and a subsequent purchaser is bound to inquire whether it was accepted in substitution of the lien.

Where an estate was expressed to have been conveyed in consideration of £150 down & a bill of exchange for £300 payable in three months:—*Held*: the vendor might give evidence of the real nature of the transaction, & that the lien was not discharged; & a mtgee. having notice through the solr. who had been employed in all the transactions, was bound to see that the vendor's claim for his purchase-money was satisfied.—*FRAIL v. ELLIS* (1852), 16 Beav. 850; 22 L. J. Ch. 467; 20 L. T. O. S. 197; 1 W. R. 72; 51 E. R.

704. —. Reservation of royalties—On assignment of copyright.]—The author of a book assigned by deed to a co. the exclusive right of publishing it so that upon publication the company should be the sole owners of the copyright therein. The co. undertook to publish the book forthwith at their own risk & expense. In addition to an allotment of shares to the author the co. covenanted to pay him a royalty on the price of copies disposed of, to sell at prices agreed upon by the parties, to assign only to successors in business, & subject to the terms of the deed so far as applicable, to keep & furnish accounts of sales, & to allow the author to inspect the books of the co. relating to the publication & sale of the work. The co. & a receiver appointed by debenture-holders subsequently with the assent of the ordinary creditors sold to a purchaser, who was a successor in business of the co. the copyright in the book so far only as the vendors had any right to sell & subject to all equitable or other claims thereon. In an action by the author against the purchaser for an account & payment of royalties:—*Held*: the original deed of assignment showed no intention to impose a charge or reserve a vendor's lien upon the copyright for the royalties, & the purchaser, not being a party to that deed, was not bound to account for or pay royalties to the author.

As I understand the doctrine of a vendor's lien it is this: if the instrument of transfer shows an intention that the property shall not be transferred absolutely, but subject to a charge in favour of the transferor to secure some benefit for himself, he has a vendor's lien, that is, not a possessory lien, with which the common law is familiar, but a right in equity the enforcement of which seems to be a matter of difficulty & doubt (*SCRUTTON, L.J.*).—*BARKER v. STICKNEY*, [1919] 1 K. B. 121; 88 L. J. K. B. 315; 120 L. T. 172, C. A.

Annotations:—*Reid. Macdonald v. Eyles*, [1921] 1 Ch. 631. *Mentd. The Lord Stratheona*, [1925] P. 143.

705. Expenditure on property of another—Without expectation of recoupment.]—The case is one in which the tenant for life paid the premiums without the expectation of getting them back (*STUART, V.-C.*).—*BROWNE v. BROWNE* (1860), 2 Giff. 304; 3 L. T. 119; 6 Jur. N. S. 1143; 8 W. R. 726; 66 E. R. 127.

706. —. Charge on father's estate paid off by son—In settlement of accounts.]—A son paid off a mtge. upon an estate belonging to his father, the son being at the time expectant devisee of the absolute interest in the estate, though afterwards, by an alteration in his father's will, he became only tenant for life of the estate:—*Held*: from the dealings between the parties an agreement was to be inferred that the son paid off the debt in settlement of pecuniary transactions between himself & his father, & consequently the presumption that the son paid it off for his own benefit was rebutted, & he was not entitled to any lien upon the estate for what he so paid off.—*CROW v. PETTINGELL* (1869), 20 L. T. 342; 17 W. R. 562, L. J.J.; *reusg.*, 38 L. J. Ch. 186.

707. Payment of purchase-money conditional on receipt by purchaser.]—Two persons agreed to sell certain property to a co. for a price to be paid, part in fully paid-up shares, part in shares partly paid up, & the remainder in cash, as & when the co. should receive any money in respect of shares subscribed for over & above the first £1,000; & it was provided that if the shares & cash should not be paid within two years from the date of the agreement, the agreement should be void, & that

Sect. 6.—Exclusion. Sect. 7: Sub-sect. 1, A. (a) & (b) i. & ii.]

any moneys & shares paid thereunder should be retained as liquidated damages for breach of the agreement. The shares were issued to the vendors & their nominees, but the event on which the cash was to be paid never happened, & the co. was wound up within two years from the date of the agreement:—*Held*: the vendors must be placed on the list of contributories in respect of their shares, but they were entitled to a lien on the property sold for the amount of cash which had not been paid.—*Re PATENT CARRIAGE CO., GORE & DURANT'S CASE* (1866), L. R. 2 Eq. 349.

Annotations:—*Distd. Re Brentwood Brick & Coal Co.* (1876), 4 Ch. D. 562. *Refd. Dansk Rekyrliffel Syndikat Akt. v. Snell*, [1908] 2 Ch. 127; *Barker v. Stickney*, [1918] 2 K. B. 356.

708. — Inconsistent with lien.]—It was agreed between A. & a trustee for an intended co. that as soon as the co. was formed & had adopted the agreement, A. should sell & the co. purchase A.'s interest in a leasehold brickfield, & that on an assignment to the co. being executed the co. should pay him as the purchase-money £8,000 in manner thereafter mentioned, namely, £6,000 in cash & £2,000 in fully paid-up shares. The property was assigned to the co. by a deed which stated the consideration to be £6,000, to be paid to A. as thereafter mentioned, viz. 50 per cent. on all sums of money to be received from sale of shares, & 50 per cent. on all moneys borrowed by the co. by way of capital until the £6,000 was paid. The co. became abortive; no money was ever received by sale of shares or borrowed, & ultimately the co. was ordered to be wound up:—*Held*: the nature of the contract was such as to exclude vendor's lien & A. had no lien on the leasehold premises.

It is evident that the party selling did not intend to rely on the security of the estate but on the funds of the co. (*BAGGALLAY, J.A.*).—*Re BRENTWOOD BRICK & COAL CO.* (1876), 4 Ch. D. 562; 46 L. J. Ch. 554; 36 L. T. 343; 25 W. R. 481, C. A.

Annotation:—*Refd. Barker v. Stickney*, [1918] 2 K. B. 356.

709. Purpose of purchase inconsistent with lien.]—By an agreement dated in 1851, a co., under powers conferred by the Lands Clauses Consolidation Act, 1845 (c. 18), contracted, in consideration of the payment of a yearly rentcharge, to purchase land for the construction of docks. The co. had entered, & completed the construction of the docks, but had not made any payment in respect of the rentcharge:—*Held*: the vendors were not entitled to a lien for the unpaid arrears of the rentcharge.

It would be quite contrary to the intention of the parties to suppose the vendor was reserving to himself a right at some future time to enter & destroy the public work if the annual rent should fall into arrear (*JAMES, V.-C.*).—*JERSEY (EARL) v. BRITON FERRY FLOATING DOCK CO.* (1869), L. R. 7 Eq. 409.

Annotations:—*Refd. Barker v. Stickney*, [1919] 1 K. B. 121.

Mentd. Re Gerard & Beecham's Contract, [1894] 3 Ch. 295.

See, also, No. 671, *ante*.

SECT. 7.—EXTINGUISHMENT.

SUB-SECT. 1.—UNPAID VENDOR.

A. Of Land.

(a) In General.

710. By Act of Parliament or express contract only.]—*WALKER v. WARE, HADHAM & BUNTINGFORD RY. CO.*, No. 632, *ante*.

711. Entry by purchaser under compulsory powers.]—*WALKER v. WARE, HADHAM & BUNTINGFORD RY. CO.*, No. 632, *ante*.

See, generally, COMPULSORY PURCHASE OF LAND, Vol. XI., p. 230.

712. Trust for sale supervening before completion.]—*DAVIES v. THOMAS*, No. 614, *ante*.

713. Effect of order under Lunacy Acts—Authorising receipts & giving discharge for property.]—*DAVIES v. THOMAS*, No. 614, *ante*.

See, generally, LUNATICS.

(b) By Waiver.

i. In General.

714. Payment of purchase money made conditional.]—Covenant between vendor & purchaser that purchase-money should be repaid within two years after resale discharges the vendor's lien.—*Re PARKES, Ex p. PARKES* (1822), Gl. 1 & J. 228.

Annotation:—*Mentd. Winter v. Anson* (1827), 6 L. J. O. S. Ch. 7.

715. By retention of title deeds.]—*WREFORDE v. LETHERN*, No. 701, *ante*.

716. Reliance on personal security of purchasers.]—*WHITE v. WAKEFIELD*, No. 590, *ante*.

717. Omission to claim for long period.]—Where a director was, under the co.'s deed, entitled to a remuneration for his attendance:—*Held*: non-claim for a number of years amounted to a waiver of his rights & of his lien on the funds of the co.—*Re ARIGNA IRON MINING CO.* (1853), 1 Eq. Rep. 269; 21 L. T. O. S. 206.

718. By concurrence in mortgage by purchaser.]—Pltf. agreed with H., in consideration of his erecting some houses thereon, to grant him a building lease of some land, with the option of purchasing the fee. Pltf. advanced H. £970 to enable him to build. Afterwards E. & P., jointly, made further advances to H. for the same purpose. Subsequently E., who was the solr. both of pltf. & of P., induced pltf. to execute a conveyance to H., without receiving the consideration, in order that H. might then execute a mtge. to E. & P. to secure their advances; but on the promise of E. alone, that the conveyance & the mtge. should be held, on behalf of pltf., until the "land could be sold or a transfer of the said mtges. obtained, & that in either case pltf. should, in the first place, out of the moneys obtained by such sale or transfer, be paid the purchase-money" & advances: *Held*: pltf. had trusted solely to the representations of E., & his lien for unpaid purchase-money & for advances was not entitled to priority over the claim of E. & P. under the mtge.—*SMITH v. EVANS* (1860), 28 Beav. 59; 29 L. J. Ch. 531; 2 L. T. 227; 6 Jur. N. S. 388; 54 E. R. 288.

Annotation:—*Refd. Wall v. Cockerell* (1860), 29 L. J. Ch. 816.

PART V. SECT. 7, SUB-SECT. 1.

A. (a).

e. Interposition of nominal purchaser.]—Where the original vendor & the ultimate purchaser are the real parties to a sale of property, the vendor's lien is not destroyed by the interposition of a nominal purchaser as vendor to the ultimate purchaser.

—*KIRK & MUSGRAVE v. HARVEY* (1913), 18 B. C. R. 645.—CAN.

f. Effect of Moratorium Act.]—A vendor's lien for the whole of the purchase price upon which nothing has been paid is not interfered with by Moratorium Act & must be given effect to in the usual way.—*RONALD b. LILLARD* (1916), 30 W. L. R. 382;

7 W. W. R. 1128.—CAN.

PART V. SECT. 7, SUB-SECT. 1.—A. (b) 1.

g. By recovery of judgment for amount.]—The lien of a vendor for purchase-money is not waived by his suing & recovering judgment for the amount, although such recovery is

719. By suit for specific performance.]—Where a decree for specific performance had been obtained by a vendor against a railway co. of a contract for sale, & the co. afterwards became insolvent:—*Held*: the vendor was entitled to a declaration of lien for his unpaid purchase-money.—*HERIOT v. LONDON, CHATHAM & DOVER RY. CO.* (1867), 16 L. T. 473.

720. By levying execution—Full amount not recovered.]—A railway co. gave a bond to a vendor of land to them for the purchase-money. The vendor brought an action & levied execution upon the bond. By reason of interpleader proceedings he did not recover the full amount of the purchase-money by the execution:—*Held*: he was not deprived of his lien for the remainder of the purchase-money, & was entitled to a decree for specific performance.—*PELL v. NORTHAMPTON & BANBURY RY. CO.* (1868), 16 W. R. 1077; *affd.* (1869), 20 L. T. 288, L. C.

721. Land in register county—Omission to register memorial.]—A vendor of land in a register county, part of whose purchase-money remains unpaid, is under no obligation to register a memorial of the vendor's lien, but is entitled to rely on his equitable lien against sub-purchasers who have notice of it actual or constructive. A purchaser of land in a register county is bound to inquire for & examine the deeds & documents memorials of which are registered. Land belonging to the trustees of a charity, in Y., was sold by the trustees to R. & W., who were estate agents, & bought the land with the intention of selling it in lots for building purposes. Part of the purchase-money remained unpaid, & the vendors retained this deed of conveyance in their possession, but, at the request of the purchasers, the vendors' solr. registered a memorial of it in the Y. registry. The vendors took no written security for their unpaid purchase-money but relied on their equitable lien. R. & W. sold the land again in lots. P., one of the sub-purchasers, who took a mtge. on a small lot, made no inquiries himself, but left it, as he said, to R. & W., to "manage the whole business" for him, & they prepared the conveyance to him. The original vendors having brought an action to enforce their lien for the unpaid purchase-money against some of the sub-purchasers:—*Held*: (1) there was no obligation on the original vendors to register a memorial of the vendor's lien. *Qu.*: whether the neglect of the sub-purchasers to search the register & inquire for the deed affected them with constructive notice of pltf's. lien. 'But the ct. being convinced on the evidence that the vendors knew that R. & W. wanted the deed of conveyance registered for the purpose of selling, & that they did sell, the land in lots, & that by their conduct in registering the deed they had led the sub-purchasers to believe that R. & W. had power to dispose of the land as absolute owners; (2) the vendors had waived their lien & could not enforce it against the sub-purchasers.—*KETTLEWELL v. WATSON* (1884), 26

Ch. D. 501; 53 L. J. Ch. 717; 51 L. T. 135; 32 W. R. 865, C. A.

Annotations:—*As to* (1) *Reid. Manks v. Whiteley*, [1912] 1 Ch. 735; *Barker v. Stickney*, [1919] 1 K. B. 121. *As to* (2) *Reid. National Provincial Bank of England v. Jackson* (1886), 33 Ch. D. 1; *Farrand v. Yorkshire Banking Co.* (1888), 40 Ch. D. 182. *Generally*, *Mentd. Re Payne, Young v. Payne*, [1904] 2 Ch. 608; *Berwick v. Price*, [1905] 1 Ch. 632.

722. Purchasers allowed to resell.]—*KETTLEWELL v. WATSON*, No. 721, *ante*.

Compare No. 744, *post*.

723. Substitution of alternative remedy.]—A banking co. entered into an agreement on May 29, 1886, to sell certain paper mills & machinery to the L. co. for £20,000 to be paid by instalments. By clause 2 of the agreement it was provided that upon payment of the first two instalments the bank should convey the premises to the L. Company upon their executing a mtge. for the balance of the purchase-money, & that the mtge. should contain a clause enabling the bank, in case the business of the L. co. should be suspended, to re-enter & take possession of the premises, & of everything which should have been built or placed thereon, & which should not require registration within the Bills of Sale Act, 1878 (c. 31), & to hold the same for their own use & benefit absolutely, but without prejudice to the liability of the L. co. for the unpaid balance of the purchase-money. This agreement was not registered as a bill of sale. The first two instalments of the purchase-money were paid, but no conveyance or mtge. of the property was executed in pursuance of the agreements. The L. co. entered into & held possession of the property until a winding-up order was made on Feb. 7, 1887. The bank thereupon re-entered on the property. The official liquidator of the L. co. asked by summons for delivery up of a paper-making machine & all other trade machinery attached to the mills. The bank claimed possession of the fixtures and trade machinery under their vendors' lien:—*Held*: the position of the parties under the agreement was the same as if a conveyance & mtge. of the property had been actually executed, & the bank had no vendor's lien for unpaid purchase-money, as an express stipulation had been substituted for such lien.—*Re LONDON & LANCASHIRE PAPER MILLS CO., LTD.* (1888), 58 L. T. 798; 4 T. L. R. 312.

ii. By Taking Security.

724. Whether lien abandoned—Question of fact.]—*MACKRETH v. SYMMONS*, No. 587, *ante*.

725. —.]—A party who, having lent money to enable a vendee of property sold, to pay the vendor part of the consideration for the purchase, a bond with sureties being executed to him for the remainder, took a security for repayment by assignment of the subject matter, with the privity & knowledge of the vendor, the whole matter being recited in the original deed:—*Held*: on a second sale by the vendee to satisfy all demands, the

subsequent to another judgment registered against the purchaser.—*FLINT v. SMITH* (1860), 8 Gr. 339.—*CAN.*

PART V. SECT. 7, SUB-SECT. 1.—A. (b) ii.

725 i. Whether lien abandoned.]—The fact that part of the purchase-money is secured by mtge., & the balance covered by a promissory note, is not conclusive of intention to waive the lien.—*HIGH RIVER MEAT MARKET v. ROUTLEDGE* (1908), 8 W. L. R. 259; 1 Alta. L. R. 405.—*CAN.*

725 ii. —.]—*BROWN v. CHESLEY* (1868), 7 N. S. R. 315.—*CAN.*

725 iii. —.]—*MCDONALD v. McDONALD* (1869), 16 Gr. 678.—*CAN.*

725 iv. —.]—Where land was sold to a railway co., for the purposes of the road, & a mtge. taken to secure the unpaid purchase money:—*Held*: the lien was not lost.—*GALT v. ERIC & NIAGARA RY. CO.* (1869), 15 Gr. 637.—*CAN.*

725 v. —.]—Where a vendor on the sale of land takes a mtge. thereon for part of the price agreed to be paid,

he loses his lien for such portion as remains unsecured.—*ANDERSON v. TROTT* (1873), 19 Gr. 619.—*CAN.*

725 vi. —.]—*DRIFILL v. McFALL* (1877), 41 U. C. R. 313.—*CAN.*

725 vii. —.]—*WALSH v. MASON, STEVENS v. MASON* (1914), 26 W. L. R. 942; 15 D. L. R. 895; 19 B. C. R. 48.—*CAN.*

725 viii. —.]—*DICK v. LAMBERT* (1916), 34 W. L. R. 1156.—*CAN.*

725 ix. —.]—*KEHOE v. HALES* (1843), 5 I. Eq. R. 597.—*IR.*

Sect. 7.—Eatinguishment: Sub-sect. 1, A. (b) ii., & (c), & B. (a).]

original vendor had not such a lien on the purchase-money, for what remained due to him, as would defeat, or as should be preferred to that of the mtgee. *Qu.*: how far, & in what cases, taking security for payment of purchase-money is a waiver by vendor of his lien on the purchase-money upon a subsequent sale by the vendee.—*COOD v. COOD & POLLARD* 1822), 10 Price, 109; 147 E. R. 259, Ex. Ch.

726. —.]—*DIXON v. GAYFERE, FLUKER v. GORDON*, No. 594, *ante*.

727. —.]—*THAMES IRON WORKS CO. v. PATENT DERRICK CO.*, No. 90, *ante*.

728. — **Onus of proof—On purchaser.]**—*MACCRETH v. SYMMONS*, No. 587, *ante*.

729. **Bond taken.]**—One sells an estate & takes bond for the consideration money. The vendor has no lien against the creditors of the vendee, for whose benefit the estate has been assigned.—*FAWELL v. HEELIS* (1773), Amb. 724; 2 Dick. 485; 27 E. R. 468; *sub nom.* *FOWEL v. HEELIS*, 1 Bro. C. C. 422, n., L. C.

Annotations:—*Consd.* *Blackburn v. Gregson* (1785), 1 Bro. C. C. 420. *Expld.* *Maccreth v. Symmons* (1808), 15 Ves. 329.

730. — **Bond not paid.]**—*Qu.*: where upon a sale of lands, bonds are taken for the purchase-money, which are not paid, whether the vendor has a lien upon the lands.—*BLACKBURN v. GREGSON* (1785), 1 Bro. C. C. 420; 1 Cox, Eq. Cas. 90; 28 E. R. 1215, L. C.

Annotations:—*Expld.* *Maccreth v. Symmons* (1808), 15 Ves. 329. *Mentd.* *Matthews v. Bowler* (1847), 9 L. T. O. S. 20; *Dixon v. Gayfere* (1857), 3 Jur. N. S. 1157.

731. —.]—A vendor, who has taken, as a security for part of the purchase-money, the bond of the vendees & a mtge. of part of the property sold, cannot, on the bkpcy. of the vendees, establish a lien on the entire estate.—*CAPPER v. SPOTTISWOODE* (1829), Tam. 21; 48 E. R. 9.

732. — **On exercise of option by purchaser under contract.]**—Pltf. sold land to a railway co. by an agreement under which they were to pay him a certain sum, to be paid in cash or at the option of the co. in such securities as should be agreed upon between the parties. The co. took possession of the land, & opened their line upon it. Under the agreement they elected to give security in lieu of cash payment, & a bond was thereupon settled & given. The co. made default on the day of payment, & pltf. brought an action & levied execution upon the bond, & recovered a portion of his money by a sheriff's sale:—*Held*: pltf. was not deprived of his lien for the remainder of the purchase-money, & was entitled to a decree for specific performance.—*PELL v. MIDLAND COUNTIES*

725 x. —.]—*Re DURROW BRICK & TILE WORKS CO.*, [1904] 1 L. R. 530.—IR.

728 i. — **Onus of proof—On purchaser.]**—Purchase money unpaid is, *prima facie*, a lien on the lands sold; & if a security is taken for that money, it lies on the vendee to show that the vendor agreed to rest on that security, & to discharge the lands.—*HUGHES v. KEARNEY* (1803), 1 Sch. & Lef. 132.—IR.

729 i. **Bond taken.]**—*RUTHERFORD v. RUTHERFORD* (1865), 11 Gr. 565.—CAN.

729 ii. —.]—The principle that a vendor, by taking from a purchaser an indorsed note as security for unpaid purchase-money, does not lose his vendor's lien, is equally applicable where the security given is a bond, in which a third person joins as surety.—

SHENNAN v. PARSILL (1871), 18 Gr. 8.—CAN.

729 iii. —.]—The acceptance by the vendor of a railway of the bonds of the co. purchasing the road is a waiver by implication of his lien.—*MINISTER OF RAILWAYS & CANALS FOR THE DOMINION OF CANADA v. QUEBEC SOUTHERN RY. CO. & SOUTH SHORE RY. CO.* (1908), 12 Exch. C. R. 61.—CAN.

729 iv. —.]—The acceptance by a vendor of immovable property, of a separate bond given by the vendee to secure payment by instalments of the balance of the purchase money, does not imply an intention on the part of the vendor to relinquish his lien.—*BASHIR, ETC. v. NAZIR, ETC.* (1921), L. L. R. 43 All. 544.—IND.

729 v. —.]—*SAUNDERS v. LESLIE* (1814), 2 Ball & B. 509.—IR.

& *SOUTH WALES RY. CO.* (1869), 20 L. T. 288; 17 W. R. 506, L. C.

733. **Stock pledged.]**—The consideration of marriage runs through the whole settlement; & especially supports every provision with regard to the husband & wife. She is interested in the provision for her husband, enabling him to provide for her & the children; & it is not affected by subsequent events, as the death of the wife without children. Vendor's equitable lien upon the estate for the purchase-money lost by taking a special security by way of a pledge of stock. *Qu.*: (1) whether every security would have that effect; (2) whether the vendor's lien could prevail against an equitable mtge. by deposit of deeds.—*NAIRN v. PROWSE* (1802), 6 Ves. 752; 31 E. R. 1291.

Annotations:—*As to* (1) *Consd.* *Maccreth v. Symmons* (1808), 15 Ves. 329. *Refd.* *Re Lightoller, Ex p. Peake* (1816), 1 Madd. 346; *Winter v. Anson* (1827), 6 L. J. O. S. Ch. 7.

734. **Negotiable instrument taken.]**—A. purchases lands of B. & mortgages back those lands for part of the purchase-money, & gives a note to B. for £200 the other part thereof. A. devises those lands to be sold for payment of his debts. This £200 note, though for part of the purchase-money, shall not be preferred to other debts, nor be a charge on the land in equity.—*BOND v. KENT* (1692), 2 Vern. 281; 1 Eq. Cas. Abr. 143; 23 E. R. 782.

Annotation:—*Expld.* *Maccreth v. Symmons* (1808), 15 Ves. 329.

735. — **Security distinguished from mode of payment.]**—Vendor's lien on the estate for the purchase-money not discharged by taking bills of exchange; which are to be considered, not as a security, but as a mode of payment.—*GRANT v. MILLS* (1813), 2 Ves. & B. 306; 2 Rose, 81, n.; 35 E. R. 335.

Annotations:—*Refd.* *Re Lightoller, Ex p. Peake* (1816), 1 Madd. 346; *Teed v. Carruthers* (1842), 2 Y. & C. Ch. Cas. 31.

736. — —.]—*FRAIL v. ELLIS*, No. 703, *ante*.

737. —.]—Vendor has a lien on estate sold, for his purchase-money, though he has received bills from the vendee in payment of the same, & though the vendee becomes bkpt.—*Re LIGHTOLLER, Ex p. PEAKE* (1816), 1 Madd. 346; 2 Rose, 455; 56 E. R. 128.

738. — & **negotiated.]**—Vendor held not to have waived his lien on the estate sold, by taking the promissory note of the vendee, & receiving its amount by discount.—*Re WRIGHT, Ex p. LOARING* (1814), 2 Rose, 79, L. C.

Annotation:—*Refd.* *Teed v. Carruthers* (1842), 2 Y. & C. Ch. Cas. 31.

739. —.]—*GIBBONS v. BADDALL*, No. 628, *ante*.

734 i. **Negotiable instrument taken.]**—A vendor who takes as security for the purchase money the joint & several notes of the vendee & a surety, does not lose his lien on the estate for the purchase money.—*COLBORNE v. THOMAS* (1853), 4 Gr. 102.—CAN.

734 ii. —.]—*DEGEAR v. SMITH* (1865), 11 Gr. 570.—CAN.

734 iii. —.]—*SCHWARTZ v. BIELSCHOWSKY* (1911), 17 W. L. R. 616; 21 Man. L. R. 310.—CAN.

734 iv. —.]—A vendor's lien is not waived by taking a promissory note for the balance of the purchase price.—*KAULBACH v. JODREY & ZWICKER* (1913), 13 E. L. R. 409; 13 D. L. R. 782.—CAN.

734 v. —.]—*GAIRDNER v. MILNE & Co.* (1858), 20 Dunl. (Ct. of Sess.) 565; 30 Sc. Jur. 387.—SCOT.

740. Taking security distinguished from agreement as to mode of payment—Negotiable instrument taken.]—GRANT *v.* MILLS, No. 735, *ante*.

741. ———.]—FRAIL *v.* ELLIS, No. 703, *ante*.

742. ——— Payment of annuity secured by personal covenant.]—A vendor, in lieu of the price of £3,000, agreed to accept an annuity of £100 a year for the joint lives of her intended husband & herself, in case the purchaser should so long live, the purchaser engaging that his personal representatives should within three months after his decease, in certain events, but not in all events, pay a further sum of £3,000 :—*Held* : this was not a security, but a substitution for the price ; & the lien of the vendor on the land was discharged. —PARROTT *v.* SWEETLAND (1835), 3 My. & K. 655 ; 40 E. R. 250.

Annotations :—*Expld.* Pell *v.* Midland Counties & South Wales Ry. (1869), 20 L. T. 288. *Refd.* Buckland *v.* Pooknell (1843), 13 Sim. 406 ; *Re* Albert Life Assce., *Ex p.* Western Life Assce. Soc. (1870), L. R. 11 Eq. 164.

(c) *By Estoppel.*

743. Receipt for purchase-money indorsed—Rebuttal by evidence of non-payment.]—By an agreement for the sale of an estate, the purchase-money, with interest, was to be secured by the bond of the purchaser, & was to remain so secured during the life of the vendor. The conveyance, which was afterwards executed, expressed that the purchase-money had been paid, & the vendor's receipt was indorsed upon it ; but, in fact, only a part of the price had been paid, & the residue was secured by the purchaser's bond, conditioned for payment of the principal with interest, within twelve months after the death of the vendor ; & of interest in the mean time. The vendor was held to have a lien on the estate for the amount of the bond.—WINTER *v.* ANSON (LORD) (1827), 3 Russ. 488 ; 6 L. J. O. S. Ch. 7 ; 38 E. R. 658, L. C.

Annotations :—*Consd.* Parrott *v.* Sweetland (1835), 3 My. & K. 655 ; Dixon *v.* Gayfer (No. 3) (1855), 21 Beav. 118 ; Jersey *v.* Briton Ferry Floating Dock Co. (1869), L. R. 7 Eq. 409. *Distd.* *Re* Brentwood Brick & Coal Co. (1876), 4 Ch. D. 562. *Refd.* Clarke *v.* Royle (1830), 3 Sim. 499 ; Teed *v.* Carruthers (1842), 2 Y. & C. Ch. Cas. 31 ; Fuller *v.* Bennett (1843), 2 Hare, 394 ; Goode *v.* Burton (1847), 1 Exch. 189 ; Barker *v.* Stickney, [1919] 1 K. B. 121. *Mentd.* Whitbread *v.* Jordan (1835), 1 Y. & C. Ex. 303 ; Bulpett *v.* Sturges (1870), 22 L. T. 739.

— *See, generally*, DEEDS, Vol. XVII., pp. 370 *et seq.* ; ESTOPPEL, Vol. XXI., pp. 265, 266.

744. Acquiescence in resale—Lien not disclosed.]—A party who, having a lien or claim on property, suppresses it, & permits another person to purchase the property, upon the supposition that no such lien or claim exists, cannot afterwards be allowed to set up such lien or claim against such purchaser.

When pending a dispute relative to the right to certain property, it becomes greatly depreciated in value, & a decree, giving a party the property, would be no compensation for the injury received by him, he is entitled to the option of either recovering the property improperly withheld from him, or the value of it, at the time it was first withheld or subtracted.—BROWN *v.* THORPE (1841), 11 L. J. Ch. 73.

PART V. SECT. 7, SUB-SECT. 1.—
B. (a).

746 i. General rule.]—MASON *v.* HATTON (1877), 41 U. C. R. 610.—CAN.

746 ii. ———.]—PURPLE *v.* HENEY (1896), 33 N. B. R. 607.—CAN.

746 iii. ———.]—STEEVES *v.* (1903), 40 N. S. R. 401.—CAN.

746 iv. ———.]—GALVIN - WALSTON LUMBER Co. *v.* MCKINNON (1911), 16 W. L. R. 310 ; 4 Sask. L. R. 68.—CAN.

746 v. ———.]—METALS, LTD. *v.* TRUSTS & GUARANTEE Co. (1914), 29 W. L. R. 953 ; 7 W. W. R. 605.—CAN.

746 vi. ———.]—FERRARA *v.* NATIONAL SURETY (1916), 34 W. L. R. 697 ; 10

As evidence of waiver.]—See No. 721, *ante*.

See, generally, ESTOPPEL, Vol. XXI., pp. 333 *et seq.*, 366 *et seq.*

745. Recital that unpaid purchase-money a loan to purchaser.]—MUIR *v.* JOLLY, No. 585, *ante*.

B. Of Chattels.

(a) *By Loss of Possession.*

746. General rule.]—An unpaid vendor has no lien upon a cargo put on board a chartered ship ; it is no longer in his possession, but that of the captain as trustee.—GURNEY *v.* BEHREND (1854), 3 E. & B. 622 ; 23 L. J. Q. B. 265 ; 23 L. T. O. S. 89 ; 18 Jur. 856 ; 2 W. R. 425 ; 118 E. R. 1275.

Annotations :—*Mentd.* The Tigress (1863), Brown & Lush. 38 ; Pease *v.* Gloahed, The Marie Joseph (1866), L. R. 1 P. C. 219 ; The Argentina (1867), L. R. 1 A. & E. 370 ; Coventry *v.* Gladstone (1867), L. R. 4 Eq. 493 ; Shepherd *v.* Harrison (1869), L. R. 4 Q. B. 196 ; Leask *v.* Scott (1877), 46 L. J. Q. B. 576 ; Glyn, Mills *v.* East & West India Dock Co. (1882), 47 L. T. 309.

747. Actual delivery to purchaser necessary.]—Unless actual possession of goods sold has been delivered to the purchaser, the vendor is not deprived of his right of lien as against the assignees of the purchaser, in the event of his insolvency.

Where the vendors were also warehousemen of the goods sold under an arrangement with the purchasers to pay warehouse rent :—*Held* : as the goods remained in the possession of the vendors, & no actual delivery had been made to the purchasers, the vendor's lien revived upon the insolvency of the vendees.—GRICE *v.* RICHARDSON (1877), 3 App. Cas. 319 ; 47 L. J. P. C. 48 ; 37 L. T. 677 ; 26 W. R. 358, P. C.

748. Constructive loss of possession—Vendor in possession as baillee for purchaser.]—This was an action for the price of a horse, & the question was whether there was an acceptance & actual receipt by debt. to satisfy Stat. Frauds. The jury found that after the bargain was complete the vendor had asked the vendee, as a favour, to lend him the horse for a week or two, & debt., the purchaser, had, as owner, granted permission to pltf. to keep the horse, as requested.

Upon the finding of the jury, which was supported by the evidence, it is clear that pltf.'s possession as owner had ceased, & he had become baillee. His lien for the price was gone ; & debt. having dealt with the horse as owner, had accepted & received it so as to satisfy the statute (*per* CUR.). —MARVIN *v.* WALLIS (1856), 6 E. & B. 726 ; 25 L. J. Q. B. 369 ; 27 L. T. O. S. 182 ; 2 Jur. N. S. 689 ; 4 W. R. 611 ; 119 E. R. 1035.

Annotations :—*Refd.* Cusack *v.* Robinson (1861), 1 B. & S. 299 ; Nicholls *v.* White (1910), 103 L. T. 800 ; Dublin City Distillery *v.* Doherty, [1914] A. C. 823. *Mentd.* Taylor *v.* Wakefield (1856), 6 E. & B. 765 ; Castle *v.* Sworder (1860), 5 H. & N. 281.

Charge of warehouse rent.]—See No. 747, *ante* ; No. 753, *post*.

749. ——— What amounts to—Whether giving delivery order.]—Certain timber which was deposited in the name of A., the importer, in the West India Docks, was sold by him to B. B. afterwards contracted to sell the timber to C., who accepted a bill for the amount, B. giving him an invoice of the timber, & a delivery order. The

W. W. R. 526.—CAN.

746 vii. ———.]—MANECKJI PESTONJI BHARUCHA *v.* WADILAL SARABHAI & Co. (1926), 53 L. R. Ind. App. 92.—IND.

h. Delivery of part.]—Pltf. sold to debt. cordwood lying on pltf.'s premises, & agreed to remove it to the bank of an adjacent canal, & there

Sect. 7.—Extinguishment: Sub-sect. 1, B. (a) & (b)

dock co. refused to deliver the timber except upon an order from A. C. became bkpt. without having obtained such an order; & the bill was dishonoured:—*Held*: there had been no constructive delivery to C., so as to put an end to B.'s lien on the timber for the price; & B. was not estopped, by having given a delivery order as a constructive delivery of the timber.—*LACKINGTON v. ATHERTON* (1844), 7 Man. & G. 360; 8 Scott, N. R. 38; 13 L. J. C. P. 140; 3 L. T. O. S. 57; 8 Jur. 407; 135 E. R. 151.

750. ——— Transfer of wharfinger's certificates.]—B. & co. sold some iron rails to the A. co. by a written contract stipulating that payment should be made by buyers' acceptances of sellers' drafts against inspectors' certificate of approval & wharfinger's certificate of each five hundred tons being stacked ready for shipment. As the wharfinger's certificates were delivered the A. co. accepted the drafts of B. & co., according to the contract, which B. & co. negotiated; but the rails remained in B. & co.'s possession. Pltf. advanced money to the A. co. on the security of some of the wharfinger's certificates which were handed over to him with a written memorandum. The A. co. became insolvent, & their acceptances were consequently not paid. Pltf. filed a bill against B. & co. & the receiver of the estate of the A. co., claiming a lien on the rails in the hands of B. & co. in priority to their lien as vendors. The bill alleged that according to the custom of the iron trade, the wharfinger's certificates were in fact "warrants." Pltf. having moved for an injunction to restrain B. & co. from parting with the rails, or with the money which they might receive in respect of them, B. & co. were ordered to pay the value of the rails into ct., to be kept *in medio* till the decision of the case:—*Held*: (1) the giving of the acceptances in pursuance of the contract was not an absolute payment, but conditional on the acceptances being met; upon the insolvency of the acceptors the vendors' lien on the goods revived; & the fact of the vendors having negotiated the bills made no difference; (2) the wharfinger's certificates were not documents of title, & their delivery passed no right to the goods; & no custom of trade could give them the effect of "warrants" or documents of title as against the vendors.—*GUNN v. BOLCKOW, VAUGHAN & CO.* (1875), 10 Ch. App. 491; 44 L. J. Ch. 732; 32 L. T. 781, 23 W. R. 739, L. J.J.

Annotations: As to (1) Consd. Allen v. Royal Bank of Canada (1925), 41 T. L. R. 625. *Reid. Re Defries, Eichholz v. Defries*, [1909] 2 Ch. 423.

751. ——— Purchaser allowed to deal with goods.]—On Sept. 12, G. wrote to defts. as follows: "I will agree to purchase your oak timber at L. wharf, 'to be delivered free to boats when required,' at so much per foot, naming the sum. Payment by bill at four months' date from measurement." On Sept. 21, the contract was completed, & the following note signed by defts. the vendors: "Sold to G. the oak timber at the prices mentioned in his letter of Sept. 12, delivered to boats. Payment, £1,000 by bill at one month, & balance by bill at four months from measurement." The timber had been brought by defts. to the wharf at L., belonging to

deliver it; pltf. having delivered a portion at the bank:—*Semble*: any lien for the price which pltf. might before have had upon such wood, was lost by its removal to land neither his own nor under his control.—*MCNEIL*

v. KELEHER (1865), 15 C. P. 470.—*CAN.*

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B. (b) 1.

754 i. Proof in bankruptcy of pur-

a wharfinger on the canal where defts. were in the habit of conveying & depositing their timber to remain until sold, when it would be carried away by canal. On Oct. 7, G.'s agent measured the timber on the wharf, & marked it with G.'s initials, which were "scribed" & "punched" upon each piece, & G. also employed men to "square" it for his trade purposes, & paid them £5 for so doing. On Oct. 15, whilst the squaring was going on, the bills were given to defts., & the first bill for £100 was duly paid, but before the four months' bill became due, & whilst the timber remained at the wharf, G. became bkpt., & assigned all his estate to trustees, pltf., who thereupon demanded possession of the timber, which was refused by defts., who then removed the whole of it from the wharf into their own custody, except enough to cover in value the £100 paid bill. An action was brought by pltf., as trustees of the bkpt.'s estate against defts., for detention of the timber, when a verdict was found for them with leave to move, & upon a rule to set aside the verdict & enter a nonsuit or a verdict for defts. on the ground that defts. were entitled to stay *in transitu*, the ct. having power to draw inferences of fact:—*Held*: it was not a question of stoppage *in transitu*, but whether the lien of the vendors had ceased by their allowing the vendee to deal with the timber, while it was in the custody of the wharfinger, as he had done, which was a question of fact upon the evidence; & as an inference of fact, there was an actual transfer of the possession of the timber to the vendee, & the vendors' lien was gone, & they had therefore no right to meddle with the timber.—*COOPER v. BILL* (1865), 12 L. T. 466.

See, generally, SALE OF GOODS.

752. Delivery of part—Whether lien on remainder extinguished.]—*BUNNEY v. POYNTZ*, No. 756, *post*.

753. ——— To sub-purchaser.]—The vendor will not be deprived of his lien for the price, by receiving & negotiating a bill of exchange & delivering a part of the goods, by the request of the vendee, to a sub-vendee, during the currency of the bill, if the original vendee become bkpt., & the bill be dishonoured at maturity.—*MILES v. GORTON* (1834), 2 Cr. & M. 504; 4 Tyr. 295; 3 L. J. Ex. 155; 149 E. R. 860.

Annotations:—Consd. Tanner v. Scovell (1845), 14 M. & W. 28. *Apprvd. Grice v. Richardson* (1877), 3 App. Cas. 319. *Reid. Griffiths v. Perry* (1859), 1 E. & E. 680; *Re Oxley, Ex p. Turnbull* (1868), 19 L. T. 463; *Re Edwards, Ex p. Chalmers* (1873), 8 Ch. App. 289; *Re McLaren, Ex p. Cooper* (1879), 27 W. R. 518.

(b) By Waiver.

i. In General.

754. Proof in bankruptcy of purchaser.]—X. bought hops of T. on a custom known in the hop trade as W. O., i.e., the hops were to wait the order of X. in T.'s warehouse, & to be charged for warehouse room & insurance. X. paid for the hops by bills of exchange, which were dishonoured at maturity. X. afterwards registered a deed of composition which was assented to & executed by T. to the full amount of his debt in respect of the dishonoured bills:—*Held*: T.'s assent & execution of the deed operated as a proof in bkpcy., & therefore an abandonment of his lien for unpaid purchase-money.—*Re OXLEY, Ex p. TURNBULL* (1868), 19 L. T. 463; 17 W. R. 200.

*chaser.]—*The proof of a debt by a lienor against the property of the licensee in the subsequent bkpcy. of the licensee does not *ipso facto* destroy the lien.—*BONTHORNE v. MAUDE* (1906), 26 N. Z. L. R. 317.—*N.Z.*

ii. *By Taking Security.*

755. Negotiable instrument taken—& negotiated.]—Where the owner of a ship having a lien on the goods until the delivery of good & approved bills for the freight, took a bill of exchange in payment, & though he objected to it at the time, afterwards negotiated it:—*Held*: such negotiation amounted to an approval of the bill by him, & it was a relinquishment of his lien on the goods.—*HORNCastle v. FARRAN* (1820), 3 B. & Ald. 497; 106 E. R. 743.

Annotations:—*Consd.* *Pooley v. Budd* (1851), 14 Beav. 34. *Distd.* *Gunn v. Bolckow, Vaughan* (1875), 32 L. T. 781. *Refd.* *Tamvaco v. Simpson* (1865), 19 C. B. N. S. 453. *Mentd.* *Nicholl v. Thomas* (1850), 15 L. T. O. S. 50.

756. ———.]—(1) A vendor who takes in payment a promissory note & negotiates it, loses his lien; which is not revived upon the dishonour of the note which is outstanding in the hands of an indorsee.

(2) A part delivery of goods to vendee, will not vest the absolute right of possession to the whole in him, unless it be done in progress of the delivery of the whole; but if it be clear that the intention was separate the part delivered from the rest, the original right of lien which the vendor had will still remain.—*BUNNEY v. POYNTZ* (1833), 4 B. & Ad. 568; 1 Nev. & M. K. B. 229; 2 L. J. K. B. 55; 110 E. R. 569.

Annotations:—*As to* (1) *Consd.* *Pooley v. Budd* (1851), 14 Beav. 34. *Distd.* *Gunn v. Bolckow, Vaughan* (1875), 32 L. T. 781. *Dbtd.* *Re Defries, Eichholz v. Defries*, [1909] 2 Ch. 423. That case is inconsistent with, if not expressly overruled by, *Gunn v. Bolckow, Vaughan & Co.* (*WARRINGTON, J.*). *Refd.* *Sykes v. Giles* (1839), 5 M. & W. 643; *Allen v. Royal Bank of Canada* (1925), 41 T. L. R. 625. *As to* (2) *Refd.* *Dixon v. Yates* (1833), 5 B. & Ad. 313; *Tanner v. Scovell* (1843), 14 M. & W. 28; *Re McLaren, Ex p. Cooper* (1879), 11 Ch. D. 68. *Generally, Mentd.* *Nicholl v. Thomas* (1850), 15 L. T. O. S. 50.

757. ———.]—*MILES v. GORTON*, No. 753, *ante*.

758. ———.]—*GUNN v. BOLCKOW, VAUGHAN & Co.*, No. 750, *ante*.

759. Effect of subsequent dishonour.]—*BUNNEY v. POYNTZ*, No. 756, *ante*.

760. ———.]—*GUNN v. BOLCKOW, VAUGHAN & Co.*, No. 750, *ante*.

Negotiable instruments as payment.]—*See, generally, CONTRACT*, Vol. XII., pp. 462 *et seq.*

(c) *Other Cases.*

761. By tender.]—On a contract for the sale of a specific chattel on credit, time, without express stipulation, is not of the essence of the contract; & the vendee, on tender of the price, though after the expiration of the period of credit, may maintain trover against the vendor to recover such chattel. The vendor cannot rescind the contract on non-payment at the day.

The vendor's right, therefore, to detain the thing sold against the purchaser, must be considered as a right of lien till the price is paid, not a right to

rescind the bargain, & here the lien was gone by tender of the price (*LORD DENMAN, C.J.*).—*MARTINDALE v. SMITH* (1841), 1 Q. B. 389; 1 Gal. & Dav. 1; 10 L. J. Q. B. 155; 5 Jur. 932; 113 E. R. 1181.

Annotations:—*Folld.* *Chenery v. Viall* (1860), 5 H. & N. 288. *Refd.* *Page v. Cowasjee Eduljee* (1866), L. R. 1 P. C. 127.

———.]—*See, further, SALE OF GOODS.*

762. Judgment obtained for price.]—The right of an unpaid vendor to lien over goods in the hands of his agent is not taken away by the fact that the vendor has recovered a verdict for their price against the purchaser, & under a county ct. order for payment of the debt by instalments, has been paid one instalment of it.—*SCRIVENER v. GREAT NORTHERN RY. CO.* (1871), 19 W. R. 388.

763. Admission by carrier that goods held to order of purchaser.]—Goods were consigned to pltf's. order to a station on the defts.' railway, & the usual advice note was sent them by defts. On Apr. 12, pltf's. sold these goods to one J., payment half by cash, half by bill at three months due July 13; & handed over the advice note to J. with an indorsement directing defts. to deliver the goods to J.'s order. On Apr. 24 J. handed over this delivery order to D. as collateral security for the payment of money advanced to him by D. with a second indorsement ordering defts. to deliver the goods to D.'s order. But neither this delivery order nor that made by pltf's. was stamped in accordance with Stamp Act, 1870 (c. 97), s. 89. J. becoming insolvent, D. on May 14 wrote defts. inclosing the delivery order, & directing them to hold the goods to his order. To this he received the following reply from defts.' goods manager dated May 15: "I have yours of yesterday inclosing transfer of rails & beg to say I hold them to your order; but you will please produce this order when applying for the rails, & which order must also bear a transfer stamp by both parties transferring the goods, in accordance with the Act of Parliament. You will be aware they remain here at owner's risk & subject to our usual rent-charges." On May 19 D. affixed an adhesive stamp to each transfer, but omitted to cancel the stamps as required by Stamp Act, 1870 (c. 97), ss. 24, 89, & same were never up to trial so cancelled. On May 23 defts. wrote to pltf's. asking if they consented to the goods being delivered to D., to which pltf's. replied on June 23 & 30, giving defts. formal notice to hold them to their (pltf's.) order; but upon indemnity being given by D. the goods were handed over to D. The bill given to pltf's. by J. in part payment of these goods not being met at maturity, pltf's. claimed the goods as partial unpaid vendors, & brought an action against defts. for wrongfully parting with the possession of them:—*Held*: the condition in defts.' letter of May 15 as to the transfer stamp was no qualification of their admission that they held

PART V. SECT. 7, SUB-SECT. 1.—
B. (b) ii.

755 i. Negotiable instrument taken—& negotiated.]—E. supplied a contractor with materials for building a house for W. & took the contractor's note, which was discounted:—*Held*: as the lien was suspended during the currency of the note it was absolutely gone.—*EDMONDS v. TIERNAN & WALTERS* (1892), 21 S. C. R. 406.—*CAN.*

755 ii. ———.]—*COUGHLAN (J.) & Co., LTD. v. NATIONAL CONSTRUCTION Co., JSONG MONG LIN & McLEAN v. LOO GEE WING* (1909), 14 B. C. R. 339.—*CAN.*

755 iii. ———.]—If a person claim-

ing a lien under Mechanics' & Wage-Earners' Lien Act, 1902, takes a promissory note for the amount, & discounts it, he thereby forfeits his right to a lien.—*ARBUTHNOT (JOHN) CO. v. WINNIPEG MANUFACTURING CO. (Man.)* (1906), 16 Man. L. R. 401; 4 W. L. R. 48.—*CAN.*

755 iv. ———.]—*NATIONAL SUPPLY CO. v. HORROBIN* (1906), 16 Man. L. R. 472.—*CAN.*

755 v. ———.]—A mechanics' lien is not waived by the claimant accepting & negotiating a promissory note from the contractor.—*GORMAN, CLANCEY & GRINDLEY v. ARCHIBALD* (1908), 1 Alta. L. R. 524; 8 W. L. R. 916.—*CAN.*

755 vi. ———.]—A pltf.'s lien is not destroyed or prejudiced by taking a note & discounting it.—*BROOKS-SANFORD HARDWARE CO., LTD. v. THEODORE TELIER CONSTRUCTION CO.* (1910), 17 O. W. R. 167; 2 O. W. N. 138.—*CAN.*

755 vii. ———.]—*WILSON v. DOBLE & HARTNELL* (1910), 13 W. L. R. 290.—*CAN.*

755 viii. ———.]—*WORTMAN v. FRID-LEWIS CO.* (1915), 33 W. L. R. 119; 9 W. W. R. 812.—*CAN.*

k. Mortgage taken.]—*WENBOURNE v. J. I. CASE THRESHING MACHINE CO. (Alta.)*, [1917] 2 W. W. R. 1262; 35 D. L. R. 577.—*CAN.*

Sect. 7.—Eatinguishment: Sub-sect. 1, B. (c), & C.; sub-sect. 2. Part VI.]

the goods to D.'s order; the letter was an absolute attornment by defts. to D., by which pl'tfs.' right of possession as unpaid vendor was destroyed, & pl'tfs. were, therefore, not entitled to recover.—*POOLEY v. GREAT EASTERN RY. CO.* (1876), 34 L. T. 537.

764. Bankruptcy of debtor.]—SWAINSTON v. CLAY, No. 513, *ante*.

C. Of Chose in Action.

765. Whether waived—By taking security.]—COLLINS v. COLLINS (No. 2), *DOWNES v. DOWNES*, No. 608, *ante*.

SUB-SECT. 2.—OTHER EQUITABLE LIENS.

766. Lien created by judgment—Action on judgment.]—Bringing debt upon a judgment is no waiver of lien created by that judgment.—ERBY v. ERBY (1714), 1 Salk. 80; 91 E. R. 75.

767. — Effect of subsequent appointment under power.]—In 1822 an estate was conveyed to such uses as A. should by deed, etc. appoint, — in the meantime to the use of himself for life, etc. In 1826 a judgment was obtained against him, & in 1827 he mortgaged this estate, & appointed the use to B. for five hundred years. After the execution of this deed, the judgment creditor issued an *elegit*:—*Held*: his lien upon the land was defeated by the execution of the power.—*DOE d. WIGAN v. JONES* (1830), 10 B. & C. 459; 5 Man. & Ry. K. B. 563; 8 L. J. O. S. K. B. 214; 109 E. R. 521.

Annotations:—*Reid*. *Skeels v. Shearly* (1837), 3 My. & Cr. 112; *Doe d. Egremont v. Hellings* (1842), 6 Jur. 821; *Langton v. Horton* (1842), 6 Jur. 910; *Ellis v. R.* (1851), 6 Exch. 921.

768. — —.]—The lien of a judgment creditor on the real estate of his debtor, where execution has not been taken out, is defeated by the exercise of a power of appointment given to the debtor in a conveyance to the usual uses to bar dower; & that, notwithstanding the appointee had notice of the judgment.—*SKEELES v. SHEARLY* (1837), 3 My. & Cr. 112; 7 L. J. Ch. 3; 1 Jur. 888; 40 E. R. 867, L. C.

Annotation:—*Reid*. *Langton v. Horton* (1842), 1 Hare, 549.

—*See, generally*, JUDGMENTS, Vol. XXX., pp. 157 *et seq.*

769. Lien for taxes collected—Effect of bankruptcy of collector.]—A collector of land tax becomes a bkpt., but before assignment his goods are seized under a warrant from the comrs. of land tax; this creates such a lien as cannot be defeated by the subsequent assignment.—*BRACEY v. DAWSON* (1734), 2 Barn. K. B. 342, 382; 94 E. R. 541, 567; *sub nom.* *BRASSEY v. DAWSON*, Cunn. 65; Kel. W. 290; 7 Mod. Rep. 182; *Ridg. temp. H.* 12; 2 Stra. 978.

d. Rush v. Baker (1734), Cunn. 130; (1743), Park. 1; *R. v. Cotton* (1761), *Giles v. Grover* (1832), 9 Bing. 128; *Balme* (1833), 9 Bing. 471; *Garland v. Carlisle* (1837), S. 421.

See, generally, REVENUE.

PART V. SECT. 7, SUB-SECT. 2.

1. Merchant's lien—Laches.]—COLE v. HALL (1891), 13 P. R. 100.—CAN.

m. ———.]—*KERRUSH v. SENKLER* (1909), 12 W. L. R. 324.—CAN.

n. ———.]—*LEE (A.) & Co. v. HILL* (1909), 11 W. L. R. 611.—CAN.

o. ———.]—*FALSE CREEK LUMBER CO. v. SLOAN* (1911), 17 W. L. R. 526; 3 Alta. L. R. 363.—CAN.

p. ———.]—*RINGLAND v. EDWARDS* (1911), 19 W. L. R. 219.—CAN.

770. Lien on shares in company—Subsequent bankruptcy of shareholder.]—By a clause in the deed of settlement of a banking co., it was stipulated that the co. should have a lien on the shares of such proprietors as were customers & indebted to the bank, & that no share should be transferred without the consent of the directors; & an abstract of these provisions was indorsed on the certificate of the share held by each proprietor. The bkpt., at the time of his bkpcy., was the owner of thirty of these shares, & had in his possession the certificates of ownership thus indorsed, being then largely indebted to the bank for advances:—*Held*: these shares did not pass to his assignee under the clause of reputed ownership in Bankrupts Act, 1825 (c. 16), so as to defeat the lien of the bank, which had been provided for in the deed.—*Re BUTTERWORTH, Ex p. PLANT* (1835), 4 Deac. & Ch. 160, Ct. of R.

Annotation:—*Reid*. *Deering & McQuestion v. Hibernian Joint Stock Banking Co.* (1868), 16 W. R. 578.

—*See, generally*, COMPANIES, Vol. IX., pp. 345, 346.

771. Lien of executor for costs—Payment of fund to court.]—An exor. having been ordered to pay money into ct. is not thereby deprived of his lien on the fund for his costs.—*BLINKINSOP v. FOSTER* (1838), 3 Y. & C. Ex. 205; 8 L. J. Ex. Eq. 8; 160 E. R. 675.

Annotation:—*Mentd.* *Re Griffith, Jones v. Owen* (1904), 73 L. J. Ch. 464.

See, generally, EXECUTORS, Vol. XXIV., p. 824, Nos. 8570, 8571.

772. Purchaser's lien — Purchase going off through default of purchaser.]—An hotel keeper, who was also the owner, agreed, on Mar. 24, 1851, to sell his hotel, & to assist in carrying on the business for two years, receiving half the profits. The purchaser's wife, who was the hotel keeper's daughter, went on the premises & assisted in managing the concern. From the purchaser's letters it appeared that he was not able to supply the funds necessary to carry on the business; & in a letter of May 24, 1851, he wrote thus to the hotel keeper: "You must mortgage or sell the premises." He subsequently asked the hotel keeper to give him a mtge. on the hotel for sums which he claimed to be due to him, & brought an action against the hotel keeper for, among other things, a remuneration in respect of the services of his, the purchaser's, wife above mentioned. The hotel keeper became bkpt. Upon a claim filed by the purchaser against the assignees, claiming that they should elect specifically to perform the agreement, or that it should be declared that the purchaser was entitled to a lien for the sums he had advanced under the contract:—*Held*: although the purchaser would have been entitled to a lien, if the contract had failed through the vendor's default; yet as the purchaser had himself abandoned the contract, the purchaser was not entitled to any lien, & his claim was dismissed.—*DINN v. GRANT* (1852), 5 De G. & Sm. 451; 64 E. R. 1194.

Annotations:—*Expld.* *Whitbread v. Watt* (1901), 70 L. J. Ch. 515. *Reid*. *Cornwall v. Henson*, [1899] 2 Ch. 710.

773. Bond debt charged by testator on realty—Omission by creditor to claim payment out of

BEACH & TURNER (1913), 23 W. L. R. 174, 406; 3 W. W. R. 952; 18 B. C. R. 73; 9 D. L. R. 410.—CAN.

r. ———.]—*Claim including land not subject to lien.]—POLSON v. THOMSON* (1916), 84 W. L. R. 745; 10 W. W. R. 865.—CAN.

JONES v. t. Thresher's Lien—Laches.]—ELSON

personalty.]—In 1806 a bond was executed by A. in favour of B., & by a contemporaneous settlement it was settled by B., the obligee, upon certain trusts. By his will, dated in 1812, A., the obligor, charged his real & personal estate with payment of the bond debt. He shortly afterwards died. Pltf. claimed as assignee of the bond, a valid equitable lien on the obligor's real estate in respect of the bond debt & interest. The defence was that the obligor died possessed of personal estate amply sufficient to pay the bond debt & interest, & that pltf.'s

predecessors in title ought to have obtained payment out of such personal estate, & that not having done so, they waived their right to have recourse to the real estate:—*Held*: pltf. was entitled to a valid charge in equity for the amount of the bond & interest upon the real estate of the obligor.—*JUSTICE v. FOOKS* (1887), 57 L. T. 868.

Lien by deposit of title deeds.]—*See* MORTGAGE. **Secured creditor in bankruptcy—Abandonment of security.**]—*See* BANKRUPTCY, Vol. IV., pp. 368 *et seq.*, Nos. 3413 *et seq.*

Part VI.—Maritime Lien.

See SHIPPING.

v. ELLIS (1911), 16 W. L. R. 373; 4 Sask. L. R. 294.—CAN.

a. — *Bringing action & issuing garnishee summons.*]—*MCCABE v. LEISH*, [1922] 1 W. W. R. 465 63

D. L. R. 705; 15 Sask. L. R. 238.—CAN.

b. *Lien effected by attachment proceedings—Laches.*]—The lien effected by attachment proceedings is only

temporary & expires if the creditor does not prosecute his suit to judgment & execution with all due diligence.—*EVANS v. NOVA SCOTIA GOLD MINES, LTD.* (1896), 40 N. S. R. 119.—CAN.

LIFE INSURANCE.

See INSURANCE.

LIFE-BOATS.

See SHIPPING AND NAVIGATION.

LIFE-SAVING APPLIANCES.

See PUBLIC HEALTH AND LOCAL ADMINISTRATION; SHIPPING AND NAVIGATION.

LIGHT.

See EASEMENTS AND PROFITS À PRENDRE.

LIGHT COIN.

See CRIMINAL LAW AND PROCEDURE.

LIGHT RAILWAYS.

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Part I.—The Statutes of Limitation Generally.

SECT. 1.—NATURE, PURPOSE AND CONSTRUCTION.

1. **Nature**—All in *pari materia*.]—(1) The several statutes of limitation being all in *pari materia* ought to receive a uniform construction notwithstanding any slight variations of phrase, the object & intention being the same (ABBOT, C.J.).

(2) We think that it cannot be said that a cause of action exists unless there be also a person in existence capable of suing (ABBOTT, C.J.).—MURRAY v. EAST INDIA CO. (1821), 5 B. & Ald. 204; 106 E. R. 1167.

Annotations:—As to (1) *Refd.* Tolson v. Kaye (1822), 3 Brod. & Bing. 217. As to (2) *Refd.* R. v. Okeford, Fitzpayne (1830), 9 L. J. O. S. M. C. 12; Cowper v. Godmond (1833), 9 Bing. 748; Perry v. Jenkins (1836), 1 My. & Cr. 118; Rhodes v. Smethurst (1840), 6 M. & W. 351; Webster v. Kirk (1852), 17 Q. B. 944; Re Fuller (1853), 2 E. & B. 573; Thomson v. Harding (1853), 2 E. & B. 630; Sturgis v. Darell (1859), 4 H. & N. 622; Musurus Bey v. Gadban, [1894] 2 Q. B. 352; Smith v. Islington Grdns. (1902), 66 J. P. 664; Meyappa Chetty v. Supramanian Chetty, [1916] 1 A. C. 603. *Generally, Mentd.* Blades v. Free (1829), 7 L. J. O. S. K. B. 211; Ward v. Shew (1833), 9 Bing. 608; Esdalle v. Le Nauze (1835), 1 Y. & C. Ex. 394; Goldstone v. Tovey (1839), 6 Bing. N. C. 98; Davidson v. Stanley (1841), 2 Man. & G. 721; Curlewis v. Mornington (1858), 27 L. J. Q. B. 439; Bateman v. Mid-Wales Ry. (1866), Har. & Ruth. 508; Crouch v. Credit Foncier of England (1873), L. R. 8 Q. B. 374.

2. — **Rule of procedure**.]—LAFOND v. RUDDOCK, No. 9, *post*.

3. **Purpose**—**Curtailment of litigation**.]—DOE d. DUROURE v. JONES, No. 328, *post*.

4. — — —.]—A'COURT v. CROSS, No. 578, *post*.

5. — — — **Quieting of possession**.]—The old English statutes of limitation barred the remedy only, not the right; but the modern ones cut off the right as well as the remedy.

All statutes of limitation have for their object the prevention of the rearing up of claims at great distances of time when evidences are lost; & in all well-regulated countries the quieting of possession is held an important point of policy (LORD ST. LEONARDS, C.).—DUNDEE HARBOUR TRUSTEES v. DOUGALL (1852), 1 Macq. 317, H. L.

6. — — —.]—LYALL v. FLUKER, [1873] W. N. 208.

7. **Construction**—**To be construed liberally**.]—KING v. WALKER, No. 289, *post*.

8. — — —.]—I cannot agree in the position that statutes of this description [Statute of Limitations, 1623 (c. 16)] ought to receive a strict construction, on the contrary, I think they ought to receive a beneficial construction (DALLAS, C.J.).—TOLSON v. KAYE (1822), 3 Brod. & Bing. 217; 6 Moore, C. P. 542; 129 E. R. 1267.

Annotations:—*Mentd.* Doe d. Daniell v. Woodroffe (1842), 12 L. J. Ex. 147; Abergavenny v. Brace (1872), L. R. 7 Exch. 145.

9. — — —.]—The Statute of Limitations is a rule of procedure only; & foreigners suing here are only allowed the time limited by the statute of James, without reference to any limitation which may obtain in the country where the contract was made (JERVIS, C.J.).

The statute is to be construed with liberality

(MAULE, J.).—LAFOND v. RUDDOCK (1853), 13 C. B. 813; 1 C. L. R. 339; 22 L. J. C. P. 217; 21 L. T. O. S. 129; 17 Jur. 624; 1 W. R. 371; 138 E. R. 1422.

10. — — —.]—LYALL v. FLUKER, [1873] W. N. 208.

11. — **Unnecessary exceptions not to be made**.]—PERRY v. JACKSON, No. 284, *post*.

12. — **Uniform construction**—**Notwithstanding slight variation of phrase**.]—MURRAY v. EAST INDIA CO., No. 1, *ante*.

13. — — —.]—The language of this latter statute [Civil Procedure Act, 1833 (c. 42)] is the same, *mutatis mutandis*, as that used in the statute of James, & the object seems to have been to add actions upon specialties & some others to those mentioned in that statute. It would therefore seem but reasonable that the same construction should be put upon the provisions of the latter statute as has been put upon the former, so far as such a construction may be applicable (WIGHTMAN, J.).—STURGIS v. DARELL (1860), 6 H. & N. 120; 29 L. J. Ex. 472; 2 L. T. 808; 6 Jur. N. S. 1351; 8 W. R. 653; 158 E. R. 50, Ex. Ch.

Annotation:—*Refd.* Swindell v. Bulkeley (1886), 18 Q. B. D. 250.

14. — **All persons bound**—**Unless expressly excluded**.]—It may be stated as a general rule in legislation as to statutes passed for the purpose of limitation, that all parties are bound but for exceptions expressly contained in them (LORD CRANWORTH, C.).—Re WEST (1853), 3 De G. M. & G. 198; 21 L. T. O. S. 277; 1 W. R. 421; 43 E. R. 79, L. C.

Annotation:—*Refd.* Re Smedley (1864), 10 L. T. 432.

Application of statutes to dominions & dependencies.]—See DEPENDENCIES, Vol. XVII., p. 464, Nos. 314, 315.

SECT. 2.—APPLICATION.

SUB-SECT. 1.—ARBITRATION.

15. **Submission to arbitration**—**Whether defence of limitation excluded**.]—A submission to arbitration does not *per se* exclude the right of either party to raise the defence of the statute of limitations; but if it be intended to exclude such a defence, an express term to that effect must be imported into the agreement of submission.—Re ASTLEY & TYLDESLEY COAL & SALT CO. & TYLDESLEY COAL CO. (1899), 68 L. J. Q. B. 252; 80 L. T. 116; 15 T. L. R. 154.

Annotation:—*Consd.* Cayzer, Irvine v. Board of Trade (1926), 95 L. J. K. B. 1054.

16. — **Arbitration as between Crown & subject**.]—If the Crown enters into a submission to arbitration in a matter which could be a subject of arbitration between subjects, & if in such an arbitration between subjects the statute of limitations would be imported, the Crown enters into the submission on the same terms as would be applicable to a submission between subjects, & there is in the Crown no quality which prevents

PART I. SECT. 1.

71. **Construction**—**To be construed liberally**.]—ADMINISTRATOR - GENERAL OF BENGAL v. KRISTO KAMINI DASSEE (1904), 1 L. R. 31 Calc. 519; 8 C. W. N.

500.—IND.

711. — — —.]—The provisions of the Limitation Acts should receive a fair & not too technical construction.—PACHIAPPA ACHARI v. POOJALI SEENAN (1905), 1 L. R. 28 Mad.

557.—IND.

a. — — —.]—The Statute of Limitations should not be so construed as to protect or be a means of fraud.—FORSYTH v. GRIFFIN (1854), James 241.—CAN.

Sect. 2.—Application: Sub-sects. 1, 2, 3 & 4.]

it from taking advantage of the statute.—*CAYZER, IRVINE & Co. v. BOARD OF TRADE* (1925), 95 L. J. K. B. 134; 42 T. L. R. 163; 70 Sol. Jo. 347; *reversd.* on other grounds (1926), 95 L. J. K. B. 1054, C. A.

— **Whether acknowledgment to bar statute.]—**

See Part II., Sect. 8, sub-sect. 6, I. (e), *post*.

17. The award—Not within Statute of Limitations, 1623 (c. 16)—Award under seal.]—*HODSDEN v. HARRIS*, No. 81, *post*.

18. ———.]—An award under the hands & seals of arbitrators is not within above Act.—*AMBROSE v. BROOKS* (1738), West temp. Hard. 567; 25 E. R. 1088.

19. ———.]—Above Act is not applicable to debt by decree order or award.—*MILDRED v. ROBINSON* (1816), 19 Ves. 585; 34 E. R. 633.

*Annotation:—**Reffd.* *White v. Parnter* (1829), 1 Knapp, 179.

20. ———.]—Award under Lands Clauses Act, 1845 (c. 18).—*TURNER v. MIDLAND RY. Co.*, No. 133, *post*.

SUB-SECT. 2.—AGREEMENTS NOT TO SUE.

21. Statute prevented from running.]—A debtor conveyed his life interest in certain property in trust for creditors, parties to the deed; & the creditors, in consideration thereof, granted to the debtor licence to reside & attend to his affairs in any place he might think proper, without suit or molestation, in his person or his goods, chattels & effects, by any such creditors; & that, in case of any suit or molestation by any of such creditors, contrary to the true intent & meaning of such licence, the debtor should be wholly released & acquitted of the debt, & the deed might be pleaded in bar:—*Held*: the existence of the trust deed, & the covenants & licence therein contained, prevented the operation of Statute of Limitations during the life of the debtor in respect of the debts, for the payment of which the trust was created.—*O'BRIEN v. OSBORNE* (1852), 10 Hare, 92; 20 L. T. O. S. 201; 16 Jur. 960; 68 E. R. 852.

22. ———.]—A., being entitled to certain property for life, with remainder to his children in case they survived him, joined with his two children in executing a creditors' deed, dated in 1831, whereby in consideration of an assignment by the father of his life estate to his children, the two children assigned their interests, contingent upon the death of their father in their lifetime, upon trust to pay the debts of both father & son. The son also covenanted to pay £1,000 towards the debts. The debts were admitted by the deed & comprised in schedules, & the creditors covenanted not to sue for their debts during the continuance of the trusts of the deed. The children died in 1839 before the father, who then became absolutely entitled to the reversion of the property, as heir-at-law of the original donor, & he executed a voluntary assignment of it, & died in 1851:—*Held*: the time at which the creditors' right to sue revived, was the death of the surviving child, & the simple contract creditors were barred by Statute of Limitations, 1623 (c. 16).—*IVENS v. ELWES* (1854), 3 Drew. 25; 3 Eq. Rep. 163; 24 L. J. Ch. 249; 24 L. T. O. S. 187; 1 Jur. N. S. 6; 3 W. R. 119; 61 E. R. 810.

*Annotations:—**Mentd.* *Brewe v. Cox* (1855), 3 W. R. 276; *Barnes v. City of London Real Property Co.*, *Webster v. Same*, *Sollas v. Same*, *Kersey v. Same*, *Oakley, Sollas v. Same* (1918), 87 L. J. Ch. 601.

SUB-SECT. 3.—BANKRUPTCY.

23. Whether operation of statutes ended by bankruptcy.]—The Statute of Limitations has nothing to do with the bkpcy. laws. When a bkpcy. ensues, there is an end to the operation of that statute, with reference to debtor & creditor (*BACON, C.J.*).—*Re WESTBY, Ex p. BANKING CORPN.* (1879), 10 Ch. D. 776; 48 L. J. Bcy. 89; 39 L. T. 673; 27 W. R. 292.

*Annotations:—**Mentd.* *Re Goaling, Ex p. Pitt* (1882), 20 Ch. D. 308; *Re Smith, Green v. Smith* (1883), 24 Ch. D. 672.

Proof of debts—Laches.]—See **BANKRUPTCY**, Vol.

many previously.]—See **BANKRUPTCY**, Vol. IV., p. Nos. 4380–4381.

— **On statute barred debt.]—**See **BANKRUPTCY**, Vol. IV., p. 497, No. 4476.

Action against trustee—Defence of delay.]—See **BANKRUPTCY**, Vol. V., p. 994, No. 8120.

Compositions & schemes of arrangement—Realisation of property.]—See **BANKRUPTCY**, Vol. V., p. 1098, No. 8964.

SUB-SECT. 4.—CHARGES ON PERSONALTY.

24. No statutes of limitation applicable—Annuity.]—An annuity given by a will, forming no charge upon land, but being personal only, is not within Real Property Limitation Act, 1833 (c. 27), s. 42.—*ROCH v. CALLEN* (1848), 6 Hare, 531; 17 L. J. Ch. 144; 12 Jur. 112; 67 E. R. 1274.

25. ———.]—An annuity which is bequeathed payable out of the personal estate of a testator does not come within Real Property Limitation Act, 1833 (c. 47), s. 42, & therefore arrears of such an annuity after thirty-seven years of inadequate payments of it, ordered to be paid.—*Re ASHWELL'S WILL* (1859), John. 112; 33 L. T. O. S. 300; 70 E. R. 360.

26. ———.]—*Lien.*—*L.*, a partner in the firm of *B. & co.*, retired from it, & shortly afterwards borrowed from *pltf.* £20,000 on his promissory note payable on May 31, 1848, & agreed by way of collateral security to give them a lien on his share of the assets of the partnership, which had not yet been ascertained & paid. In furtherance of this, *B.*, one of the continuing partners, in July, 1847, at *L.*'s request, & with the consent of the other continuing partners, gave *pltf.* an order on *C. & co.*, the agents of *B. & co.*, directing them to pay to *pltf.*, out of the funds of *B. & co.* in their hands, the sum of £5,000, & engaged to pay to *pltf.* the residue of *L.*'s share. *C. & co.* had not at the time, nor afterwards, nearly so much as £5,000 of *B. & co.*'s money in their hands. In Aug. 1847, *pltf.* presented the order to *C. & co.* & were informed they had not funds to pay it. *Pltf.* gave *B.* no notice of this. In Sept. 1847, *C. & co.* became insolvent, without having paid any part of the £5,000. The promissory note was dishonoured. *B.* died in Feb. 1849. The share of *L.* was finally ascertained in 1853, & *L.* died in Mar. 1855. In Nov. 1855, *pltf.* filed this bill to enforce their lien:—*Held*: *pltf.* were not in the circumstances barred from relief by delay, there being no statutory bar.—*GLYN v. HOOD* (1860), 1 De G. F. & J. 334; 29 L. J. Ch. 204; 1 L. T. 353; 6 Jur. N. S. 158; 8 W. R. 248; 45 E. R. 388, L. JJ.

27. ———.]—In 1886 a vendor contracted in writing to sell free from incumbrances a contingent reversionary interest in personalty to a purchaser who paid a deposit on the purchase-money. The reversion proved to be incumbered,

& the purchaser insisted on a conveyance free from incumbrances, but was told that the incumbrances would be paid off, which was never done. The vendor afterwards created further charges on the reversionary interest to persons who had notice of the contract, & was adjudicated a bkpt. in 1888. In the same year the bkpcy. was annulled, upon the acceptance of a composition by his creditors & under the scheme of arrangement the whole of his property was sold by his trustee. In 1891 the purchaser became bkpt., having previously assigned his interest under the contract to P., who subsequently assigned the same to B. No attempt having been made to enforce the contract, the reversion fell into possession in 1895, & B. shortly afterwards claimed specific performance, or in the alternative a lien for the deposit paid by the purchaser:—*Held*: (1) the delay was a bar to any claim for specific performance; (2) the purchaser was a secured creditor of the vendor in respect of the deposit, & the purchaser must in the circumstances be treated as having elected to rely on his security; & as no statute of limitations applied, B. was entitled to enforce his lien.—*LEVY v. STODDON*, [1898] 1 Ch. 478; 67 L. J. Ch. 313; 78 L. T. 185; *affd.*, [1899] 1 Ch. 5; 68 L. J. Ch. 19; 79 L. T. 364, C. A.

Annotations:—*As to* (1) *Reid*. *Cornwall v. Henson*, [1899] 2 Ch. 710. *Generally*, *Mentd.* *Davies v. Thomas*, [1900] 2 Ch. 462.

28. ——— Vendor's Lien.—No Statute of Limitations is applicable to a charge on personal estate, whether by way of vendor's lien or otherwise: consequently the right to the recovery of the debt is not barred by lapse of time, & interest is recoverable for the whole period from the date on which the debt was incurred.

In 1874 a son, being entitled in reversion upon the death of his father to a trust legacy of £5,000 under a will of which the father was sole surviving trustee & exor., sold & assigned his reversionary interest to his father by deed absolutely for £1,500. The deed expressed that the £1,500 was paid as the consideration money by the father to the son, & a receipt for the money was indorsed on the deed, but in fact the money was never paid. In 1900 the father died, whereupon the son claimed a lien for the £1,500 upon the £5,000 legacy, which was then in the hands of the father's exors., together with interest from the date of the assignment:—*Held*: a vendor's lien on personal estate was not subject to any statutory or other bar.—*Re STUCLEY, STUCLEY v. KEKEWICH*, [1906] 1 Ch. 67; 75 L. J. Ch. 58; 93 L. T. 718; 54 W. R. 256; 22 T. L. R. 33; 50 Sol. Jo. 58, C. A.

Annotation:—*Mentd.* *Re Beirnsstein, Barnett v. Beirnsstein*, [1925] Ch. 12.

29. ——— Mortgage.—In 1824, a reversionary interest in funds, vested in trustees, was assigned to secure the payment of a sum on the following year. The reversion fell in in 1860, no notice having been given to the trustee, nor any interest paid or acknowledgment made in the meantime:—*Held*: the mtgee.'s right against the fund was not barred by the Statutes of Limitation or the lapse of time.—*Re LOWES' SETTLEMENT* (1861), 30 Beav. 95; 54 E. R. 825.

30. ——— ————By an indenture made in 1858, G. mortgaged to his father a share of personal estate to which G. was entitled in reversion, expectant on his mother's death. The father died in 1872, having made another son, C., his exor. & residuary legatee. The mother died in 1887. C. shortly afterwards sent a letter to G., inclosing the indenture, & stating that he handed it over to G. in compliance with the wish of their late mother.

C. afterwards changed his mind, & claimed the share under the mtge. No interest had ever been paid on the mtge. debt by G., & no acknowledgment given by him in respect of it:—*Held*: the right of C. was not barred by the Statute of Limitations.—*Re HANCOCK, HANCOCK v. BERREY* (1888), 57 L. J. Ch. 793; 59 L. T. 197; 36 W. R. 710.

Annotations:—*Appld.* *Re Lake's Trusts* (1890), 63 L. T. 416. *London & Midland Bank v. Mitchell*, [1899] 2 Ch. 161. *Apprvd.* *Re Stucley, Stucley v. Kekewich*, [1906] 1 Ch. 67. *Expld.* *Re Hazeldine's Trusts* (1907), 77 L. J. Ch. 97.

31. ——— ————In the case of a mtge. of reversionary personal estate, where there is no covenant for payment of interest after the date stipulated in the deed for the repayment of the capital with interest, the ct. will allow to the mtgee. in a redemption or foreclosure action interest by way of damages at the rate fixed by the deed, to be paid up to the date stipulated for payment, during the whole period, not exceeding twenty years, during which no interest had been paid; & there is no analogy between a mtge. of personal estate & one of real estate to induce the ct. to limit the amount of arrears of interest recoverable to six years.

No doubt equity, in the case of an equitable debt, follows the simple analogy afforded to it by the law applicable to a legal debt; but I never heard that a ct. of equity is under any obligation to follow, as regards personal estate, the analogy of a statute which applies to real estate. That is not an analogy within the application of the rule that equity follows the law (*KAY, J.*).—*MELLERSH v. BROWN* (1890), 45 Ch. D. 225; 60 L. J. Ch. 43; 63 L. T. 189; 38 W. R. 732.

Annotation:—*Apprvd.* *Re Stucley, Stucley v. Kekewich*, [1906] 1 Ch. 67.

32. ——— ————*LONDON & MIDLAND BANK v. MITCHELL*, No. 128, *post*.

33. ——— ——— Joint mortgage of realty & personalty—Right to realty barred.—Where real estate & a life policy have been included in one mtge. to secure one indivisible sum, the mtged. properties being subject to one & the same proviso for redemption, & the mtgee. has been in possession of the real estate for more than twelve years without any acknowledgment of the mtgor.'s title, so that the mtgagor.'s right to redeem the real estate has become barred by Real Property Limitation Act, 1874 (c. 57), s. 7, his right to redeem the policy is also barred, not by analogy to the statute, but because, it having become impossible for the mtgor. to require a reconveyance of the real estate, it has become equally impossible, according to the rules regulating the administration of mtges. in a ct. of equity, for him to require a reassignment of the policy, the real estate & the policy together constituting one security for the debt.—*CHARTER v. WATSON*, [1899] 1 Ch. 175; 68 L. J. Ch. 1; 79 L. T. 440; 47 W. R. 250; 43 Sol. Jo. 12.

Annotation:—*Reid.* *Re Jauncey, Bird v. Arnold*, [1926] Ch. 471.

34. ——— ——— ————There is no statute of limitation applying to a mtge. of personalty (*SARGANT, J.*).—*Re WITHAM, CHADBURN v. WINFIELD*, [1922] 2 Ch. 413; 92 L. J. Ch. 22; 128 L. T. 272.

Annotation:—*Consd.* *Re Jauncey, Bird v. Arnold*, [1926] Ch. 471.

35. ——— ——— ————Although the right of the mtgee. to the land is barred, he is not barred from his right to enforce the security so far as he may against any personal estate comprised in the security, & available (*RUSSELL, J.*).—*Re JAUNCEY, BIRD v. ARNOLD*, [1926] Ch. 471; 95 L. J. Ch. 377; 134 L. T. 728; 70 Sol. Jo. 527.

Sect. 2.—To what debts and actions limitation applies: Sub-sects. 4 & 5, A. & B.; sub-sects.

SUB-SECT. 4.—ARBITRATION AWARDS.
See Nos. 17-19, *ante*.

SUB-SECT. 5.—ACTIONS OF TORT.

A. *In General.*

See Statute of Limitations, 1623 (c. 16).

B. *Actions on the Case.*

53. General rule.]—I am of opinion that Jud. Act, 1873 (c. 66), did not alter or touch Statute of Limitations at all, & that that statute still applies to the circumstances which constituted the actions named in it, that is to say, that if the circumstances would have constituted an action on the case or an action of trespass, although the action which involves the remedy sought would not now be called an action on the case or an action of trespass, yet, notwithstanding, Statute of Limitations applies to it, if the facts are such as would have supported an action on the case or an action of trespass (BRETT, L.J.).—GIBBS v. GUILD, No. 1819, *post*.

See Statute of Limitations, 1623 (c. 16), s. 3.

54. Within Statute of Limitations, 1623 (c. 16).]

—An action on the case is within above Act.—ROBINSON v. WALKER (1650), Sty. 230; 82 E. R. 669. *Annotation:—Refd.* Crosier v. Tomlinson (1676), Freem. K. B. 208.

55. — Seduction.]—Where pltf. complained of a plea of trespass for that deft. with force & arms assaulted & seduced pltf.'s wife whereby he lost the comfort of her society, etc., against the peace, etc., to his damage, etc. Whether this be trespass or case, & former authorities have considered it to be case, at any rate a plea of not guilty *infra sex annos* is good on general demurrer.—MACFADZEN v. OLIVANT (1805), 6 East, 387; 2 Smith, K. B. 486; 102 E. R. 1335.

56. — Recovery of contribution from local authority.]—The justices of a county, as the local authority for the county, neglected between the years 1869 & 1878 to recoup to pltf.s, as the local authority for a borough within the county, the proportionate amount contributed by the borough to the expenses incurred by the local authority of the county, in carrying out the provisions of the Contagious Diseases (Animals) Act, 1869 (c. 70), which they were bound to repay under sect. 97 of that Act. After the passing of the Local Government Act, 1888 (c. 41), pltf.s. sued defts., as successors of the local authority for the county, to recover the sums which should have been recouped:—*Held*: if any action would lie, it would be an action on the case, and not an action for debt on a statute, & therefore the Statute of Limitations, 1623 (c. 16), was a bar to the claim.—SALFORD CORPN. v. LANCASHIRE COUNTY COUNCIL (1890), 25 Q. B. D. 384; 59 L. J. Q. B. 576; 63 L. T. 409; 55 J. P. 85; 38 W. R. 661; 6 T. L. R. 362, C. A.

Annotations:—Refd. Aylott v. West Ham Corpn., Sisson v. West Ham Corpn. (1926), 90 J. P. 99. *Mentd.* Bootle-cum-Linacre Corpn. v. Lancashire County Council (1890), 60 L. J. Q. B. 323; Everett v. Griffiths, [1924] 1 K. B. 941.

57. — Breach of duty by director.]—(1) An action against directors & promoters of a co. under 53 & 54 Vict. c. 64 [see, now, Companies (Consolidation) Act, 1908 (c. 69), s. 84], is not an

action for "penalties, damages, or sums of money given to the party grieved" by a statute within Civil Procedure Act, 1833 (c. 42), s. 3, & is not subject to the limitation of two years imposed by that sect. An action under 53 & 54 Vict. c. 64, would under the old forms of pleading have been an action on the case for breach of duty, & by analogy to the old actions the period of limitation would be six years under Statute of Limitations, 1623 (c. 16), s. 3.

(2) A statute of limitations cannot begin to run unless there are two things present, a party capable of suing & a party liable to be sued (VAUGHAN WILLIAMS, L.J.).—THOMSON v. CLANMORRIS (LORD), [1900] 1 Ch. 718; 69 L. J. Ch. 337; 82 L. T. 277; 48 W. R. 488; 16 T. L. R. 296; 44 Sol. Jo. 346; 8 Mans. 51, C. A.

Annotations:—As to (1) *Consd.* Jarvis v. Surrey County Council, [1925] 1 K. B. 554; Aylott v. West Ham Corpn., Sisson v. West Ham Corpn. (1926), 20 J. P. 99. *Refd.* Shinman v. Lyons (1922), 38 T. L. R. 560.

58. — Rebate of railway rates.]—CHAR- RINGTON, SELLS, DALE & CO. v. MIDLAND RY. CO. (1901), 11 Ry. & Can. Tr. Cas. 222; 17 T. L. R. 761.

Annotation:—Mentd. British Portland Cement Manufacturers v. G. E. Ry., Thomas v. Mid. Ry. (1914), 111 L. T. 586.

SUB-SECT. 6.—ACTIONS GIVEN BY STATUTE.

59. Action brought under statute — Within Statute of Limitations, 1623 (c. 16).]—An action of debt by a railway co. against one of its members for calls under Companies Clauses Consolidation Act, 1845 (c. 16), & the special Act is an action founded upon a statutory liability; & therefore a plea that the action is founded upon contracts without specialty & that the alleged causes of action did not, nor did any or either of them accrue within six years before the suit is a bad plea, the proper limitations to such an action being twenty years, by Civil Procedure Act, 1833 (c. 42), s. 3.

There may undoubtedly be cases where a statute enables an action to be brought which nevertheless is not an action on the Act of Parliament. There may be statutes which may be in part or in whole the foundation of an action of *assumpsit* (MAULE, J.).—CORK & BANDON RY. CO. v. GOODE (1853), 13 C. B. 826; 1 C. L. R. 345; 22 L. J. C. P. 198; 21 L. T. O. S. 141; 17 Jur. 555; 1 W. R. 410; 138 E. R. 1427.

Annotations:—Appld. Shepherd v. Hills (1855), 11 Exch. 55. *Distd.* Thomson v. Clanmorris, [1900] 1 Ch. 718. *Consd.* Aylott v. West Ham Corpn., Sisson v. West Ham Corpn. (1926), 95 L. J. Ch. 533. *Mentd.* Re Royal Bank of Australia, Robinson's Exor.'s Case (1856), 6 De G. M. & G. 572; Re Manchester & Milford Ry., [1897] 1 Ch. 276; Shepherd v. Bray (1906), 75 L. J. Ch. 633.

60. — Maintenance of pauper lunatic.]—Deceased had, for over six years prior to her death, been supported as a pauper lunatic at the county lunatic asylum. During the whole of this period she was, in fact, entitled to an annuity of £24 16s. 6d., payable by the Comrs. for the Reduction of the National Debt. This fact only came to the knowledge of the guardians at the time of her death, or shortly thereafter:—*Held*: the guardians were creditors of deceased, within Poor Law Amendment Act, 1849 (c. 103), ss. 16, 17, &, as such, entitled to administration of her estate. The claim of the guardians was not limited to the period of twelve months prescribed by Poor Law Amendment Act, 1849 (c. 103), s. 16, but that,

PART II. SECT. 2, SUB-SECT. 5.—B.

b. *Damages for personal injury.]*
—An action for damages for injuries

sustained by collision with a motor vehicle is not an action for a penalty, damages or a sum of money given by any statute, but an action on the case

& not barred in two years.—MAITLAND v. MACKENZIE & TORONTO RY. CO. (1912), 23 O. W. R. 80; 4 O. W. N. 109; 6 D. L. R. 336.—CAN.

in respect of such period, they were entitled absolutely to repayment, under the Statute, & as to a further period, not exceeding five years, making six years in all, they were entitled to come in & claim as ordinary creditors, notwithstanding the fact of their having taken no steps to recover payment for such expenditure, during the lifetime of the deceased pauper lunatic.—**LAMBETH GUARDIANS v. BRADSHAW (NEXT OF KIN)** (1886), 57 L. T. 86; 50 J. P. 472.

61. — — — — —.—Under Lunatic Asylums Act, 1853 (c. 97), s. 104, the guardians of the poor of a parish to which a pauper lunatic is chargeable are entitled in the event of his becoming entitled to property to recover only six years' arrears in respect of the sums paid by them for his maintenance in an asylum.—**Re NEWBEGIN'S ESTATE, EGGLETON v. NEWBEGIN** (1887), 36 Ch. D. 477; 56 L. J. Ch. 907; 57 L. T. 390; 36 W. R. 69; 3 T. L. R. 804.

*Annotations:—***Apld.** **Re Watson, Stamford Union v. Bartlett**, [1899] 1 Ch. 72. **Consd.** **Re Clabbon**, [1904] 2 Ch. 465. **Distd.** **Wandsworth Union Grdns. v. Worthington**, [1906] 1 K. B. 420. **Refd.** **Birkenhead Union Grdns. v. Brookes** (1906), 70 J. P. 406; **Pontypridd Union Grdns. v. Drew**, [1926] 1 K. B. 567. **Mentd.** **Re Rhodes, Rhodes v. Rhodes** (1890), 44 Ch. D. 94; **Laver v. Botham** (1894), 64 L. J. Q. B. 110; **Winkle v. Bailey**, [1897] 1 Ch. 123; **Re Tye** (1899), 81 L. T. 743.

62. — — — — —.—A lunatic not so found by inquisition was maintained in a pauper lunatic asylum by the guardians of the S. Union for sixteen years prior to her death in 1898. In 1895, the lunatic having become entitled to a fund, a receiver was appointed in lunacy; & thereupon the guardians gave notice of a claim for past & future maintenance to the Master in Lunacy, who replied that the claim would be borne in mind in dealing with the fund. The fund was, however, not recovered by the Lunacy authorities till after the death of the lunatic, & was afterwards transferred to the Ch. Div. In an action by the guardians against the legal personal representative of the lunatic for arrears of maintenance:—**Held**: that the plaintiffs were entitled only to six years' arrears from the commencement of the action.—**Re WATSON, STAMFORD UNION v. BARTLETT**, [1899] 1 Ch. 72; 68 L. J. Ch. 21; 79 L. T. 462; 47 W. R. 359.

*Annotations:—***Distd.** **Wandsworth Union v. Worthington**, [1906] 1 K. B. 420. **Refd.** **Pentypidd Union Grdns. v. Drew**, [1926], 1 K. B. 567.

63. — — — — — Criminal lunatic—Claim by Crown.—Under the Criminal Lunatics Act, 1884 (c. 64), s. 10 (3), which incorporates by reference the language of s. 104 of the Lunatic Asylums Act, 1853 (c. 97), the cost of the maintenance of a criminal lunatic can be recovered by the Crown against property to which the lunatic has become entitled, as being due under an implied obligation to pay for that maintenance as a necessary; & this is a statutory liability for the whole amount expended in respect of which there is no limitation against the Crown.—**Re J. (A PERSON OF UNSOUND MIND)**, [1909] 1 Ch. 574; 78 L. J. Ch. 348; 100 L. T. 281; 21 Cox, C. C. 766, C. A.

64. — — — — — Breach of duty by director.—**THOMSON v. CLANMORRIS (LORD)**, No. 57, *ante*.
Paupers.—See POOR LAW.

65. — — — — — Wages payable under statutory authority.—Defts., a borough council, resolved in Sept. 1914, to grant to any employee called up or volunteering for service with the Forces full civil pay less his Service pay & less his separation allowance, if any. At that time defts. had no power to make such payments. Pltf., A., who was an employee of defts., accepted the offer by enlisting in Nov. 1914. In 1916 the Local Government (Emergency Provisions) Act, 1916 (c. 12), came into force, & by sect. 1, sub-sect. 1, authorised any local authority to pay to an employee serving with the Forces the amount of his civil remuneration less his naval or military pay & allowances, & by sect. 1, sub-sect. 2, provided that in the case of an employee who had enlisted before the Act such an offer should be binding on the local authority. From Nov. 1914, to pltf.'s demobilisation in Mar. 1919, defts. paid to him weekly sums calculated on the assumption that his "full civil pay" was the pay that he was receiving at the date of his enlistment & not the increased pay that he would have received if he had stayed in defts.' employment. In an action brought on Jan. 1, 1925, to recover payments on the higher basis defts. pleaded (*inter alia*) Statute of Limitations, 1623 (c. 16), which makes the period of limitation six years in the case of simple contracts, but pltf. contended that the action was brought on Local Government (Emergency Provisions) Act, 1916 (c. 12), & that therefore the statute limitations applicable was Civil Procedure Act, 1833 (c. 42), which prescribes twenty years as the period of limitation in the case of an action brought on a specialty:—**Held**: even if the increase in salary to which pltf. would have become entitled if he had continued in the employment of defts. were included in "full civil pay" the action was brought on a simple contract & not a specialty, & therefore Statute of Limitations, 1623 (c. 16), applied.—**AYLOTT v. WEST HAM CORPN., Sisson v. WEST HAM CORPN.** (1926), 95 L. J. Ch. 533; 135 L. T. 424, 427; 90 J. P. 165; 42 T. L. R. 516; 24 L. G. R. 429, C. A.

66. Action for statutory debt—Not within Statute of Limitations, 1623 (c. 16).—Statute of Limitations, 1623 (c. 16), does not extend to 2 Edw. 6, c. 13.—**TALORY v. JACKSON** (1638), Cro. Car. 513; 79 E. R. 1043.

*Annotation:—***Refd.** **Cork & Bandon Ry. v. Goode** (1853), 13 C. B. 826.

67. — — — — —.—**CORK & BANDON RY. CO. v. GOODE**, No. 59, *ante*.

68. — — — — —.—**SALFORD CORPN. v. LANCASHIRE COUNTY COUNCIL**, No. 56, *ante*.

— **Specialty debt.**—See Part III., Sect. 1, sub-sect. 5, *post*.

SUB-SECT. 7.—BILLS OF EXCHANGE.

See Statute of Limitations, 1623 (c. 16), s. 3.

69. Action within statute.—The Statute of Limitations, 1623 (c. 16), is a good plea to an action on a bill of exchange.—**RENEW v. AXTON** (1687), 1 Carth. 3; 90 E. R. 607.

PART II. SECT. 2, SUB-SECT. 6.

66 i. Action for statutory debt—Not within Statute of Limitations, 1623 (c. 16).—An action for the recovery of taxes under Assessment Act, s. 144, is an action for debt upon the statute; Statute of Limitations, 1623, does not apply to it, & therefore, the right of action is not barred by a lapse of six years.—**PIPESTONE v. HUNTER**

(1916), 32 W. L. R. 614; 9 W. W. R. 1152.—CAN.

66 ii. — — — — —.—The price of seeds supplied under Seed Supply (Ireland) Act, 1880, is recoverable by the guardians, notwithstanding the lapse of more than six years from the striking of the special rate.—**MAGHERAFELT UNION v. GRIBBEN** (1889), 24 L. R. Ir. 520.—IR.

PART II. SECT. 2, SUB-SECT. 7.

69 i. Action within statute.—**ST. JOHN v. RYKERT** (1884), 10 S. C. R. 278.—CAN.

69 ii. — — — — —.—**M'DONAGH v. NATIONAL BANK** (1896), 31 I. L. T. 64.—IR.

69 iii. — — — — —.—**HAYES v. NEAVE** (1821), 1 Nfld. L. R. 259.—NFLD.

Sect. 2.—To what debts and actions limitation applies: Sub-sects. 7, 8 & 9, A. & B.; sub-sects. 10 & 11.]

70. —.]—CHEVELY v. BOND, No. 43, ante.

When time begins to run.]—See Sect. 4, sub-sect. 2, B., post.

Conflict of laws.]—See BILLS OF EXCHANGE, Vol. VI., p. 437, Nos. 2813–2816.

SUB-SECT. 8.—THE CROWN.

See Statute of Limitations, 1623 (c. 16), s. 3.

71. Whether Crown affected.]—In *assumpsit* against exors., declaration stated that testator made his promissory note, & thereby promised to pay J. on demand £200, & delivered the note to him, whereby testator became liable to pay, but did not pay, & at the time of his death was indebted to J. for the amount of the sum secured by the note, & interest. It then averred, that afterwards, & after the death of J., the money specified in the note being & remaining wholly due & unsatisfied, to wit, on, etc., at, etc., before A., one of the coroners for the county of N., it was found, upon view of the body of J., then & there lying dead, by the oaths of honest & lawful men, of, etc., that J. feloniously did kill & murder himself, as by the inquisition before the coroner remaining of record more fully appeared, by reason of which said inquisition, & by force of the felony, J. forfeited to the King the promissory note & the money due thereon. The declaration then set forth a grant under the King's sign manual to pltf. of the note & money due thereon, as mentioned in a certain other inquisition, & that His Majesty delivered the note to pltf., of which debts, after the death of testator, had notice. Breach, non-payment by testator or debts. since his death. Plea (a) *non-assumpsit* testator; (b) the note became due & payable to J. in his lifetime, & the causes of action did not accrue to him within six years before the exhibiting of the bill; upon which plea issue was taken & joined; (c) *nul tiel* record of the inquisition taken before the coroner—upon which issue was taken; (d) that there was no such grant as alleged in the declaration. On motion by pltf. for judgment *non obstante veredicto*:—*Held*: the plea of the Statute of Limitations, that the causes of action did not accrue to J. within six years, was bad, inasmuch as it did not show that J. was barred by the statute at the time of his death; & if he was not, then the King, not being expressly mentioned in the statute, was not within the statute, & his rights were not barred.—LAMBERT v. TAYLOR** (1825), 4 B. & C. 138; 6 Dow. & Ry. K. B. 188; 3 L. J. O. S. K. B. 160; 107 E. R. 1010.**

Annotations:—*Reid*. Doe d. Watt v. Morris (1835), 1 Hodg. 215. *Mentd.* Plummer v. Lee (1837), 5 Dowl. 755; Gwynne v. Burnell (1840), 6 Bing. N. C. 453; R. v. Toole (1867), 16 W. R. 439.

72. —.]—Moneys issued by the Crown to an army agent for the pay, subsistence, etc., of officers, & carried in the books of the agent to the credit of the respective officers, but not paid over to them, & not made the subject of any private arrangement with them, continue the moneys of the Crown in the hands of the agent, for which he

is accountable to the Crown; & may be called back by the A.-G., as representing the Crown, even after a lapse of more than thirty years.—**BRUMMELL v. M'PHERSON** (1828), 5 Russ. 263; 7 L. J. O. S. Ch. 1; 38 E. R. 1026, L. C.

73. —.]—Pltfs. entered into an agreement with debts. for the use of debts.' hall for county ct. purposes. After some years the term was surrendered by operation of law, but by inadvertence pltfs. continued to pay rent for the hall. To a claim by pltfs. to recover the sums so paid as money paid under a mistake of fact debts. pleaded the Statute of Limitations, 1623 (c. 16):—*Held*: notwithstanding the fact that pltfs. were an incorporated body, they were mere agents of the Crown in the matter, & as the Statute of Limitations, 1623 (c. 16), does not bind the Crown, it afforded no answer to the claim.—PUBLIC WORKS COMRS. v. PONTYPRIDD MASONIC HALL CO.**, [1920] 2 K. B. 233; 89 L. J. K. B. 607; 123 L. T. 334; 84 J. P. 139; 36 T. L. R. 459; 18 L. G. R. 771.**

74. — Debt due to Crown debtor.]—The Statute of Limitations, 1623 (c. 16), may be pleaded to a *sci. fa.* issued by the Crown against the drawer of a bill of exchange in the hands of the Crown debtor & which has been seized by the sheriff under an inquisition on the prerogative process.

I admit that as between the Crown & its immediate debtor this statute has no application. But when the question is what debt was due from the debt. to the Crown's debtor the rule is different; for the Crown is only entitled to its debtor's rights & cannot create or revive any right in the person of its debtor if none ever existed or it has become extinct. In this case nothing could have been recovered by the debtor of the Crown against this debt. if the statute had been pleaded. I, therefore, consider that it is also a good bar to the suit of the Crown who stands precisely in the same situation as its debtor & that this is a plea which the law allows (**RICHARDS, C.B.**).—**R. v. MORRALL** (1818), 6 Price, 24; 146 E. R. 730.

Annotation:—*Distd.* Lambert v. Taylor (1825), 4 B. & C. 138.

75. — Mandamus.]—The Crown is not limited to any time within which to make such an application [*mandamus*].—*Re* WOOTTON (INHABITANTS) (1818), 6 Price, 103; 146 E. R. 754.

76. —.]—A plea that the alleged causes of action did not accrue within six years is a bad plea to a declaration for a *mandamus*, as Statute of Limitations does not bar an application for such a writ.—WARD v. LOWNDES** (1859), 1 E. & E. 956; 29 L. J. Q. B. 40; 1 L. T. 268; 24 J. P. 228; 6 Jur. N. S. 247; 8 W. R. 81; 120 E. R. 1169, Ex. Ch.**

Annotations:—*Consd.* R. v. Marshland Smeeth & Fen District Comrs., [1920] 1 K. B. 155. *Reid*. Bush v. Beavan (1862), 1 H. & C. 500. *Mentd.* Smith v. Chorley District Council, [1897] 1 Q. B. 532.

Mandamus generally, see CROWN PRACTICE, Vol. XVI., pp. 276 et seq.

77. — Petition of right.]—Qu.: whether the Statute of Limitations applies to a claim by a subject against the Sovereign, enforceable only by petition of right.—RYVES v. WELLINGTON (DUKE)** (1846), 9 Beav. 579; 15 L. J. Ch. 461; 8 L. T. O. S. 66; 10 Jur. 697; 50 E. R. 467.**

Annotations:—*Mentd.* Dyson v. A.-G., [1911] 1 K. B. 410; Esquimault & Nanaimo Ry. v. Wilson, [1920] A. C. 358.

PART II. SECT. 2, SUB-SECT. 8.

71 i. Whether Crown affected.]—Statute of Limitations, 1623, does not apply to the Crown.—FISHER v. R.** 100), 26 V. L. R. 460.—**AUS.****

71 ii. —.]—DOE d. WEST v. HOWARD** (1837), 5 O. S. 462.—**CAN.****

71 iii. —.]—VACUUM OIL CO. v.****

R. (1890), 2 Exch. C. R. 234.—CAN.****

71 iv. —.]—ALLSTADT v. GORTNER** (1899), 31 O. R. 495; 20 C. L. T. 100.—**CAN.****

71 v. —.]—SECRETARY OF STATE FOR INDIA v. MATHURABHAI** (1890), 1 L. R. 14 Bom. 213.—**IND.****

71 vi. —.]—R. v. BAYLY** (1841),**

1 Dr. & War. 213.—IR.****

71 vii. —.]—A.-G. v. HOWLEY**, [1914] 1 I. R. 124; 48 I. L. T. 145.—**IR.****

71 viii. —.]—VAN DER MERWE v. MINISTER OF DEFENCE** (1916), O. P. D. 47.—**S. AF.****

71 ix. —.]—UNION GOVERNMENT v. TONKIN**, [1918] App. D. 533.—**S. AF.****

78. ———.]—The Statute of Limitations does not apply to a petition of right.—*RUSTOMJEE v. R.* (1876), 1 Q. B. D. 487; 45 L. J. Q. B. 249; 34 L. T. 278; 24 W. R. 428, D. C.; *on appeal*, 2 Q. B. D. 69, C. A.

Annotations:—*Expld.* Cayzer, *Irvine v. Board of Trade* (1925), 95 L. J. K. B. 134. *Mentd.* *Burnard v. Rodocanachi* (1880), 5 C. P. D. 424; *R. v. Income Tax Special Purposes*, *Ex p. Cape Copper Mining Co.* (1888), 59 L. T. 455; *West Rand Central Gold Mining Co. v. R.*, [1905] 2 K. B. 391.

Petition of right generally, *see* CROWN PRACTICE, Vol. XVI., pp. 236 *et seq.*

79. ——— Right to benefits of statute—Where Crown not expressly mentioned.]—*CAYZER, IRVINE & Co. v. BOARD OF TRADE* (1925), 95 L. J. K. B. 134; 42 T. L. R. 163; 70 Sol. Jo. 347; *on appeal* (1926), 95 L. J. K. B. 1054, C. A.

80. ———.]—*LAMBERT v. TAYLOR*, No. 71, *ante*.

Claim for maintenance of criminal lunatic.]

—*See* No. 63, *ante*.

SUB-SECT. 9.—CLAIMS RELATING TO LAND.

A. In General.

See Statute of Limitations, 1623 (c. 16), s. 3.

81. Debt for copyhold fine.]—(1) The Statute of Limitations, 1623 (c. 16), does not extend to debt for a copyhold fine.

(2) An award under the hands & seals of the arbitrator is not within Statute of Limitations, 1623 (c. 16).—*HODSDEN v. HARRIS* (1670), 2 Keb. 537; 1 Sid. 415; 2 Wms. Saund. 61; 84 E. R. 337; *sub nom.* *HODGSON v. HARRIS*, 1 Lev. 273.

Annotations:—*As to* (1) *Refd.* *Curlewis v. Mornington* (1858), 27 L. J. Q. B. 439. *As to* (2) *Appld.* *Ambrose v. Brooks* (1738), *West temp. Hard.* 567. *Refd.* *Paget v. Foley* (1836), 3 Scott, 120; *Tobacco Pipe Makers' Co. v. Loder* (1851), 16 Q. B. 765; *Thorne v. Kerr* (1855), 25 L. J. Ch. 57; *Curlewis v. Mornington* (1858), 27 L. J. Q. B. 439. *Generally, Mentd.* *R. v. Morrall* (1818), 6 Price, 24; *Scales v. Jacob* (1826), 11 Moore, C. P. 553; *Gwynne v. Burnell* (1840), 1 Scott, N. R. 711; *Lee v. Wilmot* (1866), L. R. 1 Exch. 364; *Lievesley v. Gilmore* (1866), L. R. 1 C. P. 570; *Spencer v. Hemmerde*, [1922] 2 A. C. 507.

— When time begins to run.]—*See* Sect. 4, sub-sect. 2, G., *post*.

82. Mesne profits.]—(1) Accounts of rents & profits confined to six years by analogy to the action for mesne profits.

(2) You cannot recover more than six years mesne profits at law (*per* CUR.).—*READE v. READE* (1801), 5 Ves. 744; 31 E. R. 836, L. C.

Annotations:—*Generally, Mentd.* *Casterton v. Sutherland* (1804), 9 Ves. 445; *Butcher v. Butcher*, *Gooday v. Butcher* (1812), 1 Ves. & B. 79; *Ricketts v. Loftus* (1841), 4 Y. & C. Ex. 519; *Fry v. Capper* (1853), 2 W. R. 136; *Paske v. Haselfoot* (1863), 9 L. T. 75.

83. Action against equitable assignee of leaseholds—On covenants in lease.]—The liability of an equitable assignee of leaseholds is that of simple contract, & the Statute of Limitations limits his liability to six years after the cause of suit.—*SANDERS v. BENSON* (1841), 4 Beav. 350; 49 E. R. 374.

Annotations:—*Mentd.* *Hollingsworth v. Shakeshaft* (1851), 14 Beav. 492; *Cox v. Bishop* (1857), 8 De G. M. & G. 815.

84. Simple contract debt charged on land.]—Where an action is brought to recover a simple contract debt, & the money sought to be recovered is charged on land, the period of limitation is that imposed by Statute of Limitations, 1623 (c. 16), & has not been enlarged to twelve years by the Real

Property Limitation Act, 1874 (c. 57).—*BARNES v. GLENTON*, [1899] 1 Q. B. 885; 68 L. J. Q. B. 502; 80 L. T. 606; 47 W. R. 435; 15 T. L. R. 295; 43 Sol. Jo. 366, C. A.

Annotation:—*Refd.* *London & Midland Bank v. Mitchell*, [1899] 2 Ch. 161.

B. Arrears of Rent.

See Statute of Limitations, 1623 (c. 16), s. 3.

85. No application to rent reserved by deed.]—Arrearages of rent reserved by indenture is not within Statute of Limitations, 1623 (c. 16).—*FREEMAN v. STACY* (1629), Hut, 109; 123 E. R. 1135.

Annotation:—*Refd.* *Paget v. Foley* (1836), 3 Scott, 120.

86. ——— Or will.]—Statute of Limitations, 1623 (c. 16), as to rents, extends only to customary rents between lord & tenant, & not to rent arising by grant, or a will, whereof the commencement may be shown.—*COLLINS v. GOODALL* (1691), 2 Vern. 235; 1 Eq. Cas. Abr. 304; 23 E. R. 753.

Annotation:—*Refd.* *Stackhouse v. Barnston* (1805), 10 Ves. 453.

87. Rentcharge.]—There is no Statute of Limitations to bar a legal rentcharge (*GRANT, M.R.*).—*STACKHOUSE v. BARNSTON* (1805), 10 Ves. 453; 32 E. R. 921.

Annotations:—*Consd.* *Cupit v. Jackson* (1824), M'Cle. 495. *Refd.* *Cholmondeley v. Clinton* (1820), 2 Jac. & W. 1.

88. ———.]—The Statute of Limitations does not bar the demand of a rentcharge.—*CUPIT v. JACKSON* (1824), M'Cle. 495; 13 Price, 721; 148 E. R. 207, Ex. Ch.

Annotations:—*Mentd.* *Graves v. Hicks* (1841), 11 Sim. 536; *Philipps v. Philipps* (1844), 8 Beav. 193; *Harrison v. Mason* (1849), 12 L. T. O. S. 478; *White v. James* (No. 2) (1858), 26 Beav. 191; *Hall v. Hurt* (1861), 2 John. & H. 76; *Horton v. Hall* (1874), L. R. 17 Eq. 437; *Kelsey v. Kelsey* (1874), L. R. 17 Eq. 495; *Taylor v. Taylor*, *Re Taylor's Estate Act* (1874), L. R. 17 Eq. 324; *Scottish Widows' Fund v. Craig* (1882), 20 Ch. D. 208; *Sandeman v. Rushton* (1891), 61 L. J. Ch. 136; *Re Tucker, Tucker v. Tucker*, [1893] 2 Ch. 323; *Hambro v. Hambro*, [1894] 2 Ch. 564; *Re Herbage Rents, Greenwich, Charity Comrs. v. Green*, [1896] 2 Ch. 811; *Blackburne v. Hope-Edwardes*, [1901] 1 Ch. 419.

—.]—*See, now*, Real Property Limitation Acts, 1833 (c. 27), & 1874 (c. 57), & Parts IV. & V., *post*.

89. Former tenancy from year to year—No act of tenancy for six years before action brought.]—The Statute of Limitations, 1623 (c. 16), is a good defence to an action by a landlord for rent against one who had once been his tenant from year to year, but who had not, within the last six years, occupied the premises, paid rent, or done any act from which a tenancy could be inferred, although the tenancy had not been determined by a notice to quit.—*LEIGH v. THORNTON* (1818), 1 B. & Ald. 625; 106 E. R. 230.

SUB-SECT. 10.—CONTRACTS BY MARRIED WOMEN.

See HUSBAND & WIFE, Vol. XXVII., p. 183, Nos. 1493–1496.

SUB-SECT. 11.—SET-OFF.

See Statute of Limitations, 1623 (c. 16), s. 3, & *now* Statute of Frauds Amendment Act, 1828 (c. 14), s. 4.

Set-off generally.]—*See* SET-OFF.

PART II. SECT. 2, SUB-SECT. 9.—A.

c. Action on purchaser's promise to pay.]—*WATERMAN v. WILL* (1873),

R. E. D. 197.—CAN.

d. ———.]—*SASKATOON TOWNSHIP Co., LTD. v. PEEBLES*, [1921] 1 W. W. R. 65; 55 D. L. R. 706; 14 Sask. L. R.

13.—CAN.

e. Contingent transfer of land.]—*HAJI ABDUL RAHMAN v. MAHOMED HASSAN*, [1917] A. C. 209.—IND.

Sect. 2.—To what debts and actions limitation applies: Sub-sects. 11, 12 & 13. Sect. 3: Sub-sect. 1.]

90. Whether set-off within limitation rules.]—The Statute of Limitations may be replied to a plea of a set-off.—*REMINGTON v. STEVENS* (1747), 2 Stra. 1271; 93 E. R. 1175.

Annotations:—Consd. Chapple v. Durston (1830), 1 Cr. & J. 1; *Rawley v. Rawley* (1876), 1 Q. B. D. 460.

91. —.]—Assumpsit & plea of set-off for money lent by debt. to pltf. Replication denying the set-off. It appears that the loan took place thirteen years ago. Although the Statute of Limitations is not a legal bar to the action, the jury may presume from length of time & other circumstances, that the debt has been satisfied.—*COOPER v. TURNER* (1819), 2 Stark. 497, N. P.

92. —.]—Upon the true construction of 2 Geo. 2, c. 22, s. 13, & Statute of Frauds Amendment Act, 1828 (c. 14), s. 5, a set-off cannot be maintained of a debt, contracted by pltf. during infancy & not ratified by him in writing after full age

As long ago as *Strange's Reports* the Statute of Limitations was held to apply to set-off (*DENMAN, J.*).—*RAWLEY v. RAWLEY* (1876), 1 Q. B. D. 460; 45 L. J. Q. B. 675; 35 L. T. 191; 24 W. R. 995, C. A.

Annotation:—Mentd. McCreagh v. Cox & Ford (1923), 92 L. J. K. B. 855.

93. — Cross demands accruing at same time—Plaintiff's claim saved from operation of statute.]—When there are cross demands between parties, which accrued at nearly the same time, for which bills are given, both of which would be barred by the Statute of Limitations, & pltf. has saved the statute by suing out process, but debt. has not, debt. may nevertheless set off these demands.—*ORD v. RUSPINI* (1797), 2 Esp. 568, N. P.

94. — Only if six years expired before action brought.]—In cases under Statute of Limitations, 1623 (c. 16), the Statute of Limitations is not a bar to a set-off unless the six years have expired before action is brought.—*WALKER v. CLEMENTS* (1850), 15 Q. B. 1046; 16 L. T. O. S. 170; 117 E. R. 755.

Annotation:—Refd. Re Ballard, Lovell v. Forester, [1890] W. N. 64.

95. — —.]—Re BALLARD, LOVELL v. FORESTER, [1890] W. N. 64.

96. — Order for administration of estate—Set-off against claim of creditor.]—Re BALLARD, LOVELL v. FORESTER, [1890] W. N. 64.

97. Bill of costs—Statute-barred items—Appropriation of payment.]—The exor. of a deceased solr. brought an action in 1902 to recover costs alleged to be due to his testator's estate from debt., of which a bill had been delivered to debt., together with a cash account, on Dec. 2, 1899. The items of the bill extended over a period from 1878 to 1899, & the Statute of Limitations being pleaded, the judge at the trial gave judgment for debt. in respect of all items prior to 1893, as being statute-barred. He referred the rest of the bill to a master for taxation, & to take the cash account from 1893, directing that credit should be given to debt. for all sums of money received by pltf.'s testator for or on account of debt., in respect of, or which ought to be treated as reducing or discharging, the bill of costs so taxed. Upon taxation debt. brought in a surcharge in respect of a sum of £66, which had been received by pltf.'s testator, as debt.'s

solr. in an action brought by debt., in 1894, & not accounted for to debt. No cash account had been delivered by pltf.'s testator to debt. except the account of Dec. 2, 1899, which, through an inadvertence, contained no entry of the said sum of £66. Pltf. claimed that this sum should be treated as appropriated to payment or satisfaction of items which had accrued due from debt. to pltf.'s testator prior to 1893:—*Held*: the sum of £66 could not be set off against the statute-barred items under the statutes of set-off; & assuming that pltf.'s testator would have had a right to appropriate the said sum to these items, yet, there having been no such appropriation, it was not, having regard to the terms of the judgment of the judge at the trial, open to pltf. so to appropriate the said sum subsequently to that judgment, & the surcharge in respect of the said sum of £66 must be allowed.—*SMITH v. BETTY*, [1903] 2 K. B. 317; 72 L. J. K. B. 853; 89 L. T. 258; 52 W. R. 137; 19 T. L. R. 602, C. A.

Annotation:—Consd. Seymour v. Pickett, [1905] 1 K. B. 715.

Pleading to claim of set-off.]—See Part IX., Sect. 1, post.

SUB-SECT. 12.—SOLICITOR'S CHARGES.

See Statute of Limitations, 1623 (c. 16), s. 3.

98. Action within statute.]—Assumpsit for fees due to pltf. as an attorney. Debt. pleaded the Statute of Limitations, 1623 (c. 16):—*Held*: a good plea.—*OLIVER v. THOMAS* (1694), 1 Ld. Raym. 2; 3 Lev. 367; 91 E. R. 898.

99. Statute-barred items.]—SMITH v. BETTY, No. 97, ante.

When time begins to run, *see Part II., Sect. 5, sub-sect. 2, S., post.*

SUB-SECT. 13.—OTHER CASES.

See Statute of Limitations, 1623 (c. 16), s. 3.

100. Promise of quiet enjoyment—To save possession harmless.]—To an action on a promise of quiet enjoyment, & to save the possessor harmless, debt. may plead the Statute of Limitations, 1623 (c. 16).—*PECK v. AMBLER* (1634), Cro. Car. 349; W. Jo. 329; 79 E. R. 906.

101. Action for court fees.]—BARBE v. BURTON (1677), T. Raym. 243; 83 E. R. 126.

102. Debt against sheriff—Money levied on execution—Before return to writ.]—Debt lies against a sheriff before the return of the writ for money levied on a *fi. fa.* The Statute of Limitations, 1623 (c. 16), cannot be pleaded to debt against a sheriff for money levied on a *fi. fa.*—*COCKRAM v. WELBYE* (1679), 2 Show. 79; 1 Freem. K. B. 236; 1 Mod. Rep. 245; 2 Mod. Rep. 212; 89 E. R. 806.

Annotations:—Refd. Paget v. Foley (1836), 3 Scott, 120. *Mentd. Vaughan v. Guy* (1729), 1 Barn. K. B. 271; *Morland v. Pellatt* (1829), 7 L. J. O. S. K. B. 54.

103. Collateral security to mortgage—Not under seal.]—If the collateral security had been a note of hand instead of a bond, the statute of limitations would run against the note, & leave the mtge. as it was (*EYRE, C.B.*).—*TOPLIS v. BAKER* (1789), 2 Cox, Eq. Cas. 118; 30 E. R. 55.

Annotations:—Refd. Christopher v. Sparke (1820), 2 Jac. & W. 223; *Barnes v. Glenton*, [1899] 1 Q. B. 885; *London & Midland Bank v. Mitchell*, [1899] 2 Ch. 161. *Mentd. Izon v. Butler* (1815), 2 Price, 34; *Re Gresley's Settlement*, *Willoughby v. Drummond*, [1911] 1 Ch. 358.

PART II. SECT. 2, SUB-SECT. 11.

90 i. Whether set-off within limitation rules.]—PARSONS v. CRABB (1875),

34 U. C. R. 136.—CAN.

PART II. SECT. 2, SUB-SECT. 13.

1. Action on lien note.]—The right

of action upon a lien note is barred by Statute of Limitations in six years from the due date of it without adding any days of grace.—*KEDDY*

104. Debt under decree or order.]—MILDRED v. ROBINSON, No. 19, ante.

105. Warrant of attorney to confess judgment.]—Debtor executes a warrant of attorney to his creditor to confess judgment for the balance of account as then stated between them. The warrant of attorney is not a specialty, which takes the case out of the Statute of Limitations.—CLARKE v. FIGES (1817), 2 Stark. 234, N. P.

106. Recovery of penalty—Due under bye-law—Made under charter.]—An action of debt for a penalty due under a bye-law made by virtue of a charter, is "an action of debt grounded upon a contract without specialty," & is barred by Statute of Limitations, 1623 (c. 16), s. 3, if not commenced within six years after the penalty becomes due.—TOBACCO PIPE MAKERS' CO. v. LODER (1851), 16 Q. B. 765; 20 L. J. Q. B. 414; 18 L. T. O. S. 34; 15 J. P. 723; 15 Jur. 1194; 117 E. R. 1074.

Annotation:—Mentd. Re Manchester & Milford Ry., [1897] 1 Ch. 276.

107. Debt recited in deed of assignment—For benefit of creditors—Covenant by creditors not to sue.]—IVENS v. ELWES, No. 22, ante.

108. Debt recited in agreement not under seal.]—FIRTH v. SLINGSBY, No. 540, post.

109. Rectification—Of insurance policies.]—A firm of insurance brokers effected with an insurance company a number of open covers for the purpose of reinsuring risks taken by their principals. The premiums under the open covers were to be the same as those received by the original insurers less a brokerage to the firm. The brokers in declaring risks under the open covers stated definite amounts of premiums, without explaining what deductions had been made by the original insurers, their principals, in order to determine the rates received by them. In each case policies were drawn up by the co. containing the premiums stated by the brokers. The insurance company, afterwards learning the facts, disputed the correctness of these deductions, & sued the brokers for breach of duty to the co. in not securing correct amounts of premium. The brokers acted in good faith.

The insurance co. also claimed rectification of the policies as against the brokers so as to comply with their view of the effect of the open covers. The claim was made more than six years after the issue of the policies:—*Held*: apart from any question under the Statute of Limitations, there was no clear evidence of common mistake & the policies ought not to be rectified as against the brokers in an action to which their principals were not parties. *Semble*: the Statute of Limitations was a good defence.—**EMPRESS ASSURANCE CORPN., LTD. v. BOWRING & CO., LTD. (1905), 11 Com. Cas. 107.**

Annotation:—Mentd. Glasgow Asseo. Corpn. v. Symondson (1911), 104 L. T. 254.

110. Agreement to settle after-acquired property—Claim by trustees.]—By a marriage settlement

dated Oct. 7, 1878, the wife's property was settled upon the usual trusts in favour of the wife, the husband, & the issue of the marriage, with an ultimate trust in favour of the wife's next of kin; & it was declared & agreed by the husband & wife respectively that after-acquired property of the wife should be brought into settlement. In Aug. 1884, the husband invested £1,000 in stock in the wife's name. In 1909 the wife died intestate & without issue, & the stock was transferred to her husband as her administrator:—*Held*: the trustees could not enforce the agreement at law, their claim on the contract to settle being statute barred.—**RE PLUMPTRE'S MARRIAGE SETTLEMENT, UNDERHILL v. PLUMPTRE, [1910] 1 Ch. 609; 79 L. J. Ch. 340; 102 L. T. 315; 26 T. L. R. 321; 54 Sol. Jo. 326.**

Annotations:—Refd. Pullan v. Koe, [1913] 1 Ch. 9. Mentd. Re Torrington, [1913] 2 Ch. 623; Re Cavendish Browne's Settltmt. Trusts, Horner v. Rawle (1916), 61 Sol. Jo. 27; Re Pryce, Nevill v. Pryce, [1917] 1 Ch. 234.

111. Patent rights.]—SADGROVE v. GODFREY (1919), 37 R. P. C. 7.

SECT. 3.—EFFECT OF LIMITATION.

SUB-SECT. 1.—IN GENERAL.

112. Remedy by action barred—Right unaffected.]—Statute of Limitations bars the remedy only, not the debt, & therefore, where an attorney for a pltf. had obtained judgment, & debt. was afterwards discharged under Lords' Act, but at a subsequent period a *fi. fa.* issued against his goods, upon which the sheriff levied the damages & costs:—*Held*: the attorney, though he had taken no step in the cause, or to recover the amount of his bill of costs, within six years, had still a lien on the judgment for his bill of costs, & the ct. directed the sheriff to pay him the amount out of the proceeds of the goods.—HIGGINS v. SCOTT (1831), 2 B. & Ad. 413; 9 L. J. O. S. K. B. 262; 109 E. R. 1196.****

Annotations:—Apld. Courtenay v. Williams (1844), 3 Hare, 539. Refd. Dingle v. Coppen, Coppen v. Dingle, [1899] 1 Ch. 726; Re Lloyd, Lloyd v. Lloyd, [1903] 1 Ch. 385; Smith v. Betty, [1903] 2 K. B. 317.

113. ———.]—The barring of the remedy for the recovery of debt does not, however, extinguish the debt (LORD LYNDBURST, C.).—COURTNAY v. WILLIAMS (1846), 15 L. J. Ch. 204; 6 L. T. O. S. 517, L. C.****

Annotations:—Consd. Dingle v. Coppen, Coppen v. Dingle, [1899] 1 Ch. 726; Re Bruce, Lawford v. Bruce, [1908] 2 Ch. 682. Refd. Coates v. Coates (1864), 33 Beav. 249; Re Morley, Morley v. Saunders (1869), L. R. 8 Eq. 594; Poole v. Poole (1871), 7 Ch. App. 17; Re Stead's Settltmt. Trusts (1876), 24 W. R. 698; Re Milnes, Milnes v. Sherwin (1885), 53 L. T. 534; Re Akerman, Akerman v. Akerman, [1891] 3 Ch. 212; Re Taylor, Taylor v. Wade (1894), 8 R. 186; Re Langham, Otway v. Langham (1896), 74 L. T. 611; Re Watson, Turner v. Watson, [1896] 1 Ch. 925; Re Lloyd, Lloyd v. Lloyd, [1903] 1 Ch. 385. Mentd. Harvey v. Palmer (1851), 4 De G. & Sm. 425; Re Sewell, White v. Sewell, [1909] 1 Ch. 806; Re Rhodesia Goldfields, Partridge v. Rhodesia Goldfields, [1910] 1 Ch. 239; Re National Live Stock Insce., Re National General Insce., [1917] 1 Ch. 628.

v. MORDEN (1905), 15 Man. L. R. 629.—CAN.

g. Foreign judgment.]—A judgment of a foreign ct. is a simple contract debt with reference to the application of the defence of the Statute of Limitation.—WRIGHT v. NAROV-LANSKY, [1920] 1 W. W. R. 681.—CAN.****

h. ———.]—CAMP v. DANVILLE (1901), 8 Nfld. L. R. 491.—NFLD.

k. Divorce.]—Statute of Limitations does not apply to suits for divorce *a vinculo*.—HAY v. GORDON (1872), 21 W. R. 11.—IND.****

PART II. SECT. 3, SUB-SECT. 1.

112 i. Remedy by action barred—Right unaffected.]—BRYSON v. GRAHAM (1848), 2 Thom. 271.—CAN.****

112 ii. ———.]—HERVEY v. PRIDHAM (1860), 11 C. P. 329.—CAN.****

112 iii. ———.]—SHERIFF v. HOLCOMBE (1863), 13 C. P. 590; 2 E. & A. 516.—CAN.****

112 iv. ———.]—CARVELL v. WALLACE (1873), 9 N. S. R. 165.—CAN.****

112 v. ———.]—Pltf. made a mortgage on a farm, but paid nothing for more than ten years:—*Held*:

although the remedy was barred the debt remained.—**NORCKER v. NORCKER (1917), 13 O. W. N. 273; 41 O. L. R. 296; 41 D. L. R. 138.—CAN.**

112 vi. ———.]—TARRABAIN v. JAMHA, [1923] 1 D. L. R. 914; 19 Alta. L. R. 273, [1923] 1 W. W. R. 204.—CAN.****

112 vii. ———.]—CAMPBELL v. DISTRICT LAND REGISTRAR OF AUCKLAND (1910), 29 N. Z. L. R. 332.—N.Z.****

112 viii. ———.]—Re KIRTON, [1919] N. Z. L. R. 138.—N.Z.****

1. ——— Collateral securities may be

Sect. 8.—Effect of limitation: Sub-sects. 1 & 2, A., B. & C.; sub-sect. 3. Sects. 4 & 5: Sub-sect. 1.]

114. ———.]—DUNDEE HARBOUR TRUST v. DOUGALL, No. 5, *ante*.

115. ———.]—The Statute of Limitations does not destroy the debt but only the remedy for it (BOWEN, L.J.).—*Re ROWNSON, FIELD v. WHITE* (1885), 29 Ch. D. 358; 54 L. J. Ch. 950; 52 L. T. 825; 33 W. R. 604; *sub nom. Re ROWSON, FIELD v. WHITE*, 49 J. P. 759, C. A.

Annotations:—Reid. Midgley v. Midgley, [1893] 3 Ch. 282; *Wilson v. Wilson*, [1911] 1 K. B. 327.

116. ———.]—CURWEN v. MILBURN, No. 372, *post*.

117. ———.]—*Re MARGETTS*, No. 568, *post*.

118. ———.]—WILSON v. WILSON, [1911] 1 K. B. 327; 80 L. J. K. B. 296; 104 L. T. 96; 18 Mans. 18.

119. ———.]—*Revival of remedy.*—Statute of Limitations which had incurred against the petitioning creditor of a bkpt. before the commission issued, shall not be taken advantage of by a third person against the assignees.

The Statute of Limitations does not extinguish the debt but the remedy for the least hint will revive it, & it lies only in the mouth of the debtor himself to take advantage of it (LORD MANSFIELD, C.J.).—*QUANTOCK v. ENGLAND* (1770), 2 Wm. Bl. 702; 5 Burr. 2638; 96 E. R. 413.

Annotations:—Consd. Ex p. Dewdney (1809), 15 Ves. 479. *Reid. Bickerdike v. Bollman* (1786), 1 Term Rep. 405; *Jellis v. Mountford* (1821), 4 B. & Ald. 256; *Mavor v. Pyne* (1825), 3 Bing. 285.

120. ———.]—BAKER v. BILLERICAY UNION GUARDIANS (1863), 2 H. & C. 642; 3 New Rep. 295; 33 L. J. M. C. 40; 9 L. T. 486; 28 J. P. 24; 9 Jur. N. S. 1201; 13 W. R. 11; 159 E. R. 266.

Annotations:—Mentd. R. v. Stepney Union Grdns. (1874), 43 L. J. M. C. 145; *Sharpington v. Fulham Grdns.* (1904), 73 L. J. Ch. 777; *Chester Waterworks Co. v. Chester Union Grdns.* (1907), 96 L. T. 566.

121. ———.]—*Manx law.*—HARRIS v. QUINE, No. 226, *post*.

122. ———.]—*Effect of failure of all remedies.*—There is in law no right without a remedy; & if all remedies for enforcing a right are gone, the right has in point of law ceased to exist (CAVE, J.).—*Re HEPBURN, Ex p. SMITH* (1884), 14 Q. B. D. 394; 54 L. J. Q. B. 422.

Annotation:—Reid. Re Stephens, Warburton v. Stephens (1889), 43 Ch. D. 39.

123. Remedies other than by action—Summary jurisdiction of court over solicitors.]—Where a client has voluntarily paid money to his attorney, pursuant to an agreement in itself void for champerty, the ct. will not, after a lapse of thirteen years, interfere to compel the attorney to refund or deliver his bill, unless sufficient reason is shown for not making an earlier application.

I apprehend this ct. would not interfere summarily in a way analogous to the bringing an action by the client, unless it appears that he was not a free man, or in the power of the attorney (LITTLEDALE, J.).—*Ex p. YEATMAN* (1835), 4 Dowl. 304; 1 Har. & W. 510.

Annotation:—Consd. Ex p. Sharpe (1837), 5 Dowl. 717.

124. ———.]—Where a client had a claim on his attorney for a sum of money received by him in a cause:—*Held*: the client's remedy by action being barred by the Statute of Limitations,

the creditor to recover a debt be barred by Statute of Limitations, he may hold the collateral securities for such debt until paid.—WILEY v. LEDYARD (1882)

m. Nuisance — Remedy by action not barred — Recovery of damages limited.]—In an action on the case for nuisance in overflowing ptl's land by a dam was erected by deft. more than six years before bringing

was not a reason to prevent the ct. exercising its summary jurisdiction.—*Ex p. SHARPE* (1837), 5 Dowl. 717; Will. Woll. & Dav. 354; 1 Jur. 405.

125. ———.]—*Exceptional circumstances.*—The summary jurisdiction of the ct. over solrs. will not, except under very special circumstances, be exercised to enforce a claim which has been barred in an action at law.—*SITTINGBOURNE & SHEERNESS RY. Co. v. LAWSON* (1886), 2 T. L. R. 605, C. A.

126. ———.]—*Appropriation of payments made—Payment made on behalf of debtor.*—WALLER v. LACY, No. 444, *post*.

127. ———.]—*Warrant of attorney for debt.*—Where a debtor who is under arrest gives to the creditor, as the consideration for his discharge, a warrant of attorney for the whole amount of the debt in respect of which he is arrested, together with sums justly due from him to the creditor on other accounts, the fact of such warrant being given while he is under arrest will not be a ground for the interference of the ct., if the arrangement has been entered into by him deliberately, advisedly, & with full knowledge of the circumstances. That one of the debts for which such warrant is given is barred by Statute of Limitations will make no difference.—*RICHARDS v. CURLEWIS* (1854), 3 Eq. Rep. 278, L. JJ.

128. ———.]—*Enforcement of equitable charges.*—Where a bank had an equitable charge on shares in a limited co. to secure a simple contract debt & after the debt was barred brought an action to enforce their security by foreclosure or sale:—*Held*: the bank were not deprived of their remedy against the property by the fact that the personal remedy for the debt was barred, & there being no Statute of Limitations applicable to foreclosure of a mtge. of personal property, the security was enforceable.—*LONDON & MIDLAND BANK v. MITCHELL*, [1899] 2 Ch. 161; 68 L. J. Ch. 568; 81 L. T. 263; 47 W. R. 602; 15 T. L. R. 420; 43 Sol. Jo. 586.

Annotation:—Reid. Stubbs v. Slater, [1910] 1 Ch. 632.

———.]—*Lien.*—See Sub-sect. 3, *post*.

Statute-barred debt as consideration.—See CONTRACT, Vol. XII., p. 218, Nos. 1781–1784.

SUB-SECT. 2.—IN ADMINISTRATION OF ESTATES.

A. Right of Statute-Barred Creditors to Administration.

See EXECUTORS, Vol. XXIII., p. 158, Nos. 1684–1685.

B. Set-Off of Debts Against Legacies.

See EXECUTORS, Vol. XXIII., pp. 437, 439–441, Nos. 5072, 5085, 5101–5109.

C. Payment or Retention of Statute-Barred Debts.

Right of representative to pay.—See EXECUTORS, Vol. XXIII., pp. 356–366, Nos. 4245–4341.

Right of representative to retain.—See EXECUTORS, Vol. XXIII., pp. 379, 382, Nos. 4490–4492, 4519.

SUB-SECT. 3.—ON LIEN.

See, generally, LIEN, p. 217, Nos. 16–19, *ante*.
Solicitor's lien.—See SOLICITORS.

the action:—*Held*: the effect of a plea of the Statute of Limitations was not to bar the action, but only to limit the recovery of damages to the last six years.—*CONNORS v. McLAGGAN* (1844), 2 Kerr, 446.—CAN.

SECT. 4.—PERIODS OF LIMITATION.

See Statute of Limitations, 1623 (c. 16), s. 3; Civil Procedure Act, 1833 (c. 42), s. 3.

129. Slander—Words actionable only on proof of special damage.]—LAW v. HARWOOD (1628), Cro. Car. 140; 79 E. R. 724; *sub nom.* LOWE v. HAREWOOD, W. Jo. 196; *sub nom.* HARWOOD v. LOWE, Palm. 529.

*Annotations:—*Mentd. Cane v. Golding (1649), Sty. 176; Crosse v. Gardner (1688), Comb. 142; Iveson v. Moore (1698), 1 Salk. 15; Brown v. Gibbons (1702), 2 Ld. Raym. 831; Perry v. Perry (1732), Kel. W. 71; Turner v. Horton (1743), Willes, 438; Carter v. Fish (1825), 1 Stra. 645; Malachy v. Soper (1836), 3 Bing. N. C. 371; Bathishill v. Reed (1856), 25 L. J. C. P. 290; Ratcliffe v. Evans, [1892] 2 Q. B. 524.

130. ———.]—SAUNDERS v. EDWARDS (1662), 1 Sid. 95; 82 E. R. 991.

*Annotation:—*Refd. Aldridge v. Drake (1686), 2 Show. 493.

131. ———Words actionable per se.]—SAUNDERS v. EDWARDS (1662), 1 Sid. 95; 82 E. R. 991.

*Annotation:—*Refd. Aldridge v. Drake (1686), 2 Show. 493.

132. Recovery of money improperly paid—Action against company directors—Payment ultra vires.]—In July, 1890, pltf. contracted with the Railways & General co., Ltd., for the sale of certain stock in the Wrexham, Mold, & Connah's Quay Railway. The real purchaser, however, was the Manchester, Sheffield, & Lincoln Railway, & the money was paid by that co. in two sums, the larger on Aug. 5, & the smaller on Oct. 10, 1890. These payments were then *ultra vires*. But by their Act of 1891 they were authorised to subscribe towards the undertaking of the Wrexham co., & to hold shares therein, & a resolution authorising the Manchester co. to so subscribe was agreed to the day after the Act passed. The books of the Manchester co. did not accurately represent the facts. The writ was issued on Aug. 6, 1896, claiming against three of the directors repayment to the co. of these sums:—*Held*: the purchase was not a subscription within the meaning of the Act of 1891, & was therefore *ultra vires*. As to the larger sum, the writ not having been issued within six years & no fraud being alleged, Statute of Limitations afforded a good defence.—WHITWAM v. WATKIN (1898), 78 L. T. 188; 14 T. L. R. 288.

133. Enforcement of compensation award—Under Lands Clauses Act, 1845 (c. 18).]—The period within which an action may be brought to enforce an award of compensation made by an arbitrator under above Act, is six years from the date of the award.—TURNER v. MIDLAND RY. CO., [1911] 1 K. B. 832; 80 L. J. K. B. 516; 104 L. T. 347; 75 J. P. 283, D. C.

*Annotation:—*Refd. Cayzer, Irvine v. Board of Trade (1926), 42 T. L. R. 731.

To what debts & actions limitation applies.]—See Part II., Sect. 2, *ante*.

When time begins to run.]—See Part II., Sect. 5, *post*.

SECT. 5.—WHEN TIME BEGINS TO RUN.

SUB-SECT. 1.—IN GENERAL.

134. Time runs from accrual of cause of action.]

—It is lawful to sue out an original against a member of the House of Commons although Parliament is sitting. From the death of Charles I. to the restoration of Charles II., the law did not

die; but was only suspended in its operation by the impediment of the usurpation. As the law did not require pltf. to sue in the cts. set up during that time, nor look upon them as cts. & as 12 Car. 2, c. 3, concerning judicial proceedings is not to be extended to confirm the cts. themselves, only the acts done in them, the not suing in those cts. was a merit not a laches. Nevertheless where the cause of action accrued on July 10, 1645, an action of the case, brought upon a writ sued forth on May 27, 1662, is barred by Statute of Limitations, 1623 (c. 16), although deft. was a member of the House of Commons from the said July 10, until Jan. 30, 1648, & although no legal cts. sat afterwards until the restoration. The reason is that the lapse of time is a bar in the body of the said statute; & the proviso of exceptions reaches only to cases of infants, *non compos mentis*, *femes covertis*, the imprisoned or beyond the seas, & not to persons impeded by the obstruction of justice, or otherwise.—BENYON v. EVELYN (1664), O. Bridg. 324; 124 E. R. 614.

*Annotations:—*Refd. Hall v. Wybourn (1689), 2 Salk. 420. *Mentd.* R. v. Knollys (1694), 2 Salk. 509; Prideaux v. Morris (1703), 2 Salk. 503; R. v. Paty (1704), 2 Ld. Raym. 1105; Burdett v. Abbott (1811), 14 East, 1; Stockdale v. Hansard (1839), 9 Ad. & El. 1.

135. ———.]—GOULD v. JOHNSON (1702), 2 Ld. Raym. 838; 2 Salk. 422; 92 E. R. 60; *sub nom.* BOOTH v. JOHNSON, 7 Mod. Rep. 143.

*Annotations:—*Consd. Tanner v. Smart (1827), 5 L. J. O. S. K. B. 218; Irving v. Veitch (1837), 3 M. & W. 90. *Refd.* Hickman v. Walker (1737), Willes, 27; Leaper v. Tatton (1812), 16 East, 420; Chapple v. Durston (1830), 1 Cr. & J. 1.

136. ———.]—Goods having been bailed by pltf. to deft. for safe custody, deft. wrongfully sold them; & pltf., more than six years after the sale, being ignorant of the fact of its having taken place, demanded the return of the goods, which deft. refused:—*Held*: Statute of Limitations, 1623 (c. 16), ran from the date of the demand & refusal, & not from that of the sale, inasmuch as pltf., in such a case, though entitled if they had discovered the sale to sue immediately for a conversion of the goods, were also entitled to elect to sue upon the breach of the bailee's duty in the ordinary course by the refusal to deliver up on request. *Semble*: where an action of detinue is founded upon a bare taking & withholding of the property of another without any circumstances to show a trust for the owner, or to found an option to sue either for the wrong or for the breach of the original terms of deposit, the statute would run from the time at which the property was first wrongfully dealt with.

It is a general rule that, where there has once been a complete cause of action arising out of contract or tort, the statute begins to run, & that subsequent circumstances which would but for the prior wrongful act or default have constituted a cause of action are disregarded (WILLES, J.).—WILKINSON v. VERITY (1871), L. R. 6 C. P. 206; 40 L. J. C. P. 141; 19 W. R. 604; *sub nom.* WILLIAMSON v. VERITY, 24 L. T. 32.

*Annotations:—*Distd. Miller v. Dell, [1891] 1 Q. B. 468. *Consd.* Baker v. Courage (1909), 101 L. T. 854. *Mentd.* Frost v. Knight (1872), L. R. 7 Exch. 111; Bristol & Wes of England Bank v. Mid. Ry. (1891), 61 L. J. Q. B. 115; Coldham v. Hill, [1919] 1 K. B. 443.

PART II.

*n. Criminal conversation.]—*An action for crim. con. is an action upon the case & the period of limitation is six years.—GRAY v. QUINN (1921), 64 D. L. R. 719; 51 O. L. R. 128.—CAN.

*o. Action on covenant in indenture of mortgage.]—*The period of limitation for an action upon a covenant contained in an indenture of mtge. is ten years.—

MARTIN v. YOUNGSON (1924), 55 O. L. R. 658.—CAN.

PART II. SECT. 5, SUB-SECT. 1.

134 i. Time runs from accrual of cause of action.]—BADI-UN-NISSA v. SHAMS-UD-DIN (1895), 1 L. R. 17 All. 103.—IND.

134 ii. ———.]—FAZL-UR-RAHMAN v. SHAH MUHAMMAD KHAN (1908), 1 L. R.

30 All. 385.—IND.

134 iii. ———.]—SINGARAPPA v. TALAE SANJIVAPPA (1905), 1 L. R. 28 Mad. 249.—IND.

134 iv. ———.]—NICHOLL v. NICHOLL [1916] W. L. D. 10.—S. AF.

134 v. ———.]—PATLANSKY v. PATLANSKY (1), [1917] W. L. D. 7.—S. AF. *p. When cause of action accrues—Person capable of being sued.]—*GRAN

Sect. 5.—When time begins to run: Sub-sects. 1 & 2, A., B. & C. (a) & (b).]

137. When cause of action accrues—Person capable of suing.]—MURRAY v. EAST INDIA CO., No. 1, ante.

138. ———.]—THOMSON v. CLANMORRIS (LORD), No. 57, ante.

139. ——— Amount of claim ascertained.]—By an agreement dated Dec. 24, 1915, made under seal, pltf. let to deft. a small holding, containing about 48 acres, 2 roods, 13 poles, in Cheshire, from year to year from Feb. 2, 1916, at a rent of £132 10s. a year payable by half-yearly payments on Feb. 2 & Aug. 2 each year. The tenant agreed to pay on entry any allowance or compensation which may be due from the council to the outgoing tenant in respect of feeding stuffs or manures or any improvements mentioned in Agricultural Holdings Act, 1908 (c. 28), Sched. I., Part III. . . . Deft. entered into occupation of the small holding on Feb. 2, 1916. At that date the amount of the compensation payable to the outgoing tenant had not been fixed, & it was not until Feb. 11, 1918, that the amount of compensation was agreed to. It was then agreed that the council should pay the outgoing tenant £30 17s. 6d. & that sum was paid by the council to the outgoing tenant on Mar. 17, 1921. On Jan. 13, 1923, pltf. council brought an action in the county ct. claiming to recover from deft. the sum of £30 17s. 6d. under the agreement of Dec. 14, 1915. Deft. pleaded that pltf.'s cause of action had arisen on Feb. 2, 1916, the date of his entry on the holding, & that therefore the claim was barred by Statute of Limitations, 1623 (c. 16), s. 3, because the action was not brought "within six years next after the cause of such action or suit":—*Held*: pltf.'s cause of action against deft. did not arise on Feb. 2, 1916, when deft. entered on the holding, but only on Feb. 11, 1918, when the amount of the compensation was ascertained by agreement. Therefore the time only began to run from Feb. 11, 1918, & the action was not barred by Statute of Limitations, 1623 (c. 16), s. 3.—CHESHIRE COUNTY COUNCIL v. HOPLEY (1923), 130 L. T. 123; 21 L. G. R. 524, D. C.

Annotation:—Refd. Cayzer, Irvine v. Board of Trade (1926), 95 L. J. K. B. 1054.

140. Person capable of being sued.]—Cause of action is the right to prosecute an action with effect; no one has a complete cause of action until there is somebody he can sue (BEST, C.J.).—DOUGLAS v. FORREST (1828), 4 Bing. 686; 1 Moo. & P. 663; 6 L. J. O. S. C. P. 157; 130 E. R. 933.

Annotations:—Consd. Musurus Bey v. Gadban, [1894] 2 Q. B. 352. Refd. Cowan v. Braidwood (1840), 9 Dowl. 26; Rhodes v. Smethurst (1840), 6 M. & W. 351; Towns v. Mead (1855), 16 C. B. 123. Mentd. Don v. Lippman (1837), 5 Cl. & Fin. 1; Schibsy v. Westenholz (1870), L. R. 6 Q. B. 155; Rousillon v. Rousillon (1880), 14 Ch. D. 351; Mohamidu Mohideen Hadjar v. Pitchey, [1894] A. C. 437; Emanuel v. Symon, [1908] 1 K. B. 302; Gavin, Gibson v. Gibson, [1913] 3 K. B. 379.

v. McDONALD (1860), 8 Gr. 468.—CAN.

q. ———.]—LAKSHMIBAI BAPUJI OKA v. MADHAVRAY BAPUJI OKA (1888), I. L. R. 12 Bom. 65.—IND.

PART II. SECT. 5, SUB-SECT. 2.—A.

142 i. From date of breach.]—JESSUP

142 ii. ———.]—Each of several successive mutual promises becomes a new & independent contract, from the breach of which only the Statute of Limitations will begin to run.—GRANT v. CORNOCK (1888), 16 O. R. 406; *affd.* on appeal (1889), 16 A. R. 532.—

142 iii. ———.]—WATEROUS ENGINE WORKS CO. v. WILSON (1896), 11 Man. L. R. 287.—CAN.

142 iv. ———.]—ROBINSON v. CANADIAN NORTHERN RY. CO. (1910), 13 W. L. R. 8.—CAN.

142 v. ———.]—SMITH v. HALIFAX PILOT COMMISSION (1917), 51 N. S. R. 241.—CAN.

142 vi. ———.]—MATI SAHU v. FORBES (1866), B. L. R. Supp. Vol. 500; 6 W. R. Act X. 61.—IND.

142 vii. ———.]—RE CHENI BASH SHAHA MUNDUL (1879), I. L. R. ———.—IND.

142 viii. ———.]—PRAGI LAL v. MAX-

141. ———.]—THOMSON v. CLANMORRIS (LORD), No. 57, ante.

Persons capable of suing or being sued.]—See Sub-sect. 4, post.

Meaning of cause of action.]—See ACTION, Vol. I., p. 13, Nos. 104–108.

SUB-SECT. 2.—ACTIONS FOUNDED ON CONTRACT.

A. In General.

142. From date of breach.]—BROWN v. HOWARD, No. 197, post.

143. ——— Damage suffered within six years.]—Where A., under a contract to deliver spring wheat had delivered to B. winter wheat, & B., having again sold the same as spring wheat had, in consequence, been compelled, after a suit in Scotland which lasted many years, to pay damages to the vendee, & afterwards B. brought an action of *assumpsit* against A. for his breach of contract, alleging as special damage, the damages so recovered:—*Held*: although such special damage had occurred within six years before the commencement of the action by B. against A., yet the breach of contract, which, in *assumpsit*, was the gist of the action, having occurred & become known to B. more than six years before that period, A. might properly plead *actio non accrevit infra sex annos*.—BATTLE v. FAULKNER (1820), 3 B. & Ald. 288; 106 E. R. 668.

Annotations:—Apld. Brown v. Howard (1820), 2 Bro. & Bing. 73. Consd. East India Co. v. Oditchurn (1849), 7 Moo. P. C. C. 85. Apld. Violett v. Sympton (1857), 8 E. & B. 344. Refd. Davis v. Bank of England (1824), 2 Bing. 393; Rhodes v. Smethurst (1838), 4 M. & W. 42; Collinge v. Heywood (1839), 9 Ad. & El. 633; Gibbs v. Guild (1881), 8 Q. B. D. 296.

144. ——— Not from time of refusal to perform.]—In *assumpsit*, the breach of a contract is the cause of action, & Statute of Limitations, 1623 (c. 16), runs from the time of the breach, & not from the time of the refusal to perform the contract.—EAST INDIA CO. v. ODITCHURN PAUL (1850), 7 Moo. P. C. C. 85; 5 Moo. Ind. App. 43; 14 Jur. 253; 13 E. R. 811, P. C.

Annotations:—Refd. Ruckmaboye v. Mottichund (1853), 22 L. T. O. S. 203; Spencer v. Hemmerde (1922), 91 L. J. K. B. 941. Mentd. Reigate R. D. C. v. Sutton District Water Co. (1908), 6 L. G. R. 936.

B. Banker and Customer.

145. Current account—No interest paid by banker—Date of payment in.]—A banking firm, who, on opening an account with a customer, had agreed to allow him interest at three per cent. on the balances which should from time to time be standing to his credit, set up Statute of Limitations as a defence to a bill filed against them by the customer for an account. The account as it stood in the bankers' book showed a considerable balance due to pltf., but there being no item in it, or evidence of any transaction connected with it, or a date within six years prior to the filing of

WELL (1885), I. L. R. 7 All. 284.—IND.

142 ix. ———.]—RAMASAMI v. MUTTUSAMI (1891), I. L. R. 15 Mad. 380.—IND.

144 i. ——— Not from time of refusal to perform.]—EAST INDIA CO. v. ODITCHURN PAUL (1850), 5 Moo. Ind. App. 43.—IND.

r. Money paid for another—From date of adoption.]—AHEARNE v. M'SWINEY (1874), I. R. 8 C. L. 568.—IR.

PART II. SECT. 5, SUB-SECT. 2.—B. t. Current account—From date of payment in.]—CITY BANK OF SYDNEY

the bill, nor any suggestion in the bill, that the bankers were bound, by the agreement or otherwise, to have actually entered the interest as it became due to the credit of the customer in the account, or that they had omitted so to do with a fraudulent intent, the defence was allowed to prevail.—*FOLEY v. HILL* (1844), 1 Ph. 399; 13 L. J. Ch. 182; 2 L. T. O. S. 513; 8 Jur. 347; 41 E. R. 683, L. C.; *on appeal* (1848), 2 H. L. Cas. 28, H. L.

Annotations:—*Consd.* Jackson v. Ogg (1859), John. 397. *Distd.* Atkinson v. Bradford Third Equitable Benefit Bldg. Soc. (1890), 25 Q. B. D. 377; *Re Tidd, Tidd v. Overell*, [1893] 3 Ch. 154. *Consd.* Joachimson v. Swiss Bank Corp., [1921] 3 K. B. 110. *Refd.* Blower v. Blower (1858), 5 Jur. N. S. 33; Teed v. Beere (1859), 33 L. T. O. S. 26; Burdick v. Garrick (1870), 5 Ch. App. 233; Banner v. Berridge (1881), 18 Ch. D. 254; Seagram v. Tuck (1881), 44 L. T. 800; How v. Winterton, [1896] 2 Ch. 626; *Re Richardson, Pole v. Pattenden*, [1920] 1 Ch. 423. *Mentd.* Pennell v. Deffell (1853), 4 De G. M. & G. 372; Padwick v. Hurst (1854), 18 Beav. 575; Thomas v. Cooper (1854), 18 Jur. 688; Smith v. Leveaux (1863), 2 De G. J. & Sm. 1; Hill v. South Staffordshire Ry. (1865), 12 L. T. 63; St. Aubyn v. Smart (1867), L. R. 5 Eq. 183; A.-G. v. Edmunds (1868), L. R. 6 Eq. 381; Moxon v. Bright (1869), 4 Ch. App. 292; South Australian Insee. v. Randell (1869), L. R. 3 P. C. 101; Blyth v. Whiffin (1872), 27 L. T. 330; Garnett v. McKewan (1872), 21 W. R. 57; Summers v. City Bank (1874), L. R. 9 C. P. 580; *Re Palmer, Ex p. Richdale* (1882), 19 Ch. D. 409; Greenwell v. National Provincial Bank (1883), Cab. & El. 56; Marten v. Roocke, Eyton (1885), 53 L. T. 946; Royal Bank of Scotland v. Tottenham, [1894] 2 Q. B. 715; *Re Derbyshire, Webb v. Derbyshire*, [1906] 1 Ch. 135; Kerrison v. Glyn, Mills, Currie (1911), 81 L. J. K. B. 465; London Joint Stock Bank v. MacMillan & Arthur, [1918] A. C. 777.

146. ———.]—(1) Money deposited with a banker by his customer in the ordinary way, is money lent to the banker, with a superadded obligation that it is to be paid when called for by cheque; & consequently, if it remain in the banker's hands for six years, without any payment by him of the principal or allowance of interest, Statute of Limitations, 1623 (c. 16), is a bar to its recovery.

(2) An admission by a bkpt. in his balance sheet will not take a debt out of Statute of Limitations, 1623 (c. 16), as against his assignees.

(3) An admission in an unsigned letter, written & sent by direction of the assignees of a bkpt., by an accountant employed by them to wind up the affairs of the bkpt. estate, will not take a debt of the bkpt. out of Statute of Limitations, 1623 (c. 16).—*POTT v. CLEGG* (1847), 16 M. & W. 321; 16 L. J. Ex. 210; 8 L. T. O. S. 493; 11 Jur. 289; 153 E. R. 1212.

Annotations:—*As to* (1) *Distd.* Atkinson v. Bradford Third Equitable Benefit Bldg. Soc. (1890), 25 Q. B. D. 377; *Re Tidd, Tidd v. Overell*, [1893] 3 Ch. 154. *Consd.* Joachimson v. Swiss Bank Corp., [1921] 3 K. B. 110. *As to* (2) *Refd.* *Re Clendenning* (1859), 33 L. T. O. S. 291. *Generally, Mentd.* Cooke v. Seeley (1848), 17 L. J. Ex. 286; Tassell v. Cooper (1850), 9 C. B. 509; Farley v. Turner (1857), 5 W. R. 666; Seymour v. Brecon Corp., (1860), 29 L. J. Ex. 243; R. v. Hassall (1861), 9 W. R. 708; Garnett v. McKewan (1872), L. R. 8 Exch. 10; Goodwin v. Roberts (1875), 44 L. J. Ex. 157; Arnold v. Cheque Bank, Same v. City Bank (1876), 1 C. P. D. 578.

C. Bills of Exchange and Promissory Notes.

(a) Payable on Demand.

Summary procedure under Bills of Exchange Act, 1855 (c. 67), see *BILLS OF EXCHANGE*, Vol. VI., p. 467 *et seq.*

147. Date of making.]—*CHRISTIE v. FONSICK* (1811), 1 Selwyn's N. P., 13th ed. 301.

Annotation:—*Refd.* *Re George, Francis v. Bruce* (1890), 44 Ch. D. 627.

v. DEANE (1917), 17 S. R. N. S. W. 562; 34 N. S. W. N. 212.—*AUS.*

a. Deposit account—*From date of demand.*—*NASIR BIN ABDUL HABIB FAZAL v. DAYABHAI ITCHACHAND* (1873), 10 Bom. 300.—*IND.*

b. ———.]—*ISHUR CHUNDER BHADURI v. JIBUN KUMARI BIBI* (1888), 1 L. R. 16 Calc 25.—*IND.*

c. ———.]—*PERUNDEVITAYAR AMMAL v. NAMMALVAR CHETTI* (1895), 1 L. R. 18 Mad. 390.—*IND.*

148. ———.]—On a note payable with interest on demand, Statute of Limitations begins to run from the date of the note.—*NORTON v. ELLAM* (1837), 2 M. & W. 461; Murp. & H. 69; 6 L. J. Ex. 121; 1 Jur. 433; 150 E. R. 839.

Annotations:—*Apld.* Jackson v. Ogg (1859), John. 397; *Re Bethell, Bethell v. Bethell* (1887), 34 Ch. D. 561. *Consd.* *Re George, Francis v. Bruce* (1890), 44 Ch. D. 627; *Re Brown's Estate, Brown v. Brown*, [1893] 2 Ch. 300. *Refd.* Bradford Old Bank v. Sutcliffe, [1918] 2 K. B. 833; Joachimson v. Swiss Bank Corp., [1921] 3 K. B. 110.

149. ——— Necessity for demand.]—*Re BROWN'S ESTATE, BROWN v. BROWN*, No. 219, *post*.

150. ——— Note deposited as security for future advances.]—C. & S., the latter by way of guarantee, gave their joint & several promissory note for £200 to a banking co., as security for advances to be made by the bank to C. A memorandum of the same date, & signed by the same parties, accompanied the note, & purported to be a further & collateral security for C.'s banking account:—*Held*: the note & memorandum must be construed together, & Statute of Limitations did not run from the time when advances were first made by the bank to C. but from the time when the first balance was struck.—*HARTLAND v. JUKES* (1863), 1 H. & C. 667; 1 New Rep. 480; 32 L. J. Ex. 162; 7 L. T. 792; 9 Jur. N. S. 180; 11 W. R. 519; 158 E. R. 1052.

151. Note deposited with banker to be delivered to payee on performance of condition—Right of action accrues on receipt from banker.]—A promissory note made more than six years ago & deposited with a banker, to be delivered to the payee, on his producing a certain other note cancelled. The cause of the action to the payee on the first note, accrues on receiving it from the banker, & is not barred either by the lapse of six years from the date, or by the bkpcy. & certificate of the maker, which intervene between the date of the note, & the time of its delivery to the payee.—*SAVAGE v. ALDREN* (1817), 2 Stark. 232, N. P.

152. What is proof of demand—Payment of interest.]—In May, 1857, J. gave to R. a promissory note for payment of £150 three months after demand, no interest being reserved. J. died in 1869, & R. in 1878. The note was in R.'s possession at his death, & he had indorsed upon it receipts in Nov. 1857, & Aug. 1858, each for half a year's interest. It appeared that no other interest had ever been paid. J.'s estate being administered by the ct., R.'s exor. claimed to prove on the promissory note:—*Held*: the admissions by the payee of the payment of interest were evidence of a demand having been made in 1857 so as to make the £150 immediately payable, & Statute of Limitations was a bar to the claim.

Payment of interest implies that a debt is due, interest being paid in forbearance of a debt (*JESSEL, M.R.*).—*Re RUTHERFORD, BROWN v. RUTHERFORD* (1880), 14 Ch. D. 687; 49 L. J. Ch. 654; 43 L. T. 105; 28 W. R. 802, C. A.

Annotations:—*Refd.* Bradford Old Bank v. Sutcliffe, [1918] 2 K. B. 833. *Mentd.* Woodcock v. Eames (1925), 69 Sol. Jo. 444.

(b) Payable at Sight.

153. On presentment.]—No debt accrues on a bill payable after sight, until it is presented for payment. Therefore Statute of Limitations, 1623 (c. 16), is no bar to such a note, unless it has been

PART II. SECT. 5, SUB-SECT 2.—
C. (a).

d. Note payable to "A. or bearer."—The right of action on a note payable to A. or bearer, does not accrue to a third person as bearer till an actual

Sect. 5.—When time begins to run: Sub-sect. 2, C. (b), (c), (d) & (e), D. & E.]

presented for payment six years before the action commenced.—*HOLMES v. KERRISON* (1810), 2 Taunt. 323; 127 E. R. 1102.

Annotations:—Apld. Thorpe v. Booth (1826), Ry. & M. 388. *Consd. Norton v. Ellam* (1837), 1 Jur. 433. *Refd. Dixon v. Nuttall* (1834), 1 Cr. M. & R. 307.

154. —.]—In 1872, B. drew a bill of exchange at sight to her own order; she lived from that time to her death in 1878 at Marseilles with G. as his wife; she indorsed the bill to G. In 1876, G. indorsed it to C. The bill was presented for payment in 1880:—*Held*: time did not begin to run for the purpose of barring the right of action on the bill till presentation.—*Re BOYSE, CROFTON v. CROFTON, CANONGE'S CLAIM* (1886), 33 Ch. D. 612; 56 L. J. Ch. 135; 55 L. T. 391; 35 W. R. 247.

Time for presentment of bills.]—See BILLS OF EXCHANGE, Vol. VI., pp. 227, 228, Nos. 1421–1431.

(c) Payable at Fixed Date.

Bills of exchange, generally, see *BILLS OF EXCHANGE, Vol. VI., pp. 1 et seq.*

155. *Date of maturity.]—BUCKLER v. MOOR* (1672), 1 Mod. Rep. 89; 2 Keb. 874; Freem. K. B. 22; 86 E. R. 754; *sub nom. PUCKLE v. MOOR*, 1 Vent. 191.

156. —.]—*Semble*: an instrument in the following terms is a promissory note: "I have received the imperfect books, which, together with the cash overpaid on the settlement of your account, amounts to £80 7s., which sum I will pay in two years":—*Held*: such instrument was evidence of an account stated of debts, which would become due in two years, & Statute of Limitations did not begin to run until the expiration of the two years.—*WHEATLEY v. WILLIAMS* (1836), 1 M. & W. 533; 2 Gale, 140; Tyr. & Gr. 1043; 5 L. J. Ex. 237; 150 E. R. 546.

Annotations:—Refd. Jarvis v. Wilkins (1841), 7 M. & W. 410; *Spong v. Wright* (1842), 9 M. & W. 629; *Fryer v. Roe* (1852), 12 C. B. 437. *Mentd. Turquand v. Knight* (1836), 2 M. & W. 98; *Cleave v. Jones* (1852), 21 L. J. Ex. 105.

157. —.]—K. being indebted to pltfs. & to deft. & also to a banking co., it was agreed between all the parties that, for the purpose of securing K.'s debt to the co. deft. should draw upon K. three bills of exchange, payable to pltfs., & that pltfs. should indorse the bills to the co. The bills became due in 1843, & were dishonoured. In 1847 the banking co. sued pltfs. on the bills, & pltfs., in 1851, paid the amount:—*Held*: pltfs. were barred by Statute of Limitations from suing deft. as drawer of the bills.—*WEBSTER v. KIRK* (1852), 17 Q. B. 944; 21 L. J. Q. B. 159; 19 L. T. O. S. 46; 16 Jur. 247; 117 E. R. 1543.

158. —.]—A promissory note was given by deft. to pltfs. in 1840, payable, five years after date, for value received:—*Held*: it was evidence of an account stated, against which Statute of Limitations did not commence running until the maturity of the note.—*FRYER v. ROE* (1852), 12 C. B. 437; 138 E. R. 977; *sub nom. FRIAR v. ROE*, 19 L. T. O. S. 168.

159. — *Note given as security.]—STAFFORD v. FORCER* (1715), 10 Mod. Rep. 311; 88 E. R. 742.

Annotations:—Mentd. Cole v. Hawkins (1717), 1 Stra. 21; *Matthews v. Spicer* (1728), 2 Stra. 806.

delivery to him.—*SHAW v. MATTHISON* (1833), 3 O. S. 74.—CAN.

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O. (a).

155 i. *Date of maturity.]—MONTGOMERY v. M'NAIR* (1850), 2 All. 31.

—CAN.

155 ii. —.]—*DARLING v. HITCHCOCK* (1870), 28 U. C. R. 439; 25 U. C. R. 463.—CAN.

155 iii. —.]—*EDGAR v. MAGEE* (1882), 1 O. R. 287.—CAN.

160. — — —.]—Where a bill of exchange is drawn payable at a certain future period for the amount of a sum of money lent by the payee to the drawer at the time of drawing the bill, the payee may recover the money in an action for money lent although six years have elapsed since the time when the loan was advanced; Statute of Limitations beginning to operate only from the time when the money was to be repaid, i.e., when the bill became due.—*WITTERSHEIM v. CARLISLE (LADY)*

Annotation:—Refd. HAYES v. HAYES (1885), 10 App. Cas. 453.

161. — *Days of grace.]—The three days of grace allowed by the custom of merchants for payment of bills of exchange, are allowable on bills drawn & payable in Scotland; the limitation of an action on such bill therefore only begins to run from the third or last day of grace.—FERGUSON v. DOUGLAS, HERON & Co.* (1796), 6 Bro. Parl. Cas.

v. Orr Ewing (1885), 10 App.

Cas. 453.

162. — — — *Last day Sunday—R. S. C., Ord. 64, r. 3.]—Pltf. in the action sued on a promissory note at three months, dated Mar. 11, 1874; the note was therefore prima facie due on June 14, of the same year; June 14 was a Sunday. The writ in the action bore date June 14, 1880, which was a Monday. It was contended that the right of action was barred by Statute of Limitations:—Held: the action was barred, & the mercantile usage in the matter of days of grace had the effect of law, it had the like effect on the custom of bills & notes falling due on a Sunday becoming payable on the previous Saturday, & Ord. 57, r. 3, of Jud. Act, 1875 (c. 77) [now R. S. C., Ord. 64, r. 3], did not apply to such a case as the present one, as it was not intended to extend the time fixed by the Statute of Limitations.—MORRIS v. RICHARDS* (1881), 45 L. T. 210; 46 J. P. 37.

Annotation:—Folld. Gelmini v. Moriggia, [1913] 2 K. B. 549.

163. — *Note due on Saturday—R. S. C., Ord. 64, r. 3.]—The time for payment of a promissory note expired on Saturday, Sept. 22, 1906. The writ in an action upon the note against the makers was issued on Monday, Sept. 23, 1912:—Held: (1) inasmuch as the cause of action was complete at the commencement of Sept. 23, 1906, that day must be included in calculating the six years within which the action could be brought under Statute of Limitations, 1623 (c. 16), therefore the six years expired on Sunday, Sept. 22, 1912, & the writ was issued too late; & (2) although for the purpose of calculating the time for doing anything required to be done by R. S. C., Ord. 64, r. 3, if the time expires on a Sunday the following Monday, if the offices are open, is to count as if it were the Sunday, the rule has no effect upon the operation of Statute of Limitations, 1623 (c. 16), & did not prevent the issue of the writ being out of time.—GELMINI v. MORIGGIA*, [1913] 2 K. B. 549; 82 L. J. K. B. 949; 109 L. T. 77; 29 T. L. R. 486.

164. — *Note payable at specified period after demand.]—Where a promissory note was made payable "two years after demand":—Held: Statute of Limitations did not begin to run until two years after demand had elapsed.—THORPE v. COOMBE* (1826), 8 Dow. & Ry. K. B. 347.

165. — — —.]—Statute of Limitations is no bar to an action on a promissory note, payable

161 i. — *Days of grace.]—BANK OF TORONTO v. McBEAN*, 21 O. L. T. 44.—CAN.

161 ii. — — —.]—*WILLOUGHBY v. WAINWRIGHT* (1913), 84 W. L. R. 504; 4 W. W. R. 875.—CAN.

"twenty-four months after demand," if presented for payment within six years before the action commenced.—*THORPE v. BOOTH* (1826), Ry. & M. 388.

166. ———.]—*Re RUTHERFORD, BROWN v. RUTHERFORD*, No. 152, *ante*.

(d) *Accepted in Blank.*

167. From time blank filled up.] — In the case of a blank acceptance Statute of Limitations runs from the time the bill became due as filled up, & not from the time it would have become due if completed when it was accepted in blank.—*MOUNTAGUE v. PERKINS* (1853), 1 C. L. R. 579; 17 Jur. 557; *sub nom.* *MONTAGUE v. PERKINS*, 22 L. J. C. P. 187; 21 L. T. O. S. 185; 1 W. R. 437.

Annotations:—*Mentd.* *Hatch v. Searles* (1854), 2 Sm. & G. 147; *Harvey v. Cane* (1876), 34 L. T. 64; *London & South Western Bank v. Wentworth* (1880), 5 Ex. D. 96; *Carter v. White* (1882), 20 Ch. D. 225.

(e) *Dishonour by Non-Acceptance.*

168. From time of non-acceptance.] — The holder of a bill of exchange, on non-acceptance, & protest & notice thereon, has an immediate right of action against the drawer, & does not acquire a fresh right of action on the non-payment of the bill when due. Statute of Limitations, therefore, runs against him from the former & not from the latter period.—*WHITEHEAD v. WALKER* (1842), as reported in 9 M. & W. 506; 11 L. J. Ex. 168; 152 E. R. 214.

Annotation:—*Reid.* *Hemp v. Garland* (1843), 4 Q. B. 519.

D. *Cheques.*

169. Cheque given to be presented on contingency—*Failure of contingency.*]—(1) In an action commenced in 1885 for the administration of B.'s estate, on inquiries for creditors, P. brought in a claim to be paid a sum of £541 16s. 7d. which, as to £441 16s. 7d. was for commission & moneys lent before Mar. 1878, & which, as to £100 was for payment of a cheque, undated, given by B. in Mar. 1878, & accepted by P. in discharge of a larger sum. B. was sent to the Cape of Good Hope in Mar. 1878, & died there in 1884. He, while on board ship, wrote a letter in which he asked P. to make out his account, & send it to him: "I will send it you as soon as possible." The account was sent in Mar. 1878, & B. afterwards wrote letters to P. in which he said, "I will send you a cheque as soon as I can" & "I will send some coin home as soon as ever I can":—*Held*: as to the £441 16s. 7d. there had not been an acknowledgment sufficient to enable the ct. to infer an absolute promise to pay.

(2) As to the cheque, B. had not at the time of drawing it sufficient moneys at his bank to meet it, & was negotiating a loan, which he expected shortly to complete, out of which the cheque would be paid. The loan was not completed. P. was informed of that fact. The cheque remained undated & was never presented for payment:—*Held*: Statute of Limitations barred the claim, as the six years began to run when the letter was received stating that the loan would not be completed, & had long since elapsed.—*Re BETHELL, BETHELL v. BETHELL* (1887), 34 Ch. D. 561; 56

L. J. Ch. 334; 56 L. T. 92; 35 W. R. 330; 3 T. L. R. 296.

Annotation:—*As to* (1) *Consd.* *Barrett v. Davies, Barrett v. Withers* (1904), 90 L. T. 460.

Time for presentment of cheques.]—*See* *BILLS OF EXCHANGE*, Vol. VI., pp. 228–230, Nos. 1432–1450.

E. *Contracts Dependent on Contingency.*

170. Whether from happening of contingency.]

—*REYNOLDS v. COWPER* (1726), 2 Eq. Cas. Abr. 73; 5 Vin. Abr. 524, pl. 47; 22 E. R. 64.

Annotations:—*Dttd.* *Fenton v. Emblers* (1762), 3 Burr. 1278. *Reid.* *Wells v. Horton* (1826), 12 Moore, C. P. 177.

171. ———.]—Statute of Limitations in case of a contingency does not run from the time of making but from the contingency happening.—*FENTON v. EMBLERS* (1762), 3 Burr. 1278; 1 Wm. Bl. 353; 97 E. R. 831.

Annotations:—*Consd.* *Davey v. Shannon* (1879), 4 Ex. D. 81. *Reid.* *Wells v. Horton* (1826), 4 Bing. 40. *Mentd.* *Donellan v. Read* (1832), 3 B. & Ad. 899; *Souch v. Strawbridge* (1846), 2 C. B. 808; *Hanau v. Ehrlich*, [1911] 2 K. B. 1056.

172. ——— *Death of promissor.*] — A person borrowed a sum of money in the year 1807. In the year 1815, he stated, by parol, to the attorney of the party entitled to it, that he had made provision by his will, & had directed his exors. to pay it at his death. He died in the year 1825, without having made any such provision. In an action against the exor.:—*Held*: the promise was good, & the money recoverable; neither Stat. Frauds nor Statute of Limitations applied to the case; & a moral obligation to pay was a sufficient consideration for the promise.—*WELLS v. HORTON* (1826), 2 C. & P. 383, N. P.; *subsequent proceedings*, 4 Bing. 40.

Annotations:—*Reid.* *Souch v. Strawbridge* (1846), 2 C. B. 808. *Mentd.* *O'Sullivan v. Murphy* (1866), 14 W. R. 407; *Knowlman v. Bluett* (1874), L. R. 9 Exch. 307; *McGregor v. McGregor* (1888), 21 Q. B. D. 424; *Hanau v. Ehrlich*, [1911] 2 K. B. 1056.

173. ———.]—A promissory note was given more than six years before action, with a memorandum, indorsed on the back, by the payees, to the effect that they undertook that no demand should be made for payment during the life of the maker. An action being brought, within six years after the death of the maker against his exors., he pleaded Statute of Limitations:—*Held*: pltf. were entitled to recover, if not upon the note itself, at all events on a special count setting forth the effect of the arrangement.—*WATKINS v. FIGG* (1863), 11 W. R. 258.

174. ——— *Capacity to pay.*] — Deft., being drawer of two bills of exchange of which pltf. was holder, gave him a written promise that, in consideration of pltf. having agreed not to proceed against him, deft. thereby debarred himself of all future plea of Statute of Limitations, 1623 (c. 16), in case of his being sued, & thereby promised to pay the bills, "whenever my circumstances may enable me to do so, & I may be called upon for that purpose." In an action of special *assumpsit* on this agreement:—*Held*: under Statute of Limitations, 1623 (c. 16), s. 3, the limitation of action ran from the time of deft. becoming able to pay, though pltf. had made no demand, & had

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170 i. Whether from happening of contingency.]—*LAND MORTGAGE BANK v. REID*, [1909] V. L. R. 284.—AUS.

170 ii. ———.]—*Re KIRKPATRICK, KIRKPATRICK v. STEVENSON* (1883), 3 O. R. 361.—CAN.

170 iii. ———.]—*COSTELLO v. HUNTER* (1886), 12 O. R. 333.—CAN.

170 iv. ———.]—*GRANT v. CORNOCK* (1888), 16 O. R. 406; *affd. on appeal* (1889), 16 A. R. 532.—CAN.

170 v. ———.]—The period of limitation for a suit to recover money deposited by pltf. with deft., upon the understanding that it will be returned in a certain event, begins to run on the happening of the event.—*JOHURI*

MAHTON v. THAKOOR NATH LUKER (1880), I. L. R. 5 Cal. 830; 6 C. L. R. 355.—IND.

170 vi. ———.]—*GUDRI KOER v. BHUBANSEWARI COOMAR SINGH* (1891), I. L. R. 19 Cal. 19.—IND.

174 i. ——— *Capacity to pay.*]—*CUDDIHY v. COSTIGAN* (1902), 8 Nfld. L. R. 567.—NFLD.

Sect. 5.—When time begins to run: Sub-sect. 2, E., F., G. & H. (a).]

not been informed by deft., or otherwise had knowledge, of such ability.—*WATERS v. THANET (EARL)* (1842), 2 Q. B. 757; 2 Gal. & Dav. 166; 11 L. J. Q. B. 87; 6 Jur. 708; 114 E. R. 295.

175. ———.]—In May, 1849, an order was made to wind up a co., & in the ensuing Oct., the solrs., who had acted for the co., carried in a claim against them for costs. In Nov. 1850, the solrs., on the application of the official manager, delivered to him the co.'s books & papers, on which they had a lien for their costs, upon the official manager at the same time undertaking, in writing, to pay them the amount of their bill out of the first funds which might come into his hands. That undertaking received the sanction of the master. In 1859 the official manager recovered a sum of money, & the solrs. subsequently thereto sent in to him a larger bill of costs against the co.:—*Held*: having regard to the undertaking of the official manager of Nov. 1850, the solrs. claim was not barred by Statute of Limitations.—*Re GLOUCESTER, ABERYSTWITH & CENTRAL WALES RY. CO.* (1860), 2 Giff. 47; 29 L. J. Ch. 383; 1 L. T. 320; 6 Jur. N. S. 116; 8 W. R. 175; 66 E. R. 20.

176. ———.]—A debtor wrote to his creditor, "I will pay you as soon as I get it in my power":—*Held*: Statute of Limitations did not commence running until the debtor became of ability to pay.—*HAMMOND v. SMITH* (1864), 33 Beav. 452; 9 L. T. 746; 10 Jur. N. S. 117; 12 W. R. 328; 55 E. R. 443.

Annotation:—*Mentd. Re McHenry, McDermott v. Boyd, Barker's Claim* (1894), 63 L. J. Ch. 741.

F. Copyhold Fines.

Copyholds generally, see *COPYHOLDS*, Vol. XIII., pp. 9 *et seq.*

177. **Lord entitled to arbitrary fine on admittance—Time runs from admittance.**—The lord of a manor was entitled to an arbitrary fine on the admittance of a tenant to copyhold. He brought an action for the fine more than six years after the admittance, but less than six years from the assessment & demand of the fine:—*Held*: the period of limitation began to run from the time of the admittance, & the lord's right was therefore barred by Civil Procedure Act, 1833 (c. 42), s. 3.—*MONCKTON v. PAYNE*, [1899] 2 Q. B. 603; 68 L. J. Q. B. 951; 81 L. T. 204; 48 W. R. 44; 15 T. L. R. 531; 43 Sol. Jo. 706, N. P.

Annotation:—*Refd. Cheshire County Council v. Hopley* 23), 130 L. T. 123.

See, now, Law of Property Act, 1922 (c. 16), s. 128.

G. Co-Trustees.

See, generally, *TRUSTS & TRUSTEES*.

178. **Right of contribution—From time claim of cestui que trust established.**—The principle established in *Wolmershausen v. Gullick*, No. 188, *post*, that Statute of Limitations does not begin to run against a surety suing a co-surety for contribution until the liability of the surety is established, applies equally to the case of a trustee claiming contribution against his co-trustee in respect of a liability incurred from loss occasioned to the trust estate by their joint default. In such a case, therefore, time does not begin to run as

between the co-trustees until the claim of the *cestui que trust* has been established against one of them.

Pltf. who was trustee of a marriage settlement allowed the trust fund to be in the hands of deft., his co-trustee, for investment. Deft. entrusted the whole fund to an "outside" stockbroker who applied a portion of it to his own uses. In an action by pltf. & infant *cestui que trust* under the settlement, deft. denied his liability & claimed contribution against pltf. trustee:—*Held*: as between the two trustees time did not begin to run under Statutes of Limitation until the date of the judgment in the action.—*ROBINSON v. HARKIN*, [1896] 2 Ch. 415; 65 L. J. Ch. 773; 74 L. T. 777; 44 W. R. 702; 12 T. L. R. 475; 40 Sol. Jo. 600.

H. Guarantee.

(a) Surety and Creditor.

Liability of surety generally, see *GUARANTEE*, Vol. XXVI., pp. 62 *et seq.*

179. **From time of surety's liability to creditor.**—H. gave pltf. a guarantee for the value of coals to be supplied to N., on condition that no application should be made to H. for payment but on failure of the "utmost efforts & legal proceedings" of pltf. to obtain payment from N. Coals were supplied under the guarantee, & remained unpaid for till Apr. 1820, when H., in consideration of pltf. giving N. "two years & upwards" for the liquidation of his then debt, agreed to reserve to pltf. all claim that they might have upon him, H., by virtue of the former security, & "to be bound by the consequence thereof, if, at the expiration of such period," pltf. should not have been paid. N. never paid the debt. In Apr. 1824, he went to France, but was occasionally in England, privately, & for short periods, from that time till 1830, when he finally returned. Pltf. issued process against him in June, 1826, & continued it till 1830, when they arrested N. upon it, on his return to England. Soon afterwards he took the benefit of the Insolvent Debtors' Act. In July, 1828, pltf. commenced an action against H., on his guarantees; that action abated by his death in 1829, & in June, 1829, pltf. brought an action upon the guarantees against his exors., who pleaded Statute of Limitations. Issue was tendered & joined on that plea:—*Held*: assuming that the first guarantee was incorporated with the second, & that a reasonable time must be allowed after the expiration of the two years for pltf. to endeavour to obtain payment from H., nevertheless pltf., having allowed two years to pass without proceeding against N., after which he went abroad, had at all events exceeded such reasonable time, & were barred of their remedy against H. by Statute of Limitations in July, 1828.—*HOLL v. HADLEY* (1835), 2 Ad. & El. 758; 4 Nev. & M. K. B. 515; 4 L. J. K. B. 126; 111 E. R. 292.

180. ———.]—In 1816 G. shipped goods on board a vessel chartered by him for Calcutta & B. & co. made advances to enable him to do so, under an arrangement that the goods should be transmitted to the agents at Calcutta of B. & co., who were to dispose of the outward cargo there, & send the proceeds in goods or bills to B. & co. in London, who were to reimburse themselves their charges, & hold the balance at the disposal of G. In Nov.

PART II. SECT. 5, SUB-SECT. 2.—G. O. W. R. 681.—CAN.

of contribution—From
of cestui que trust established.]
—*GARDNER v. PERRY* (1903), 23
C. L. T. 295; 6 O. L. R. 269; 2

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H. (a).

1791. From time of surety's liability
to creditor.]—*UNION BANK OF AUS-*

TRALIA, LTD. v. BARRY (1897), 23
V. L. R. 505.—AUS.

17911. ———.]—*ROYAL BANK OF
CANADA v. HUMPHREYS* (1922), 31
B. C. R. 81.—CAN.

1817, G. being in difficulties & indebted to debts. in £850, debts. & G. applied to B. & co. to pay off this debt by a further advance to G. on his consignment, & debts. gave B. & co. the following guarantee: "Messrs. B. & co., you having expressed some doubts of the propriety of paying G.'s draft on you for £850 in our favour, we hereby engage, if you will pay us the same, that we will reimburse you the amount on demand, with interest in the event of your finding it necessary to call upon us to do so, either from the state of G.'s pending account with you, or from any other circumstances." B. & co. thereupon accepted & paid a bill for £850, drawn by G. on them in favour of debts. The vessel returned to England with a cargo in Apr. 1818, when C. the owner, G. having become bkpt., gave notice to the East India co., in whose docks she lay, not to deliver any part of the cargo without his authority; they thereupon sold the cargo, & paid the owner's demand for freight, & in consequence of conflicting claims from G.'s assignees & from B. & co., filed an interpleader bill, & paid the balance of the proceeds into ct. Proceedings at law & equity were continued between all the above parties, under legal advice up to the year 1837, when the result was, that B. & co. were obliged to pay C.'s costs. In 1838, B. & co. demanded of debts. the £850 due by the guarantee, with interest & their share of the expenses incurred in the law proceedings, & on their refusal to pay, brought an action against them on the guarantee:—*Held*: Statute of Limitations began to run against pltf., not from the termination of the legal proceedings in 1837, but from the return & sale of the cargo in 1818, when all the facts were ascertained upon which debts.' legal liability depended, & therefore it was a bar to the action.—*COLVIN v. BUCKLE* (1841), 8 M. & W. 680; 11 L. J. Ex. 33; 151 E. R. 1212.

181. Guarantee to pay on demand—Time runs from demand.—*Re BROWN'S ESTATE, BROWN v. BROWN*, No. 219, *post*.

182. ———.]—In 1894 pltf. agreed to grant a co. a fixed loan of £3,600 & to allow an overdraft of £2,500 on the co. depositing debentures for £6,100 & procuring a guarantee from two of its directors. The debentures were deposited, & the directors gave a guarantee, which was expressed as being given to protect pltf. from loss on the realisation of the debentures, agreeing to pay to pltf. on demand all sums owing by the co., the amount ultimately recoverable under the guarantee not to exceed £6,100 with interest "from the time of default of payment by the co. or from the time of your demanding payment thereof from us." In 1898 F., one of the guarantors, became insane, & pltf. had notice of this in 1899. The co. continued to bank with pltf. until 1907, when pltf. amalgamated with another bank under the name of the United Counties Bank, Ltd., selling to the new bank all its debts & the benefit of all securities & guarantees. The £6,100 debentures remained registered in the name of pltf. The new bank continued to use the books of the old bank, a note being made therein to the effect, "United Counties Bank, Ltd., as from Feb. 13, 1907." The co.'s accounts were transferred in those books to the name of the new bank, & the co. paid interest on the loan account by cheques drawn on the current account in favour of the new bank. In 1912 pltf. demanded payment from the co. of the amounts owing & commenced an action to enforce the debentures, in which they realised a certain sum; & in 1915 they commenced an action on the guarantee against debt. as the committee of F. for the amounts accrued due on the loan account

& current account less the amount realised on the debentures:—*Held*: pltf.' claim was not barred by Statute of Limitations, as no cause of action arose against the surety until demand had been made by pltf., & no demand was made till 1912.—*BRADFORD OLD BANK v. SUTCLIFFE*, [1918] 2 K. B. 833; 88 L. J. K. B. 85; 119 L. T. 727; 34 T. L. R. 619; 62 Sol. Jo. 753; 24 Com. Cas. 27, C. A.

183. Guarantee of mortgage debt—Time runs after reasonable time for repayment.—On Jan. 20, 1881, E., in consideration of an advance of £2,000, mortgaged certain real estate to G., & covenanted to pay £2,000 & interest at five per cent. *per annum* on July 20, 1881, & to pay interest at the like rate half-yearly on the £2,000, or so much of it as should for the time being remain owing, until the same should be fully paid. On May 9, 1882, C. executed a document in the following terms: "I, C.," for the consideration therein mentioned, "do hereby guarantee to the said G. repayment of the sum . . . of £2,000, & interest for the same" at five per cent. *per annum*. This guarantee was referred to in the correspondence relating to the execution thereof as "the guarantee of E.'s mtge." Interest was regularly paid by E. until July 20, 1891. E. died on Sept. 13, 1891, & the proceeds of his estate & the property comprised in the mtge. were sufficient to pay £600 only of the mtge. debt. Upon non-compliance by C. with a notice to pay the balance of £1,400 & interest, the mtgee. brought an action against C., & thereby sought to recover from him £1,400 & interest, as sums payable by him under his guarantee:—*Held*: (1) the liability of C. was confined to the payment of £2,000 & interest, in accordance with the terms of the mtge. deed; (2) in the absence of an agreement not to sue for a definite time, the mtgee. could at the most be presumed to have agreed not to sue for a reasonable time; & (3) such time had elapsed prior to the commencement of six years before the bringing of the action, & consequently the mtgee.'s claim against C. was barred by Statute of Limitations.—*HENTON v. PADDISON* (1893), 68 L. T. 405; 9 T. L. R. 333; 3 R. 450.

184. Guarantee as to safety of money lent—Time runs from time advance jeopardised.—In 1879 debts. wrote to pltf., by letter dated Sept. 15: "We hereby guarantee the safety of the above investments;" & by letter dated Sept. 16: "We acknowledge to have received from you the sum of £710 as under: a mtge. on the estate at T. the property of B., £360; a mtge. on the estate at F., the property of A., £350." Pltf. C. advanced to B. on mtge. of the estate at T. the sum of £360 through debts. In 1891 pltf. C. conveyed & transferred to the pltf. D., in consideration of £300, the benefit of the mtge. In 1896 pltf. sued debts. to recover the sum of £360 from them as guarantors of the mtge.

The breach arose within six years before action brought, for it was not till then that the investment was shown to be unsafe (*LOPES, L.J.*).—*SHEERS v. THIMBLEBY & SON* (1897), 76 L. T. 709; 13 T. L. R. 451; 41 Sol. Jo. 558, C. A.

Annotations:—*Mentd. Stokes v. Whicher*, [1920] 1 Ch. 411; *Wade v. L. & N. W. Ry.*, [1921] 1 K. B. 582.

185. Continuing guarantee of bank account—Advance made more than six years before action—Interest & commission accrued due within six years.—In an action on a guarantee it appeared that debt. had guaranteed to pltf., a banking co. payment of all moneys which might be owing to them in account with a customer with interest, commission, & other banking charges; & it was

Sect. 5.—When time begins to run: Sub-sect. 2, H. (a), (b) & (c),

provided that the guarantee should be a continuing guarantee & should not be withdrawn except by six months' written notice from the guarantor. Pltfs. made advances to the customer by honouring his overdrafts from time to time down to a period more than six years before the action, but made no advances subsequently to that period, & the customer paid sums in to his account with the bank against his liability from time to time down to a period within six years before the action. At the end of each half year pltfs. debited him in account with the interest for the half year on the amount owing by him from time to time & carried forward the balance to his debit as the amount owing at the commencement of the next half year:—*Held*: pltfs.' right of action upon the guarantee in respect of the sums advanced by them to the customer was barred by Statute of Limitations, but the action was maintainable in respect of interest which had accrued due from the customer within six years before the action & had not been paid.—*PARR'S BANKING CO. v. YATES*, [1898] 2 Q. B. 460; 67 L. J. Q. B. 851; 79 L. T. 321; 47 W. R. 42, C. A.

Annotations:—*Reid*. *Ascherson v. Tredegar Dry Dock & Wharf Co.*, [1909] 2 Ch. 401; *Bradford Old Bank v. Sutcliffe*, [1918] 2 K. B. 833.

(b) Surety and Principal Debtor.

Sureties' rights against principal debtor, generally, see *GUARANTEE*, Vol. XXVI., pp. 121 *et seq.*

186. From time of making payment to creditor.]—*DAVIES v. HUMPHREYS*, No. 187, *post*.

(c) Co-Sureties.

Rights & liabilities of co-sureties *inter se*, see *GUARANTEE*, Vol. XXVI., pp. 139 *et seq.*

187. Where more than proportion paid—From time of payment of excess.]—By a promissory note, E., D., & H., jointly & severally promised to pay to J. £300, with interest. D. having afterwards paid J. £280 on account of the note, J. made the following indorsement upon it: "Received of D. the sum of £280, on account of the within note, the £300 having been originally advanced to E." In an action brought by D., who had paid the whole amount due, against H., to recover contribution from him "as a co-surety," it appeared that the amount of principal & interest was paid by pltf. more than six years before the commencement of the suit, with the exception of £30, which was paid by him within that period. Statute of Limitations having been pleaded:—*Held*: (1) pltf. was entitled to recover only to the extent of £30, which had been paid within the six years, & Statute of Limitations was a bar to the rest, as the right of action attached as soon as pltf. had paid more than his proportion; (2) in an action on the same note against E., the principal, Statute of Limitations was a bar to all except £30, as pltf. had a right of action against the principal the moment he paid anything, for so much money paid to his use.—*DAVIES v.*

HUMPHREYS (1840), 6 M. & W. 153; 9 L. J. Ex. 263; 4 Jur. 250; 151 E. R. 361.

Annotations:—*As to* (1) *Consd.* *Wolmershausen v. Gullick*, [1893] 2 Ch. 514. *Reid*. *Pitt v. Purssord* (1841), 8 M. & W. 538; *Batard v. Hawes*, *Batard v. Douglas* (1853), 2 E. & B. 287. *Generally*, *Mentl.* *Kemp v. Finden* (1844), 12 M. & W. 421; *Doe d. Kinglake v. Bevis* (1849), 7 C. B. 456; *Percival v. Nanson* (1851), 7 Exch. 1; *Re Snowden, Ex p. Snowden* (1881), 17 Ch. D. 44; *Stirling v. Burdett*, [1911] 2 Ch. 418.

188. Not till liability of surety ascertained—Though time run as between principal creditor & co-surety.]—The Statute of Limitations does not begin to run against a surety suing a co-surety for contribution until the liability of the surety is ascertained, i.e., until the claim of the principal creditor, has been established against him; although at the time of the action for contribution the statute may have run as between the principal creditor & the co-surety.—*WOLMERSHAUSEN v. GULLICK*, [1893] 2 Ch. 514; 62 L. J. Ch. 773; 68 L. T. 753; 9 T. L. R. 437; 3 R. 610.

Annotations:—*Appld.* *Robinson v. Harkin*, [1896] 2 Ch. 415. *Mentl.* *Ellis v. Pond*, [1898] 1 Q. B. 426; *Re Blackpool Motor Car Co.*, *Hamilton v. Blackpool Motor Car Co.*, [1901] 1 Ch. 77; *Shepherd v. Bray*, [1906] 2 Ch. 235; *Ascherson v. Tredegar Dry Dock & Wharf Co.*, [1909] 2 Ch. 401; *Re Law Guarantee Trust & Accident Soc., Liverpool Mortgage Insee. Co.'s Case*, [1914] 2 Ch. 617.

Application of rule to co-trustees.]—See Sub-sect. 2, G., *ante*.

I. Husband and Wife.

Contracts of wife generally, see *HUSBAND & WIFE*, Vol. XXVII., pp. 175 *et seq.*

189. Ante-nuptial debt of wife—Time runs in favour of husband from date of debt.]—A judgment having been recovered by pltf. in an action brought against a married woman under Married Women's Property Act, 1882 (c. 75), s. 13, for a debt incurred by her before marriage, but such judgment remaining unsatisfied because she had no separate estate, an action for the debt was afterwards brought by pltf. against the husband who had acquired property from his wife, to an amount exceeding the debt:—*Held*: (1) the judgment recovered against the wife was no defence to the action against the husband; & (2) a husband cannot be made liable under Married Women's Property Act, 1882 (c. 75), ss. 14, 15, for an ante-nuptial debt of the wife which accrued due against the wife more than six years before the commencement of the action.

The Statute of Limitations, 1623 (c. 16), ran from the time the cause of action rose against her. Any acknowledgment by her of the debt before the marriage would be available as against her; but no acknowledgments or acts of hers after the marriage would be available against either of them (*LINDLEY, L.J.*).—*BECK v. PIERCE* (1889), 23 Q. B. D. 316; 58 L. J. Q. B. 516; 61 L. T. 448; 54 J. P. 198; 38 W. R. 29; 5 T. L. R. 672, C. A.

Annotation:—*As to* (2) *Reid*. *Re Parkin, Hill v. Schwarz*, [1892] 3 Ch. 510.

J. Indemnity.

Indemnity, generally, see *GUARANTEE*, Vol. XXVI., pp. 221 *et seq.*

I. L. T. 7, 9.—IR.

PART II. SECT. 5, SUB-SECT. 2.—I.

e. Loan by wife to husband—Application of ordinary law.]—There is no reason why the Statute of Limitations should not be applied to a claim by a wife against her husband to recover a loan from him, in the same way as if she were not his wife.—*Re STARR, STARR v. STARR* (1901), 21 C. L. T. 692; 2 O. L. R. 762.—CAN.

PART II. SECT. 5, SUB-SECT. 2.—H.

186 i. From time of making payment to creditor.]—*RAGHAVENDRA GURURAO v. MAHIPAT KRISHNA* (1924), 1 L. R. 49 Bom. 202.—IND.

186 ii. —.]—*CONSIDINE v. CONSIDINE* (1846), 9 L. R. 400.—IR.

PART II. SECT. 5, SUB-SECT. 2.—H. (c).

187 i. Where more than proportion

paid—From time of payment of excess.]—*WALKER v. BOWRY* (1924), 35 C. L. R. 48.—AUS.

187 ii. —.]—*PATTERSON v. CAMPBELL* (1910), 8 E. L. R. 49.—CAN.

187 iii. —.]—The Statute of Limitations only commences to run from the date at which one of two or more co-sureties is damaged by being compelled to pay more than his just share of the common debt.—*GARDNER v. BROOKE*, [1897] 2 L. R. 6, 20; 30

190. Time when damnification occurs.]—BROWNE v. HANCOCKE (1628), as reported in Het. 111; 124 E. R. 383.

*Annotation:—*Reid. Chapple v. Durston (1830), 1 Cr. & J. 1

191. —.]—S. & co., the owners of a ship of which H. was captain, despatched the latter to Miramichi, with instructions to purchase a cargo of timber, & draw upon them for the amount. H. proceeded to Miramichi accordingly, & there purchased some timber from one L. for £154 11s. 11d. & drew a bill upon S. & co. for the amount, at sixty days' sight, in favour of the seller or his order. The bill was dated Sept. 4, 1826, & on Nov. 21, it was duly presented for acceptance & protested for non-acceptance. Pltf. was in Liverpool, with the ship under his command, from Oct. 1826, until Apr. 1827. It was not proved that pltf. received any notice of the dishonour of the bill, either from the then holder or from defts. who had got the cargo. In 1832, pltf. was arrested upon this bill at Miramichi, & paid it, in order to release himself from the arrest. In a special action of *assumpsit*, brought by pltf. against defts. for not paying the bill, for not accepting it, & for not indemnifying pltf. from all loss, etc., sustained by him from having drawn the bill:—*Held*: a promise to indemnify was the promise which the law would, in this case, imply, & as there was no damnification till 1832, Statute of Limitations did not apply.—HUNTLEY v. SANDERSON (1833), 1 Cr. & M. 467; 3 Tyr. 469; 2 L. J. Ex. 204; 149 E. R. 483, Ex. Ch.

192. —.]—On a contract to indemnify pltf. against costs, which he is afterwards called upon to pay, the cause of action arises when he pays, not when the costs are incurred, or the attorney's bill delivered to such pltf. Therefore Statute of Limitations runs from the time of payment.—COLLIDGE v. HEYWOOD (1839), 9 Ad. & El. 633; 1 Per. & Dav. 502; 2 Will. Woll. & H. 107; 8 L. J. Q. B. 98; 112 E. R. 1352.

*Annotations:—*Consd. Smith v. Howell (1851), 6 Exch. 730. *Reid.* Reynolds v. Doyle (1840), 2 Scott, N. R. 45; Blyth v. Fladgate, Morgan v. Blyth, Smith v. Blyth, [1891] 1 Ch. 337; *Re* Richardson, *Ex p.* St. Thomas' Hospital, [1911] 2 K. B. 705. *Mentd.* Spark v. Heslop (1859), 1 E. & E. 563.

193. —.]—A party who requests another to "lend his acceptance," impliedly engages to take up the bill at maturity, & to indemnify the acceptor against the consequences of non-payment. Upon a contract to indemnify an accommodation acceptor, Statute of Limitations begins to run from the time at which the pltf. is damnified by actual payment.—REYNOLDS v. DOYLE (1840), 1 Man. & G. 753; Drinkwater, 1; 2 Scott, N. R. 45; 4 Jur. 992; 133 E. R. 536.

*Annotation:—*Mentd. Batson v. King (1859), 4 H. & N. 739.

194. —.]—When a party is called upon to pay the debt of another, his remedy over against such other runs from the time of actual payment by him, & not from the time when he became merely liable to pay.

A. was the accommodation acceptor for B. of a bill of exchange, which became due in 1856; he was sued upon it, & paid the amount some time within the last six years; he thereupon sued B. for the same, & upon B. pleading Statute of Limitations:—*Held*: the statute commenced to run against A. only from the time of payment by

him, & therefore he was entitled to recover.—ANGROVE v. TIPPETT (1865), 11 L. T. 708.

195. —.]—Under a deed of indemnity of Oct. 1841, in the nature of a family arrangement, K. the younger & an exor. of testator W., was indemnified by the rest of the family from any claim in respect of having allowed the investment of a considerable portion of testator's estate to two of the sons, G. & C. on their promissory notes. These promissory notes have been barred by Statute of Limitations, no interest having been demanded in respect of them nor any acknowledgment taken. A creditor's suit had been instituted to administer the estate of G., & a claim to be indemnified against any claim in that suit had been carried into chambers in respect of the said £400 so formerly advanced to the sons. This claim was disallowed:—*Held*: such claim was not barred by Statute of Limitations, & same allowed with costs to be added thereto.—TUNSTALL v. BARTLETT, KNOWLES v. BARTLETT (1866), 14 L. T. 400.

K. Insurance.

Insurance, generally, see INSURANCE, Vol. XXIX., pp. 36 *et seq.*

196. Barratrous sale of ship—Time runs from delivery to purchaser.]—If the captain of a ship insured barratrously carries her out of the course of the voyage, procures her to be condemned in a Vice-Admty. ct., sells her, & delivers her up to the purchaser, it is only from this last event that Statute of Limitations begins to run as between the assured & the underwriter.—HIBBERT v. MARTIN (1808), 1 Camp. 538, N. P.

*Annotations:—*Mentd. Dixon v. Sadler (1839), 9 L. J. Ex. 48; Small v. Gibson (1849), 14 L. T. O. S. 290.

L. Money Had and Received.

197. Purchase of void annuity—Money laid out on fraudulent security.]—Where pltf. in a declaration of *assumpsit*, stated that he employed deft. to invest & lay out pltf.'s money in an annuity, on a good & sufficient security, which he promised to do, & assigned for breach that he laid it out on an invalid & fraudulent security:—*Held*: (1) Statute of Limitations was a good bar to pltf.'s recovery, as the promise of deft. was the gist of the action; although the action was commenced within the period of six years from the time it was discovered that the security was invalid, & deft. knew it to be so at the time the annuity was granted. (2) *Semble*: in cases of fraud, Statute of Limitations only runs from the time the fraud is discovered.—BROWN v. HOWARD (1820), 2 Brod. & Bing. 73; 4 Moore, C. P. 508; 129 E. R. 885.

*Annotations:—*As to (1) *Appld.* Granger v. George (1826), 5 B. & C. 149. *Reid.* Howell v. Young (1826), 5 B. & C. 259; East India Co. v. Oditchurn Paul (1849), 7 Moo. P. C. C. 85. As to (2) *Reid.* Davis v. Bank of England (1824), 2 Bing. 393; Philpott v. Kelley (1835), 3 Ad. & El. 106; Gibbs v. Guild (1882), 46 L. T. 248. *Generally* *Reid.* *Re* Triston (1850), 1 L. M. & P. 74.

198. —Time runs from date of annuity being set aside.]—In an action for money had & received, to recover the consideration money of a void annuity, where the annuity was granted more than six years before the action brought, but was treated by the grantor as a subsisting annuity within that period, although subsequently avoided

PART II. SECT. 5, SUB-SECT. 2.—J.

190 i. Time when damnification occurs.]—There is a period of three years' limitation for a suit upon any contract of indemnity other than those

specifically provided for from the time when pltf. is actually damnified.—PEPIN v. CHUNDER SEEKUR MOOKERJEE (1880), 1 L. R. 5 Calc. 811; 6 C. L. R. 167.—IND.

PART II. SECT. 5, SUB-SECT. 2.—K.

i. Action for non-delivery of policy.]—ROBERTSON v. LOVETT (1877), 11 N. S. R. (2 R. & C.), 250.—CAN.

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at his instance:—*Held*: Statute of Limitations did not begin to run until the annuity had been avoided.—*COWPER v. GODMOND* (1833), 9 Bing. 748; 3 Moo. & S. 219; 2 L. J. C. P. 162; 131 E. R. 795.

Annotations:—*Apld.* *Churchill v. Bertrand* (1842), 3 Q. B. 568. *Refd.* *Huggins v. Coates* (1843), 5 Q. B. 432. *Mentd.* *Molton v. Camroux* (1849), 4 Exch. 17.

199. ———.]—Intestate granted an annuity to pltf. After his death, his administratrix caused the annuity to be vacated for a defect in the memorial. Pltf., to recover the balance of consideration money, brought *indebitatus assumpsit* against the administratrix for money had & received by intestate to pltf.'s use, stating promises by intestate & by deft.:—*Held*: although a right to recover the consideration money became vested in pltf. on the refusal to continue the annuity, such right did not go back, by relation, to the time when that money was originally paid: & therefore counts in the above forms were not applicable.—*CHURCHILL v. BERTRAND* (1842), 3 Q. B. 568; 2 Gal. & Dav. 548; 11 L. J. Q. B. 270; 6 Jur. 855; 114 E. R. 625.

Annotation:—*Mentd.* *Molton v. Camroux* (1849), 4 Exch. 17.

200. ———.]—If any one of the securities for an annuity be set aside, the grantee may recover back the purchase money in an action for money had & received, for failure of consideration. Though it does not appear on what ground the security was set aside, nor whether the objection to it affects the validity of the annuity. As where a rule was obtained by the grantor to set aside the warrant of attorney & proceedings thereon, on grounds some of which would, & some would not, affect the validity of the annuity; & the rule was made absolute in terms not showing which objection prevailed; & no evidence was given on the point. In such an action, the facts appearing as above stated, Statute of Limitations runs from the time when the security is set aside, it not appearing that the consideration has failed before that time; & the statute does not attach if the security was set aside within six years, though six years have elapsed since the annuity was last paid.—*HUGGINS v. COATES* (1843), 5 Q. B. 432; 1 Dav. & Mer. 433; 13 L. J. Q. B. 46; 2 L. T. O. S. 227; 8 Jur. 334; 114 E. R. 1313.

Annotation:—*Mentd.* *Burn v. Manning* (1842), 12 L. J. Q. B. 4.

201. Money paid to avoid seizure.]—From Sept. 1900, to June, 1912, pltf. carried on business as a dealer in produce in the vicinity of Spital-fields Market. As soon as he commenced business deft., who was the owner of the market, demanded tolls from him under threat of seizure of his goods if he refused to pay, & on the first occasion pltf. objected to pay & actual seizure took place. Pltf. then consulted a solr. & upon learning that other dealers outside the market paid tolls he, acting upon the solr.'s advice, paid the tolls under protest, & thereafter, he, or his agents acting upon his instructions, always paid the tolls under protest. Subsequently, whenever pltf. challenged deft.'s right, or disputed the amount of tolls, in particular cases there was a seizure or threat of seizure followed by payment under protest:—*Held*: pltf., throughout the period of years showed that he only paid to avoid seizure of his

goods & never made the payments voluntarily, or intended to give up his right to the sums paid or close the transaction & he was entitled to recover under this head of claim the sums paid during the last six years immediately preceding this action, the earlier payments being barred by Statute of Limitations.—*MASKELL v. HORNER*, [1915] 3 K. B. 106; 84 L. J. K. B. 1752; 113 L. T. 126; 79 J. P. 406; 31 T. L. R. 332; 59 Sol. Jo. 429; 73 L. G. R. 808, C. A.

Annotation:—*Mentd.* *Brocklebank v. R.*, [1924] 1 K. B. 647.

M. Money Lent.

See, generally, MONEY & MONEY-LENDING.

202. Money repayable on demand—Time runs from date of advance.]—(1) Where money was advanced to a firm to be repaid on demand with compound interest:—*Held*: Statute of Limitations ran from the date of the advance.

(2) Entries made in the books of the firm crediting the person who advanced the money with interest from time to time, on the footing of periodical rests:—*Held*: not to bar the statute.—*JACKSON v. OGG* (1859), John. 397; 34 L. T. O. S. 6; 5 Jur. N. S. 976; 7 W. R. 730; 70 E. R. 476.

Annotation:—*Generally, Mentd.* *Re George, Francis v. Bruce* (1890), 44 Ch. D. 627.

203. Loan by cheque—Time runs from payment of cheque by bankers.]—Pltf. having agreed to lend deft. a sum of money, gave him a cheque for the amount, which deft. paid into his bankers, receiving credit for it. The cheque was not paid by pltf.'s bankers till some days later. In an action for the money so lent:—*Held*: Statute of Limitations only ran from the time of the payment of the cheque by pltf.'s bankers.—*GARDEN v. BRUCE* (1868), L. R. 3 C. P. 300; 37 L. J. C. P. 112; 17 L. T. 545; 16 W. R. 366.

Annotation:—*Refd.* *Re George, Francis v. Bruce* (1890), 63 L. T. 49.

204. Money repayable upon condition—Time runs from compliance with condition.]—(1) A. lent money to a building society upon the terms, in writing, that the sum lent should be repayable after the lender had given notice of his intention to withdraw it, & that no money would be paid out by the society except on production by the lender, personally, or by some one with a written authority, of a loan pass-book given to him when the loan was made:—*Held*: the condition as to the production of the book was a condition precedent to the liability of the society to repay the money; so until that condition had been complied with, Statute of Limitations, 1623 (c. 16) did not begin to run against the lender.

(2) If a creditor dies intestate on the day a debt becomes payable to him, & there is no evidence to show whether he died before or after the moment when the debt became payable, the Statute of Limitations, 1623 (c. 16), does not run against his administrator until letters of administration have been taken out.—*ATKINSON v. BRADFORD THIRD EQUITABLE BENEFIT BUILDING SOCIETY* (1890), 25 Q. B. D. 377; 59 L. J. Q. B. 360; 62 L. T. 857; 38 W. R. 630, C. A.

Annotations:—*As to* (1) *Consd.* *Re Tidd, Tidd v. Overall*, [1893] 3 Ch. 154. *Generally, Mentd.* *Joachimson v. Swiss Bank Corpn.*, [1921] 3 K. B. 110.

205. Money repayable at fixed date—Time runs from fixed date—Not from date of realisation of securities.]—By a memorandum of deposit, dated

in 1882, of bonds to secure the repayment in 1883 of an advance, the borrower authorised the lender to sell the bonds for the purpose of repaying the advance, & undertook to pay the lender any difference between the proceeds of the bonds & the amount of the advance. In 1889 the lender sold the bonds, but the proceeds were not sufficient to repay the whole of the advance. In 1891 the borrower died without having given any acknowledgment of the debt:—*Held*: the cause of action in respect of the whole of the debt accrued in 1883 & not in 1889, & therefore a claim for the difference by the lender against the estate of the borrower was barred by the Statute of Limitations, 1623 (c. 16).—*Re MCHENRY, McDERMOTT v. BOYD, BARKER'S CLAIM*, [1894] 3 Ch. 290; 63 L. J. Ch. 741; 71 L. T. 146; 43 W. R. 20; 10 T. L. R. 576; 38 Sol. Jo. 616; 7 R. 527, C. A.

Money repayable by instalments.—See Sub-sect. 2, O., *post*.

N. Money Paid by Mistake.

Mistake, generally, see MISTAKE.

206. Mistake of fact—Time runs from date of payment—Demand of repayment.]—(1) Where in answer to an action to recover back money paid under a mistake of fact debt. relies on Statute of Limitations, the statute must be taken to have run from the date of payment, & not from the date of the discovery of the mistake, nor from the date when pltf. might have discovered it by the exercise of reasonable diligence.

(2) Where money has been paid under a mistake of fact which was shared by both the party paying & the party receiving it, in order to entitle the payor to maintain an action for the recovery back of the money so paid it is not necessary that he should have given the payee notice of the mistake & demanded repayment. In such a case the cause of action is complete the moment the money is paid.—*BAKER v. COURAGE & Co.*, [1910] 1 K. B. 56; 79 L. J. K. B. 313; 101 L. T. 854.

Annotations:—As to (2) *Reid. Jones v. Waring & Gillow*, [1925] 2 K. B. 612. *Generally, Reid. Re Robinson, McLaren v. Public Trustee* (1911), 104 L. T. 331.

207. ———.]—A legal personal representative handed over assets to the wrong person more than six years before the commencement of proceedings by the person entitled to recover the same:—*Held*: the claim was barred.—*Re CROYDEN, HINCKS v. ROBERTS* (1911), 55 Sol. Jo. 632.

Annotations:—*Consd. Re Richardson, Pole v. Pattenden*, [1920] 1 Ch. 423. *Mentd. Re Blow, Bartholomew's Hospital v. Cambden*, [1914] 1 Ch. 233.

208. Mistake of law.—*Semble*: the money sought to be recovered was paid under a mistake of law. *Qu.*: whether, in any event, claimants could have recovered over-payments more than for six years back.—*STANLEY BROTHERS, LTD. v. NUNEATON CORPN.* (1913), 108 L. T. 986; 77 J. P. 349; 57 Sol. Jo. 592; 11 L. G. R. 902, C. A.

O. Money Repayable by Instalments.

209. Debt repayable by instalments—Time runs from default of payment of instalment.]—Deft. gave a warrant of attorney to secure a debt payable by instalments, pltf. to be at liberty, in case of any default, to have judgment & execution for the whole, as if all the periods for payment had expired:—*Held*: deft. might show, under a plea

of Statute of Limitations, that the first default was made more than six years before action; & this was a complete defence, not only as to instalments due more than six years ago, but also as to those due within that period.—*HEMP v. GARLAND* (1843), 4 Q. B. 519; 3 Gal. & Dav. 402; 12 L. J. Q. B. 154; 7 Jur. 302; 114 E. R. 994.

Annotations:—*Apprvd. Reeves v. Butcher*, [1891] 2 Q. B. 509. *Reid. Coburn v. Colledge* (1897), 66 L. J. Q. B. 462.

210. ———.]—Pltf. lent money to deft. under a written agreement, which recited an agreement for a loan for five years, "subject to the power to call in the same at an earlier period in the events hereinafter mentioned." Deft. agreed to pay interest quarterly, & pltf. agreed not to call in the money for five years if deft. should regularly pay the interest. It was provided that if deft. should make default in payment of any quarterly payment of interest for twenty-one days pltf. might call in the principal. No interest was ever paid. Pltf. commenced his action within six years from the end of the term of five years:—*Held*: Statute of Limitations, 1623 (c. 16), was a good defence, for that the time began to run from the earliest time at which pltf. could have brought his action, *i.e.*, twenty-one days after the first instalment of interest became due.—*REEVES v. BUTCHER*, [1891] 2 Q. B. 509; 60 L. J. Q. B. 619; 65 L. T. 329; 39 W. R. 626, C. A.

Annotations:—*Expld. Coburn v. Colledge*, [1897] 1 Q. B. 702. *Reid. Henton v. Paddison* (1893), 68 L. T. 405; *Bradford Old Bank v. Sutcliffe*, [1918] 2 K. B. 833.

P. Negligence.

See, generally, NEGLIGENCE.

211. Rule same as in actions of tort.—*HOWELL v. YOUNG*, No. 250, *post*.

Actions of tort.—See Sub-sect. 3, *post*.

Q. Partners.

212. General rule.—It is settled that after a partnership has ceased any claim on simple contract by one former partner against the others in respect thereof is *prima facie* subject to be barred after the expiration of six years. On the other hand, while a partnership is continuing there is no authority for suggesting that a claim between the partners is affected by the statutes. In a case of exclusion time would begin to run from the act of exclusion (*KAY, J.*).—*BARTON v. NORTH STAFFORDSHIRE RY. CO.* (1888), 38 Ch. D. 458; 57 L. J. Ch. 800; 58 L. T. 549; 36 W. R. 754; 4 T. L. R. 403.

Annotations:—*Consd. The Pongola* (1895), 73 L. T. 512. *Reid. Re Severn & Wye & Severn Bridge Ry.*, [1896] 1 Ch. 559. *Mentd. Barton v. L. & N. W. Ry., Same v. Scinde, Punjab, & Delhi Ry.* (1889), 5 T. L. R. 644; *Oliver v. Bank of England*, [1902] 1 Ch. 610; *Bank of England v. Cutler*, [1908] 2 K. B. 208.

See, generally, PARTNERSHIP.

Claims for account.—See Part VII., Sect. 2, sub-sect. 2, B., *post*.

Misrepresentation by partner.—See Sub-sect. 3, *post*.

R. Promise to Pay on Demand.

213. From time of demand.—*SHUTFORD & BOROUGH'S CASE* (1628), Godb. 437; 78 E. R. 257; *sub nom. SHUTFORD v. PENOW*, Cro. Car.

PART II. SECT. 5, SUB-SECT. 2.—N.

k. *Mistake of fact.*—*ASSETS CO., LTD. v. R.* (1902), 22 N. Z. L. R. 459.—N.Z.

PART II. SECT. 5, SUB-SECT. 2.—R.

213 i. *From time of demand.*—*DAY v. DAY* (1889), 17 A. R. 157.—CAN.

Sect. 5.—When time begins to run: Sub-sect. 2, R., S. & T.]

139; *sub nom.* SHUTFORD *v.* PERCOWE, W. Jo. 194.

*Annotations:—*Refd. Manby *v.* Scot (1663), 1 Keb. 80. *Mentd.* Aldridge *v.* Drake (1686), 2 Show. 493.

214. —.]—BILL *v.* LAKE (1629), Hut. 106; Het. 138; 123 E. R. 1134.

*Annotation:—*Refd. Manby *v.* Scott (1663), 1 Keb. 80, 337, 383.

215. —.]—WEBB *v.* MARTIN (1661), 1 Lev. 48; 83 E. R. 291; *sub nom.* WEB *v.* MARTIN, 1 Keb. 177, 197.

*Annotation:—*Mentd. St. Germain *v.* Willan (1823), 3 Dow. & Ry. K. B. 441.

216. — Factor.]—If goods are consigned to a factor for sale on commission, the law will raise a contract to account for such as are sold, to pay over the proceeds, & to re-deliver the residue unsold, on demand, & an action does not lie against him for not accounting, till after a demand made of an account. Therefore Statute of Limitations runs only from the time of a demand made.—TOPHAM *v.* BRADDICK (1809), 1 Taunt. 572; 127 E. R. 956.

*Annotations:—*Refd. Crawford *v.* Crawford (1867), 16 W. R. 411. *Mentd.* Farr *v.* Hollis (1829), 4 Man. & Ry. K. B. 230.

217. — Bailee.]—Time does not begin to run under Statute of Limitations, 1623 (c. 16), against a person who has entrusted money to another person for safe custody until demand, though it was contemplated that the bailee might use the money in business.—*Re* TIDD, TIDD *v.* OVERELL, [1893] 3 Ch. 154; 62 L. J. Ch. 915; 69 L. T. 255; 42 W. R. 25; 9 T. L. R. 550; 37 Sol. Jo. 618; 3 R. 657.

*Annotation:—*Refd. Joachimson *v.* Swiss Bank Corp., [1921] 3 K. B. 110.

218. From promise to pay.]—COLLINS *v.* BENNING (1701), 12 Mod. Rep. 444; 3 Salk. 227; 88 E. R. 1440.

*Annotations:—*Consd. Topham *v.* Braddick (1809), 1 Taunt. 572. *Refd.* *Re* Brown's Estate, Brown *v.* Brown, [1893] 2 Ch. 300. *Mentd.* *Re* George, Francis *v.* Bruce (1890), 44 Ch. D. 627.

219. Present debt—Promise to pay collateral sum—From time of demand.]—(1) Where there is a present debt & a covenant or promise to pay on demand, the demand is not considered a condition precedent to bringing the action; but where there is a covenant or promise to pay a collateral sum, on demand, *e.g.*, in a covenant by a surety for the principal debtor, then request must be made before action brought, or before the money can be considered as owing by the collateral debtor.

Mtge. of Sept. 1867, contained a joint & several covenant by a father & his son to pay mtgee. £3,000 "on demand," & that they would, "in the meantime from the date hereof," pay interest on the same, at the rate therein mentioned. The father, who had joined as surety only, died in Nov. 1872, & his estate was being administered in an action commenced in Apr. 1880. No claim was made against the father's estate in respect of his liability on the covenant in the

mtgee., until July, 1880. Mtgee. now claimed to be let in as a creditor of the father's estate, in respect of the amount due on the mtgee., which the son was unable to pay:—*Held*: the right of action did not accrue against the father's estate until July, 1880, when demand was first made, & consequently mtgee. was entitled to come in & prove his claim against the father's estate, without disturbing any dividends already distributed.

(2) The law is quite settled that with regard to a promissory note payable on demand, no demand is necessary before bringing an action & indeed Statute of Limitations, 1623 (c. 16), begins to run from the making of the note (CHITTY, J.).—*Re* BROWN'S ESTATE, BROWN *v.* BROWN, [1893] 2 Ch. 300; 62 L. J. Ch. 695; 69 L. T. 12; 41 W. R. 440; 37 Sol. Jo. 354; 3 R. 463.

*Annotations:—*As to (2) Apprvd. Bradford Old Bank *v.* Sutcliffe, [1918] 2 K. B. 833. *Refd.* Edwards *v.* Walters, [1896] 2 Ch. 157.

Statutory obligation to pay.]—See HIGHWAYS, Vol. XXVI., p. 499, Nos. 2075–2076.

S. Sale of Goods.

See, generally, SALE OF GOODS.

220. Goods sold on credit—From expiration of credit.]—Goods were sold at six months' credit, payment to be then made by a bill at two or three months, at the purchaser's option:—*Held*: this was in effect a nine months' credit, & consequently, an action for goods sold & delivered commenced within six years from the end of the nine months was in time to save Statute of Limitations.—HELPS *v.* WINTERBOTTOM (1831), 2 B. & Ad. 431; 9 L. J. O. S. K. B. 258; 109 E. R. 1203.

*Annotation:—*Mentd. Rugg *v.* Weir (1864), 16 C. B. N. S. 471.

221. Goods warranted—From time of delivery of goods—Not from breach.]—In an action by a tradesman against the manufacturers of an iron safe, for the breach of an alleged warranty that it was strong enough to resist all attempts that might be thereafter made to force it open, it having in fact been broken open by burglars more than six years after the sale & delivery, & there being evidence that it was broken open easily, & that it was far less strong & secure than it ought to have been:—*Held*: the warranty, as declared upon & set up at the trial, was an absolute warranty of perfect security for all time to come, was one so extensive, even if it would be valid, that it required cogent evidence of express warranty to that extent, & was not sustained by proof of mere representations that the safe would be strong enough to resist burglars. *Semble*: even assuming that such a warranty had been given, though it had certainly been broken, Statute ran from the time of the delivery of the safe, not from the burglary.—WALKER *v.* MILNER (1866), 4 F. & F. 745.

T. Solicitor's Charges.

Costs of solicitor generally, *see* SOLICITORS.

222. From termination of work—Some items outside statute.]—(1) *Semble*: Statute of Limitations does not begin to run against an attorney's

Some items outside statute.—*Re* PERRIN (1850), 15 L. T. O. S. 187.—IR.

222 ii. —.]—MILLAR *v.* KANADY (1903), 5 O. L. R. 412.—CAN.

222 iii. —.]—An action was brought on a solr.'s account for work in connection with the formation of a co. Some items of the work were done more & some less, than six years before action. The instructions were given for the work as a whole:—*Held*: the account was not barred by the Statute

PART II. SECT. 5, SUB-SECT. 2.—S.

220 i. Goods sold on credit—From expiration of credit.]—WILSON *v.* HOWE (1903), 23 C. L. T. 137; 5 O. L. R. 323; 1 O. W. R. 272; 2 O. W. R. 52.—CAN.

221 i. Goods warranted—From time of delivery of goods—Not from breach.]—BOGARDUS *v.* WELLINGTON (1900), 27 A. R. 530.—CAN.

1. Goods misrepresented—From discovery of misrepresentation.]—RAMIAH & Co. *v.* SADASIVA MUDALIAR (1925),

1. L. R. 48 Mad. 925.—IND.

m. Hire-purchase—From payment of last instalment.]—In an action on a hire-purchase agreement:—*Held*: the period of prescription began to run from the date of payment of the last instalment.—MITCHELL'S PIANO SALOONS *v.* THEUNISSEN, [1919] T. P. D. 392.—S. AF.

PART II. SECT. 5, SUB-SECT. 2.—T.

222 i. From termination of work—

bill on his client for costs in a cause, until the termination of the cause.

(2) Where the action is not brought until after six years from the termination of the cause, a few items arising out of the cause, & within six years, will not serve to take the demand out of the statute.—*ROTHERY v. MUNNINGS* (1830), 1 B. & Ad. 15; 8 L. J. O. S. K. B. 386; 109 E. R. 693.

Annotations:—*As to* (2) *Reid. Harris v. Quine* (1869), 20 L. T. 947. *Generally, Mentd. Bonsey v. Wordsworth* (1856), 18 C. B. 325.

223. ———.]—Where a client employs an attorney to conduct a suit, it is an entire contract to carry on the suit to its termination, & determinable by the attorney only on reasonable notice; & where no such notice has been given, Statute of Limitations is no bar to that part of the demand which is for business done more than six years before the commencement of the action by the attorney for business done in the suit, which was not brought to a termination till within six years of the commencement of the action.—*HARRIS v. OSBOURN* (1834), 2 Cr. & M. 629; 4 Tyr. 445; 3 L. J. Ex. 182; 149 E. R. 912.

Annotations:—*Apld. Whitehead v. Lord* (1852), 7 Exch. 691. *Reid. Harris v. Quine* (1869), L. R. 4 Q. B. 653; *Re Hall & Barker* (1878), 9 Ch. D. 538. *Mentd. Robins v. Bridge* (1837), 6 Dowl. 140; *Nicholls v. Wilson* (1843), 2 Dowl. N. S. 1031; *Re Romer & Haslam*, [1893] 2 Q. B. 286; *Underwood & Piper v. Lewis*, [1894] 2 Q. B. 306.

224. ———.]—Where costs are incurred in a suit Statute of Limitations does not begin to run against the earlier items until the suit is terminated.—*MARTINDALE v. FALKNER* (1846), 2 C. B. 706; 3 Dow. & L. 600; 15 L. J. C. P. 91; 6 L. T. O. S. 372; 10 Jur. 161; 135 E. R. 1124.

Annotations:—*Mentd. Ivimey v. Marks* (1847), 16 M. & W. 843; *Anderson v. Boynton* (1849), 13 Q. B. 308; *Dimes v. Wright* (1849), 8 C. B. 831; *Keene v. Ward* (1849), 13 Q. B. 515; *Cook v. Gillard* (1852), 1 E. & B. 26; *Cozens v. Graham* (1852), 12 C. B. 398; *R. v. Tewkesbury Corpn.* (1868), L. R. 3 Q. B. 629; *Trench v. Nolan* (1872), 27 L. T. 69.

225. ———.]—An attorney or solr. retained in a suit at law or in equity is bound to carry it on to its termination, unless he gives a notice that he shall discontinue if he be not paid or supplied with the necessary funds, or the client dies; & Statute of Limitations does not begin to run against his right to sue for his bill of costs until the happening of one of those events.

Pltf. had, prior to 1840, been retained by A., whose administratrix deft. was, to appear for her in a suit in equity to which she had been made deft. by bill of revivor. In 1840 the suit was heard, & a supplemental bill ordered to be filed to make certain next of kin parties, but such bill was not filed nor any other step taken in the cause prior to the death of A., which took place in June, 1851:—*Held*: Statute of Limitations did not begin to run until the death of A.—*WHITEHEAD v. LORD* (1852), 7 Exch. 691; 21 L. J. Ex. 239; 19 L. T. O. S. 113; 155 E. R. 1126.

Annotations:—*Distd. Beck v. Pierce* (1889), 23 Q. B. D. 316. *Reid. Re Cartwright* (1873), L. R. 16 Eq. 469. *Mentd. Stokes v. Trumper* (1855), 2 K. & J. 232; *Re Hall & Barker* (1878), 9 Ch. D. 538; *Re Romer & Haslam*, [1893] 2 Q. B. 286; *Underwood & Piper v. Lewis*, [1894] 2 Q. B. 306.

226. ——— Same solicitor employed to conduct appeal.]—Pltfs., attorneys in the Isle of Man, were retained by deft., in 1858, to conduct a suit

in one of the Manx cts. in which he was deft. The suit was dismissed in Apr. 1861; in Sept. 1861, pltf. in the suit appealed to a superior ct., & pltfs. continued to act for deft. & conducted the appeal on his behalf up to Oct. 1, 1862. By the Manx statute law an action on simple contract brought in the temporal cts. of the island must be commenced within three years of the cause of action. Pltfs. brought an action in one of the Manx cts. more than three years after Oct. 1862, & the ct. decided that the action was barred by the statute. Pltfs. commenced an action in this country in Jan. 1868, to which deft. pleaded (a) the judgment of the Manx ct.; (b) the English Statute of Limitations:—*Held*: (1) as the Manx statute barred the remedy only & did not extinguish the debt, the judgment of the Manx ct. was no bar; (2) in the circumstances, there was a continuous employment of pltfs.; & therefore none of the items were barred by Statute of Limitations.—*HARRIS v. QUINE* (1869), L. R. 4 Q. B. 653; 10 B. & S. 644; 38 L. J. Q. B. 331; 20 L. T. 947; 17 W. R. 967.

Annotations:—*As to* (1) *Reid. Casanova v. Meier* (1885), 1 T. L. R. 213; *Re Low, Bland v. Low*, [1894] 1 Ch. 147. *As to* (2) *Apld. Baile v. Baile* (1872), L. R. 13 Eq. 497. *Generally, Reid. Turner v. Mid. Ry.* (1911), 104 L. T. 347.

227. ——— Solicitor's name continuing on record.]—Statute of Limitations will not begin to run as against a solr. in respect of his claim for costs under Solicitors Act, 1860 (c. 127), s. 28, while the proceedings are still going on, & his name is still on the record as solr.—*BAILE v. BAILE* (1872), L. R. 13 Eq. 497; 41 L. J. Ch. 300; 26 L. T. 283; 20 W. R. 534.

Annotations:—*Mentd. Briscoe v. Briscoe*, [1892] 3 Ch. 543; *Re Turner, Wood v. Turner*, [1907] 2 Ch. 126.

228. ——— Other work not completed.]—Work finished six years before the commencement of the action will be barred by the statute [Statute of Limitations], but as to work in progress & not completed at that date, the statute, of course, has no application, however long ago the work may have been begun (*CAVE, J.*).—*HANROTT'S TRUSTEES v. EVANS* (1887), 4 T. L. R. 128.

229. ——— Not from expiration of one month from delivery of bill of costs.]—In the case of a solr.'s costs the cause of action arises when the work is completed, & therefore Statute of Limitations, 1623 (c. 16), begins to run from that time, & not from the expiration of a month from the delivery of the bill of costs.—*COBURN v. COLLEDGE*, [1897] 1 Q. B. 702; 66 L. J. Q. B. 462; 76 L. T. 608; 45 W. R. 488; 13 T. L. R. 321; 41 Sol. Jo. 408, C. A.

Annotations:—*Reid. Bradford Old Bank v. Sutcliffe*, [1918] 2 K. B. 833; *Wild v. Simpson*, [1919] 2 K. B. 544; *Cheshire County Council v. Hopley* (1923), 130 L. T. 123; *Cayzer, Irvine v. Board of Trade* (1926), 95 L. J. K. B. 1054.

230. From death of client.]—*WHITEHEAD v. LORD*, No. 225, *ante*.

231. From notice of refusal to act further—Unless supplied with necessary funds.]—*WHITEHEAD v. LORD*, No. 225, *ante*.

232. Addition of subsequent items after judgment.]—*ROTHERY v. MUNNINGS*, No. 222, *ante*.

233. Solicitor's employment not continuous—Later items do not bar statute.]—Deft. employed pltf., an attorney, in several transactions, &

of Limitations.—*MACKEY, HANLEY & BOYD v. FRASER* (Alta.) (1922), 69 D. L. R. 348; [1922] 3 W. W. R. 421.

—CAN.

222 iv. ———.]—In the case of an attorney's costs, the cause of action arises when the work for which he was retained is completed, & limitation begins to run from that time.—*ATUL*

CHUNDER GHOSH v. LAKSHMAN CHUNDER SEN (1909), I. L. R. 36 Cal. 609.—IND.

222 v. ———.]—*WALKER v. FENELE* (1902), 19 S. C. 464; 12 C. T. R. 660, 871.—S. AF.

232 i. Addition of subsequent items after judgment.]—Items of an attorney's bill for work done, subsequently to the

judgment, in opposing the taxation of the opponent's costs, although done on his client's instructions, will not take the matter out of the Limitation Act.—*ADMINISTRATOR-GENERAL OF BENGAL v. CHUNDER CANT MOOKERJEE* (1893), I. L. R. 22 Cal. 952.—IND.

n. From date of settlement—Not from date of retainer.]—In an action to

Sect. 5.—When time begins to run: Sub-sect. 2, T. & U.; sub-sect. 3, A., B. & C.]

among others, in procuring him money to pay off a mtge. In an action against debt. on pltf.'s bill of costs, it appeared, by items in the bill, that he had made applications in several quarters for this purpose, but without success, after which he wrote to pltf., informing him what had been done, & requesting to know his wishes. This item bore date more than six years before action brought. The next, dated within six years, was: "Paid the postage of your answer." By subsequent items it appeared that further endeavours were made by pltf. to raise the money. Ultimately it was obtained:—*Held*: the transaction was not one in which the attorney's employment was continuous, & the latter items did not draw after them the previous ones, so as to take these out of Statute of Limitations.—*PHILLIPS v. BROADLEY* (1846), 9 Q. B. 744; 16 L. J. Q. B. 72; 8 L. T. O. S. 185; 11 Jur. 264; 115 E. R. 1461.

Annotation:—*Reid. Harris v. Quine* (1869), 10 B. & S. 644.

U. Work Done.

234. Work done—Completion of work.]—A local turnpike Act enacted that all moneys, etc., should be vested in the trustees, to be applied in the order & manner following: first, in paying costs, charges, etc., in obtaining the Act, etc.; in the second place, in defraying the expenses of erecting or providing turnpikes, toll-houses, & other buildings, & repairing the same, & of erecting & making necessary & convenient bridges, etc., & of repairing the road, etc., & otherwise executing the purposes, etc., of the Act; & lastly, in paying the interest & reducing the principal of the money subscribed, etc. In 1823, pltf. contracted with the trustees to build a toll-house, which he accordingly completed in 1824. In 1829, the trustees had a meeting, & verbally ordered that money should be raised, & the tradesmen paid:—*Held*: the right of action accrued when the work was done, & not when the trustees were in funds; & Statute of Limitations was a bar, notwithstanding the order in 1829.—*EMERY v. DAY* (1834), 1 Cr. M. & R. 245; 4 Tyr. 695; 3 L. J. Ex. 307; 149 E. R. 1071.

Annotations:—*Reid. Bush v. Martin* (1863), 2 H. & C. 311. *Mentd. Kondall v. King* (1856), 17 C. B. 483.

235. — Proviso for payment from special fund—Time runs from time of existence of fund.]—A Board of Trade warrant of abandonment of a railway, under Abandonment of Railways Act, 1850 (c. 83), & Railway Companies Act, 1867 (c. 127), was made with a condition that moneys deposited in the Ct. of Ch. as security should be applied as part of the assets of the co. The special Act gave a right to sue the co. for the costs of obtaining the Act, & it incorporated Companies Clauses Consolidation Act, 1845 (c. 16).

recover costs as between attorney & client:—*Held*: the Statute of Limitations commenced to run from the date of the settlement, & not from the date of the retainer.—*GOURLEY v. McALONEY* (1897), 29 N. S. R. 319.—CAN.

o. From date of judgment.]—An attorney is entitled on the recovery of judgment to sue for his bill, & the Statute of Limitations then begins to run.—*LIZARS & McFARLANE v. DAWSON* (1873), 32 U. C. R. 237.—CAN.

p. —.]—*Re WARD, Ex p. REES & DAY* (1894), 13 N. Z. L. R. 408.—

PART II. SECT. 5, SUB-SECT. 2.—U.

234 i. Work done—Completion of work.]—*NARO GANESH DATAR v. MUHAMMAD KHAN* (1872), 9 Bom. 280.—IND.

235 i. — Proviso for payment from special fund—Time runs from time of existence of fund.]—*SHATFORD v. FOLEY GOLD MINES CO.*, [1925] 3 D. L. R. 535; 57 O. L. R. 221; *affd.*, [1925] 1 D. L. R. 596; 56 O. L. R. 230.—CAN.

PART II. SECT. 5, SUB-SECT. 3.—A.

q. Seduction.]—Statute of Limita-

By Companies Clauses Consolidation Act, 1845 (c. 16), s. 65, the money raised by the co. is to be applied first in payment of such costs:—*Held*: Statute of Limitations did not run against creditors in respect of such costs until the co. had assets to meet the claims.—*Re KENSINGTON STATION ACT* (1875), L. R. 20 Eq. 197; 32 L. T. 183; 23 W. R. 463.

Annotations:—*Mentd. Re Hereford & South Wales Waggon & Engineering Co., Head & Walter's Claims* (1876), 45 L. J. Ch. 481; *Re Birmingham & Lichfield Junction Ry.* (1885), 28 Ch. D. 652; *Re Skegness & St. Leonard's Tram. Co., Ex p. Hanly* (1888), 41 Ch. D. 215.

SUB-SECT. 3.—ACTIONS OF TORT.

A. In General.

Tort generally, *see* TORT.

236. Tort continuing de die in diem.]—Statute of Limitations has no application to an action of tort where the tort complained of is something which goes on *de die in diem*.—*LONDON GENERAL OMNIBUS CO., LTD. v. LAVELL* (1900), as reported in 83 L. T. 453; 18 R. P. C. 74, C. A.

Annotations:—*Mentd. Alaska Packers' Assn. v. Crooks* (1901), 18 R. P. C. 129; *Bourne v. Swan & Edgar, Re Bourne's Trade Mks.*, [1903] 1 Ch. 211; *Hennessy v. Keating* (1908), 25 R. P. C. 125; *R. v. De Grey, Ex p. Fitzgerald* (1913), 109 L. T. 871.

Protection of public authorities—Under Public Authorities Protection Act, 1893 (c. 61).]—*See* PUBLIC AUTHORITIES.

B. Damage Part of Cause of Action—Continuing Cause of Action.

See, generally, DAMAGES, Vol. XVII., pp. 87–91, Nos. 59–91; MINES.

237. Time runs from date of damage—Not from date of act causing damage—Subsidence.]—The right of a person to the support of the land immediately around his house is not in the nature of an easement, but is the ordinary right of enjoyment of property; & till that is interfered with he has no legal ground of complaint, although, in fact, something may have been done which, without his knowledge, has occasioned results that will afterwards affect his property.

A. was the owner of certain houses standing on land which was surrounded by the lands of B., C. & D. E. was the owner of mines running underneath the lands of all these persons. He worked the mines in such a manner, without actual negligence, that the lands of B., C. & D. sank in; & after more than six years' interval their sinking occasioned an injury to the houses of A.:—*Held*: a right of action accrued to A. when this injury actually occurred, & his right was not barred by Statute of Limitations.

Suppose a slander to be uttered, which is not actionable in itself, but under which special damage may arise & does arise to somebody afterwards, the person complaining of that special

tions begins to run from the time of the seduction, not from the birth of the child.—*McKAY v. BURLEY* (1859), 18 U. C. R. 251.—CAN.

r. —.]—*CROSS v. GOODMAN* (1860), 20 U. C. R. 242.—CAN.

PART II. SECT. 5, SUB-SECT. 3.—B.

t. Time runs from date of damage—Not from date of act causing damage.]—*SNURE v. GREAT WESTERN RY. CO.* (1856), 13 U. C. R. 376.—CAN.

s. —.]—*WISMER v. GREAT WESTERN RY. CO.* (1856), 13 U. C. R. 383.—CAN.

—.]—*CARRON v. GREAT*

damage can bring no action till he has sustained actual damage (LORD CRANWORTH, C.).—BACKHOUSE v. BONOMI (1861), 9 H. L. Cas. 503; 34 L. J. Q. B. 181; 4 L. T. 754; 7 Jur. N. S. 809; 9 W. R. 769; 11 E. R. 825, H. L.; *affg.* S. C. *sub nom.* BONOMI v. BACKHOUSE (1859), E. B. & E. 646, Ex. Ch.

Annotations:—Distd. Whitehouse v. Fellowes (1861), 10 C. B. N. S. 765. *Consd.* Spoor v. Green (1874), L. R. 9 Exch. 99; *Eccl. Comrs.* for England v. N. E. Ry. (1877), 4 Ch. D. 845; Darley Main Colliery Co. v. Mitchell (1886), 11 App. Cas. 127. *Refd.* Rowbotham v. Wilson (1860), 8 H. L. Cas. 348; Todd v. Flight (1860), 9 C. B. N. S. 377; Croft v. L. & N. W. Ry. (1863), 3 B. & S. 436; Lamb v. Walker (1878), 3 Q. B. D. 389; Colley v. L. & N. W. Ry. (1880), 49 L. J. Q. B. 575; Dalton v. Angus (1881), 6 App. Cas. 740; Bean v. Wade (1885), Cab. & El. 519. Crumblie v. Wallsend L. B. (1891), 60 L. J. Q. B. 392; Greenwell v. Low Beechburn Coal Co., [1897] 2 Q. B. 165; Hall v. Norfolk, [1900] 2 Ch. 493; West Leigh Colliery Co. v. Tunnicliffe & Hampson, [1908] A. C. 27; Nash v. Rochford R. Co., [1917] 1 K. B. 384. *Mentd.* Hunt v. Peake (1860), John. 705; Fletcher v. Rylands (1865), 3 H. & C. 774; Smith v. Thackerah (1866), L. R. 1 C. P. 564; Metropolitan Board of Works v. Met. Ry. (1868), L. R. 3 C. P. 612; Mason v. Shrewsbury & Hereford Ry. (1871), 25 L. T. 239; Eadon v. Jeffcock (1872), L. R. 7 Exch. 379; Bower v. Peate (1876), 1 Q. B. D. 321. Birmingham Corpn. v. Allen (1877), 6 Ch. D. 284; Bell v. Love (1883), 10 Q. B. D. 547; A.-G. v. Conduit Colliery Co., [1895] 1 Q. B. 301; Edinburgh & District Water Trustees v. Clippens Oil Co. (1902), 87 L. T. 275; Harrington v. Derby Corpn., [1905] 1 Ch. 205; Hague v. Doncaster R. D. Co. (1908), 73 J. P. 69; Aynsley v. Bedlington Coal Co. (1918), 87 L. J. K. B. 1031; Davies v. Powell Duffryn Steam Coal Co. (1920), 36 T. L. R. 358.

238. ———.]—Lessees of coal under resp.'s land worked the coal so as to cause a subsidence of the land & injury to houses thereon in 1868. For the injury thus caused the lessees made compensation. They worked no more, but in 1882 a further subsidence took place causing further injury. There would have been no further subsidence if an adjoining owner had not worked his coal, or if the lessees had left enough support under resp.'s land:—*Held*: the cause of action in respect of the further subsidence did not arise till that subsidence occurred, & resp. could maintain an action for the injury thereby caused, although more than six years had passed since the last working by the lessees.—DARLEY MAIN COLLIERY CO. v. MITCHELL (1886), 11 App. Cas. 127; 55 L. J. Q. B. 529; 54 L. T. 882; 51 J. P. 148; 2 T. L. R. 301, H. L.; *affg.* S. C. *sub nom.* MITCHELL v. DARLEY MAIN COLLIERY CO. (1884), 14 Q. B. D. 125, C. A.

Annotations:—Appld. Crumblie v. Wallsend L. B., [1891] 1 Q. B. 503. *Refd.* Greenwell v. Low Beechburn Coal Co., [1897] 2 Q. B. 165; Hall v. Norfolk, [1900] 2 Ch. 493; Markey v. Tolworth Joint Hospital District Board (1900), 69 L. J. Q. B. 738; Carey v. Bermondsey B. Co. (1903), 2 L. G. R. 219; West Leigh Colliery Co. v. Tunnicliffe & Hampson, [1908] A. C. 27; Huyton & Roby Gas Co. v. Liverpool Corpn., [1926] 1 K. B. 146. *Mentd.* Brunson v. Humphrey (1884), 14 Q. B. D. 141; Serrao v. Noel (1885), 15 Q. B. D. 549; A.-G. v. Conduit Colliery Co., [1895] 1 Q. B. 301; Jordonson v. Sutton, Southcoates, & Drypool Gas Co. (1898), 67 L. J. Ch. 666; Harrington v. Derby Corpn., [1905] 1 Ch. 205; Manley v. Burn, [1916] 2 K. B. 121; Nash v. Rochford R. Co., [1917] 1 K. B. 384; Boynton v. Ancholme Drainage & Navigation Comrs., [1921] 2 K. B. 213; Kennard v. Cory (1922), 91 L. J. Ch. 452.

WESTERN RY. CO. (1856), 14 U. C. R. 192.—CAN.

c. ———.]—MCGILLIVRAY v. GREAT WESTERN RY. CO. (1865), 25 U. C. R. 69.—CAN.

d. ———.]—BAILEY v. KING (1900), 27 A. R. 703.—CAN.

e. ———.]—CLAIR v. TEMISCOUATA RY. CO. (1906), 1 E. L. R. 524; 37 N. B. R. 608.—CAN.

f. ———.]—Defts., in 1866, wrongfully obstructed a stream flowing by pltf.'s lands, & continued the obstruction down to 1873, when it caused the flooding of his lands:—

Held: the continuance of the wrongful obstruction causing fresh damage in 1873 constitutes a fresh cause of action in 1873, & Statute of Limitations began to run from the time of the damage in 1873.—DEVERY v. GRAND CANAL CO. (1875), 1 R. 9 C. L. 194.—IR.

PART II. SECT. 5, SUB-SECT. 3.—C.

241 i. *False imprisonment—Time runs from time of release.*—FISHER v. PEARSE (1885), 1 L. R. 9 Bom. 1. IND.

241 ii. ———.]—Where a prisoner has been arrested under a warrant on a

239. ———.]—The surface owner has no cause of action against the owner of the subjacent stratum for the removal thereof until actual damage results from such removal. If damage is caused, the surface owner may recover for that damage as & when it occurs, & Statute of Limitations is no bar to the recovery of damages, however long a time has elapsed since the removal.—WEST LEIGH COLLIERY CO., LTD. v. TUNNICLIFFE & HAMPSON, LTD., [1908] A. C. 27; 77 L. J. Ch. 102; 98 L. T. 4; 24 T. L. R. 146; 52 Sol. Jo. 93, H. L.; *reversg.* S. C. *sub nom.* TUNNICLIFFE & HAMPSON, LTD. v. WEST LEIGH COLLIERY CO., LTD., [1906] 2 Ch. 22, C. A.

Annotation:—Mentd. Wednesbury Corpn. v. Lodge Holes Colliery Co., [1907] 1 K. B. 78.

240. ———.]—A local authority were the owners of the surface of land & of the schools erected thereon. The minerals underlying their land & the adjoining lands had been for many years worked by defts. The surface of pltf.'s land subsided with consequent injury to the schools & pltf.s. sued defts. claiming an injunction & damages for the injury caused by their workings. Defts. alleged that the subsidence & injury had been occasioned by old workings, & alternatively, that pltf.s. were only entitled to relief in respect of damage, if any, caused since 1909, i.e., within six years before the issue of the writ:—*Held*: subsidence & damage had been occasioned by defts.' workings since 1909, & pltf.s. were entitled to an injunction & an inquiry as to damages on that footing.—DURHAM COUNTY COUNCIL v. SOUTH MEDOMSLEY COLLIERY, LTD. (OWNERS) (1916), 80 J. P. 343.

C. False Imprisonment and Malicious Prosecution.

See, generally, MALICIOUS PROSECUTION; TRESPASS.

241. *False imprisonment—Time runs from time of release.*—It was ruled that where one was falsely imprisoned for thirteen years together, Statute of Limitations shall not run upon him whilst in prison, but he shall have six years to bring his action after enlargement; so, though the wounding was above six years ago.—ALDRISH v. DUKE (1686), Comb. 26; 3 Mod. Rep. 110; 90 E. R. 322; *sub nom.* ALDRIDGE v. DRAKE, 2 Show. 493.

242. ———.]—*Damages for time within statute.*—COVENTRY v. APSLEY (1691), 2 Salk. 420; 91 E. R. 366.

Annotation:—Mentd. Eggington v. Lichfield Corpn. (1855), 24 L. J. Q. B. 360.

243. *Malicious prosecution—Time runs from close of prosecution.*—Action for wilfully & maliciously procuring E., as creditor of pltf., to oppose the discharge of pltf. by the Insolvent Debtors Ct., & for wilfully & maliciously obtaining from E. an affidavit containing, to deft.'s knowledge, a false statement, & for using the affidavit in the opposition; by reason of which pltf. was adjudged

criminal charge, & is released on bail pending a hearing of the charge, & the warrant is subsequently set aside, the time for bringing an action for false imprisonment runs from the date of the release on bail, & not from the date of the warrant being set aside.—SYED MAHAMAD YUSUF-UD-DIN v. SECRETARY OF STATE FOR INDIA IN COUNCIL (1903), 19 T. L. R. 496.—IND.

243 i. *Malicious prosecution—Time runs from close of prosecution.*—In an action for malicious prosecution:—*Held*: the Statute of Limitations commenced to run from the date of

Sect. 5.—When time begins to run: Sub-sect. 3, C., D., E., F., G., H., I., J. & K

to be discharged as soon as he should have been in custody sixteen months from the date of the order at the suit of E.; & that, by reason of the premises, & of a detainer lodged by deft. at the suit of E. while pltf. continued in custody & before the expiration of the sixteen months, pltf. did not enjoy the benefit of the Act so soon as he otherwise would, & was detained in prison. The action was commenced more than six years from the order of the ct. & the lodging of the detainer, but within six years of the termination of the imprisonment:—*Held*: the action was barred by Statute of Limitations.—*VIOLETT v. SYMPSON* (1857), 8 E. & B. 344; 27 L. J. Q. B. 138; 30 L. T. O. S. 114; 3 Jur. N. S. 1217; 6 W. R. 12; 120 E. R. 128.

D. Fraud and Fraudulent Misrepresentation.

See Part VIII., Sect. 2, sub-sect. 1, *post*.

E. Fraudulent Concealment.

See Part VIII., Sect. 2, sub-sect. 2, *post*.

F. Libel and Slander.

See, generally, *LIBEL & SLANDER*, pp. 1 *et seq.*, *ante*.

244. Slander—Words actionable without special damage—Time runs from altering the words.]—*SAUNDERS v. EDWARDS* (1662), 1 Sid. 95; 82 E. R. 991.

245. — Words' actionable on proof of special damage—Time runs from occurrence of damage.]—*SAUNDERS v. EDWARDS* (1662), 1 Sid. 95; 82 E. R. 991.

246. — — —.]—*LITTLEBOY v. WRIGHT* (1662), 1 Lev. 69; 1 Keb. 328; T. Raym. 63; 1 Sid. 85, 95; 83 E. R. 301.

Annotations:—Reid. Nicklin v. Williams (1854), 10 Exch. 259; *Darley Main Colliery Co. v. Mitchell* (1886), 11 App. Cas. 127.

247. — — —.]—*BACKHOUSE v. BONOMI*, No. 237, *ante*.

248. Libel—Time runs from date of last publication.]—The first count, in an action for a libel, was in respect of a newspaper published more than seventeen years before action brought. Statute of Limitations being pleaded:—*Held*: the plea was negatived by proof that a single copy had been purchased from deft. for pltf., by pltf.'s agent, within the six years.—*BRUNSWICK (DUKE) v. HARMER* (1849), 14 Q. B. 185; 19 L. J. Q. B. 20; 14 L. T. O. S. 198; 14 Jur. 110; 117 E. R. 75.

G. Mines—Wrongful Taking of Minerals.

See Part VIII., Sect. 1, sub-sect. 2, B., *post*.

H. Negligence.

See, generally, *NEGLIGENCE*.

249. Time runs from date of negligent act.]—(1) Declaration in *assumpsit* stated as a breach, that deft. did not diligently & sufficiently make a

acquittal, when the proceedings became terminated, before which pltf. had no right of action, & not from the date of arrest.—*CRANDALL v. CRANDALL* (1880), 30 C. P. 497.—*CAN.*

243 ii. — — —.]—*NARAYYA v. SES-HAYYA* (1899), 1 L. R. 23 Mad. 24.—*IND.*

PART II. SECT. 5, SUB-SECT. 3.—F.

248 i. Libel—Time runs from date of last publication.]—A cause of action for damages for defamation of character, arises on the date of the publication of

the letter containing the defamatory matter.—*MAHOMED IMDAD ALI v. SHEIKH AMEER ALY* (1867), 2 Agra, 47.—*IND.*

PART II. SECT. 5, SUB-SECT. 3.—H.

249 i. Time runs from date of negligent act.]—In an action against solrs. for bad advice as to investment, time runs from time of giving advice not time of incurring loss.—*WARD v. LEWIS* (1896), 22 V. L. R. 410.—*AUS.*

249 ii. — — —.]—Pltfs. sued defts. for

search at the Bank of England to ascertain whether certain stock was standing in the name of certain persons, deft. having been employed as an attorney so to do: the omission to search took place more than six years before action brought, although it was not discovered by pltf. till within the six years. Statute of Limitations having been pleaded:—*Held*: upon this form of declaration, pltf. was not entitled to recover.

(2) On the discovery being made deft. said the neglect arose from the omission of his clerk, & that he was responsible:—*Held*: upon this record, such an acknowledgment was not sufficient.—*SHORT v. M'CARTHY* (1820), 3 B. & Ald. 626; 106 E. R. 789.

Annotations:—As to (1) *Appl. Brown v. Howard* (1820), 4 Moore, C. P. 508. *Consd. Howell v. Young* (1826), 5 B. & C. 259. *Reid. Whitehead v. Howard* (1820), 2 Brod. & Bing. 372; *Davis v. Bank of England* (1824), 2 Bing. 393; *Granger v. George* (1826), 5 B. & C. 149; *East India Co. v. Odithurn* (1849), 7 Moo. P. C. C. 85; *Re Triston* (1850), 1 L. M. & P. 74; *Imperial Gaslight & Coke Co. v. London Gaslight Co.* (1854), 2 C. L. R. 1232; *Gibbs v. Guild* (1881), 8 Q. B. D. 296; *Turner v. Mid. Ry.* (1911), 104 L. T. 347.

250. — — —.]—Declaration stated that pltf. had contracted with A. to lend him the sum of £3,000 at interest; the repayment, with interest, to be secured by a warrant of attorney & certain mtges. of freehold & leasehold premises, provided they should be found to be a sufficient security for the same; that pltf. retained deft. as an attorney, to ascertain whether they would be a sufficient security; that deft. accepted such retainer, & that it became his duty to use due care & diligence to ascertain whether the warrant of attorney & mtges. would be a sufficient security for the repayment of the £3,000 & interest. Breach, that deft. did not use due care & diligence in that behalf, but wholly neglected so to do, & on the contrary, falsely represented to pltf., that the warrant of attorney & mtges. would be a sufficient security for the repayment of the £3,000 with interest, whereupon pltf. lent the £3,000 to A.; that they were not a sufficient security, by reason whereof pltf. had wholly lost the interest due & payable on the said sum of £3,000 amounting to a large sum, to wit, the sum of £1,000, & was likely wholly to lose the said principal sum of £3,000. At the trial it appeared, that in the year 1814 deft. had been retained by pltf. to ascertain whether the warrant of attorney & mtges. were a sufficient security for the £3,000 & interest, & that at that time he represented they were so. In the year 1820, the interest to that time having been regularly paid, it was discovered that the warrant of attorney & mtges. were not a sufficient security:—*Held*: the misconduct or negligence of the attorney constituted the cause of action, & Statute of Limitations began to run from the time when deft. had been guilty of such misconduct, & not from the time when it was discovered that the securities were insufficient.—*HOWELL v. YOUNG* (1826), 5 B. & C. 259; 2 C. & P. 238; 8 Dow. & Ry. K. B. 14; 4 L. J. O. S. K. B. 160; 108 E. R. 97.

Annotations:—Reid. Philpott v. Kelley (1835), 3 Ad. & El. 106; *Smith v. Fox* (1848), 6 Hare, 386; *Re Triston*

so negligently constructing their railway as to obstruct a watercourse by which his land had been drained, thereby causing the same to overflow & injure his crops:—*Held*: an action would lie, & might be brought within six months from the injury.—*VAN-HORN v. GRAND TRUNK RY. CO.* (1859), 18 U. C. R. 356; 9 C. P. 264.—*CAN.*

249 iii. — — —.]—*BURD v. MACAULAY*, [1924] 2 D. L. R. 815; 2 W. W. R. 393; 20 Alta. L. R. 352; *app.*, [1924] 1 D. L. R. 811; 1 W. W. R. 869.—*CAN.*

(1850), 1 L. M. & P. 74; *Violett v. Sympson* (1857), 27 L. J. Q. B. 138; *Gibbs v. Guild* (1881), 8 Q. B. D. 296; *Bean v. Wade* (1885), 2 T. L. R. 157; *Blyth v. Fladgate*, *Morgan v. Blyth*, *Smith v. Blyth*, [1891] 1 Ch. 337; *Re Somerset*, *Somerset v. Poulett*, [1894] 1 Ch. 231. *Mentd.* *Re Manby & Hawksford*, *Norton v. Cooper* (1856), 26 L. J. Ch. 313; *Hughes v. Twisden* (1886), 55 L. J. Ch. 481.

251. —.]—Demurrer to a bill of discovery, in aid of action on the case for negligence, allowed; it appearing by the bill that the cause of action had not arisen within six years before the suit.

In an action on the case, against an attorney for negligence:—*Held*: the cause of action arose at the time the negligence occurred, & not at the time the negligence was discovered, or the consequential damages ensued.—*SMITH v. FOX* (1848), 6 Hare, 386; 17 L. J. Ch. 170; 10 L. T. O. S. 363; 12 Jur. 130; 67 E. R. 1216.

Annotations:—*Refd.* *Bean v. Wade* (1885), 2 T. L. R. 157. *Mentd.* *Re Manby & Hawksford*, *Norton v. Cooper* (1856), 26 L. J. Ch. 313.

252. —.]—In order to perfect the title of an assignee of an equitable interest in trust funds notice of the assignment must be given to the trustees of those funds. Therefore, if new trustees have been appointed in a settlement of a reversionary interest of funds bequeathed in trust under a will, & the person who has acted as solr. to the new trustees from the date of their appointment fails to give notice of the appointment to the trustees of the will, & loss is thereby caused to the settlement fund, the solr. is liable to an action of negligence at the suit of the new trustees. In such a case the right of action arises from a breach of contract, & therefore Statute of Limitations runs in favour of deft. from the date of the breach of duty, *i.e.*, from the time when the notice should have been given.—*BEAN v. WADE* (1885), 2 T. L. R. 157, C. A.; *varying*, 1 T. L. R. 404.

Annotation:—*Mentd.* *Blyth v. Fladgate*, *Morgan v. Blyth*, *Smith v. Blyth*, [1891] 1 Ch. 337.

253. —.]—In 1869 P., a member of a firm of solrs., by his advice induced pltf. to invest moneys upon the security of an equitable mtge. of a lease which he represented as renewable, & which had previously been renewed by custom every fourteen years but the future renewal whereof was prohibited by statute passed in 1868. In 1875, P. fraudulently, & without the knowledge of his partners, gave a legal mtge. of the lease to a third party without notice of pltf.'s mtge. The security proved insufficient, & P. having absconded, pltf. sought to make P.'s firm liable for the loss sustained by him:—*Held*: since the transaction of 1869 was within the ordinary limits of the partnership business, the firm was liable for negligence in respect thereof, but the remedy against them was barred by Statute of Limitations, 1623 (c. 16).—*HUGHES v. TWISDEN* (1886), 55 L. J. Ch. 481; 54 L. T. 570; 34 W. R. 498; 2 T. L. R. 432.

254. —.]—Though negligence concealed.]—In an action against a solr. for negligence, concealment of the negligence until within six years before action is no answer to the defence of Statute of Limitations, 1623 (c. 16), if deft. has not been guilty of fraud.—*ARMSTRONG v. MILBURN* (1886), 54 L. T. 723; 2 T. L. R. 615, C. A.

Annotation:—*Consd.* *Osgood v. Sunderland* (1914), 111 L. T. 529.

255. —.]—Where a client claimed against her solr. for negligence in having advised an investment on a mtge., which proved insufficient, without disclosing that there had been

no independent valuation on behalf of the mtgee.:—*Held*: the client's right of action arose when the negligent act was committed, & not when it was discovered by the client, it not being a duty on the part of her solr. continuing day by day to disclose his negligent act.—*WOOD v. JONES* (1889), 61 L. T. 551.

256. —.]—Wrongful certification of lunacy.]—Pltf. was in 1912 certified as a lunatic by deft., a medical man, under Lunacy Act, 1890 (c. 5), s. 4 (2), & a reception order was then made, under which pltf. was detained & was taken to a licensed house. In an action brought in 1922 for negligence in giving the certificate deft. denied negligence & pleaded Statute of Limitations, 1623 (c. 16), s. 3, which bars actions on the case six years after the cause of action. The jury found that when the certificate was given pltf. was not of unsound mind & that deft. did not use reasonable care, & they awarded pltf. damages:—*Held*: the action was barred by Statute of Limitations, 1623 (c. 16), s. 3, & pltf. could not rely on the protection given by sect. 7 of that Act to a person who when the cause of action accrued was *non compos mentis*, inasmuch as the jury had found that at the time he was of sound mind.—*HARNETT v. FISHER* (1926), 135 L. T. 724; 42 T. L. R. 745; 70 Sol. Jo. 917, C.A.

I. Subsidence.

See Sub-sect. 3, B., *ante*.

J. Trespass.

See, generally, TRESPASS.

257. Time runs from each cause of action.]—*STRANGE v. ATTHOWE* (1628), Het. 116; 124 E. R. 387.

258. —.]—Account of rent & profits.]—*READE v. READE*, No. 82, *ante*.

Continuing cause of action.]—See Sub-sect. 3, B., *ante*.

K. Trover and Detinue.

(a) Of Goods.

See, generally, TROVER.

259. Detinue—Goods held with consent of owner—Time runs from refusal to return.]—*MONTAGUE v. SANDWICH (LORD)* (1702), 7 Mod. Rep. 99; 87 E. R. 1121.

260. —.]—In the case of an action of trover if goods are left in the hands of another Statute of Limitations does not begin to run from the time of delivery but from that of the demand & refusal (*LORD KENYON*).—*COMPTON v. CHANDLESS* (1801), 4 Esp. 18, N. P.

Annotation:—*Mentd.* *Bernie v. Read* (1845), 14 L. J. Q. B. 247.

261. —.]—A's furniture was seized under an execution by the sheriff, who assigned it to the judgment creditor. A's friends afterwards purchased it from the judgment creditor, & the sheriff's officer then retired & left the goods in A's possession, who remained in undisturbed enjoyment for more than six years. After his death, the furniture was claimed by his friends who had purchased it, & adversely by his administratrix:—*Held*: the rights of the former were not barred by Statute of Limitations, & as A's possession was rightful, the statute could only apply from six years from a conversion.—*EDWARDS v. CLAY* (1860), 28 Beav. 145; 54 E. R. 321.

PART II. SECT. 5, SUB-SECT. 3.—J.

257 i. Time runs from each cause of action.]—*PATTERSON v. GREAT WESTERN RY. CO.* (1857), 8 C. P.

89.—CAN.

257 ii. —.]—*NARASIMMA CHARYA v. RAGUPATHI CHARYA* (1883), 1 L. R. 6 Mad. 176.—IND.

PART II. SECT. 5, SUB-SECT. 3.—K. (a).

259 i. Detinue—Goods held with consent of owner—Time runs from refusal to return.]—*Ex p. FISHER* (1879), 1 N. S. W. S. C. R. N. S. 32.—AUS.

Sect. 5.—When time begins to run: Sub-sect. 3, K. (a) & (b), & L.; sub-sect. 4, A. & B.]

262. ——— Not from date of sale.]—WILKINSON v. VERITY, No. 136, *ante*.

263. Trover—Time runs from date of conversion.]—SWAYN v. STEPHENS, No. 297, *post*.

264. ——— If no fraudulent concealment.]—Declaration entitled generally of Michaelmas term. Plea, that the cause of action did not accrue within six years before the exhibiting of pltf.'s bill:—*Held*: (1) deft. might give evidence of the day on which the bill was actually filed, in order to support his plea; & (2) Statute of Limitations was a bar to an action of trover, commenced more than six years after the conversion, though pltf. was ignorant of the conversion till within the six years; deft. not having committed any fraud to prevent pltf.'s earlier knowledge.—GRANGER v. GEORGE (1826), 5 B. & C. 149; 7 Dow. & Ry. K. B. 729; 108 E. R. 56.

Annotations:—*As to* (2) *Refd.* Philpott v. Kelley (1835), 4 Nev. & M. K. B. 611. *Generally, Mentd.* Lester v. Jenkins (1828), 2 Man. & Ry. K. B. 429.

265. ———.]—In trover Statute of Limitations runs from the time of conversion, & not from the time of sale.—DENYS v. SHUCKBURGH (1840), 4 Y. & C. Ex. 42; 5 Jur. 21; 160 E. R. 912.

Annotations:—*Refd.* Eccl. Comrs. for England v. N. E. Ry. (1877), 4 Ch. D. 845; Gibbs v. Guild (1881), 8 Q. B. D. 296; Baker v. Courage, [1910] 1 K. B. 56. *Mentd.* Roberts v. Eberhardt (1853), 2 Eq. Rep. 780; Adair v. New River Co. & Metropolitan Water Board (1908), 25 T. L. R. 193.

266. ———.]—WILKINSON v. VERITY, No. 136, *ante*.

267. ———.]—In Sept. 1889, pltf. pledged a piano with the husband of deft. The same year he converted it to the knowledge of pltf. In Mar. 1897, he died, & pltf. then tendered the money to present deft., his extrix. & widow, & demanded the return of the piano:—*Held*: deft. could not be liable, & as she never had possession of or any property in the piano, no action of conversion would lie against her.

More than six years have elapsed since the sale of the instrument, & the knowledge of its sale. It is contended that pltf. need not sue until the money had been offered & it had been refused, & that that was the conversion, & that the six years under Statute of Limitations only ran from the tender of the money . . . which was the real act of conversion, that is the refusal to give up on that tender. I do not think so (DAY, J.).—HINCHCLIFFE v. SHARPE (1898), 77 L. T. 714.

268. ——— Goods converted in part.]—*Semble*: if a bailee of wine draws off & converts part of it without the owner's knowledge, & at the end of six years is sued in trover for the whole quantity, he cannot set up his conversion of part as a conversion of the whole, to support a plea of Statute of Limitations.—PHILPOTT v. KELLEY (1835), 3 Ad. & El. 106; 1 Har. & W. 134; 4 Nev. & M. K. B. 611; 4 L. J. K. B. 139; 111 E. R. 353.

Annotations:—*Refd.* Plant v. Cotterill (1860), 5 H. & N. 430. *Mentd.* Parry v. Roberts (1835), 3 Ad. & El. 118.

(b) Of Title Deeds.

269. Time runs from demand & refusal.]—The lord of a manor granted a lease of the manor to A. to hold for three lives, & deposited with A.

the ct. rolls. In 1820 the lease expired by the death of the survivor of the lives. In 1822 the grantor by letter requested A.'s representative to deliver up the ct. rolls. No notice was taken of this letter nor was any further application made by the grantor till the year 1844, when he filed a bill against A.'s representatives to recover the ct. rolls & title deeds of the manor. Deft. by his answer relied on Statute of Limitations:—*Held*: the bill was filed too late.—WELLS (DEAN & CHAPTER) v. DODDINGTON (1845), 2 Coll. 73; 14 L. J. Ch. 304; 5 L. T. O. S. 170; 9 Jur. 768; 63 E. R. 642.

Annotation:—*Refd.* Beaumont v. Jeffery, [1925] 1 Ch. 1.

270. ——— Unless defendant legally in possession of land.]—B. having become bkpt. in 1823, while 5 Geo. 2, c. 30, was in force, an assignee was appointed who died in 1840. In 1844, & after the passing of 1 & 2 Will. 4, c. 56, certain lands came to bkpt. by descent, which he conveyed to defts. in the following year. Bkpt. died in 1853 without ever having obtained a certificate. In 1858 pltf. were appointed assignees under the bkpcy., & recovered the land in question by ejectment. In detinue for the title deeds:—*Held*: (1) by 12 & 13 Vict. (c. 106), ss. 4, 142, on the appointment of pltf. as assignees, the property in the lands & deeds relating to it vested in them; & (2) inasmuch as until the appointment of pltf. as assignees there was no detention of the deeds adversely to them, Statute of Limitations was no answer to pltf.'s claim.—PLANT v. COTTERILL (1860), 5 H. & N. 430; 29 L. J. Ex. 198; 2 L. T. 20; 8 W. R. 281; 157 E. R. 1249.

271. ——— Deeds fraudulently deposited with defendant.]—Title deeds were fraudulently deposited by a person not having the right to their custody with a solr., who, with no knowledge of the fraud, advanced money on the security of such deposit:—*Held*: until the delivery of the deeds had been demanded from the innocent & *bona fide* holder & refused, there was no conversion; & Statute of Limitations began to run only from such demand & refusal.—SPACKMAN v. FOSTER (1883), 11 Q. B. D. 99; 52 L. J. Q. B. 418; 48 L. T. 670; 47 J. P. 455; 31 W. R. 548, D. C.

Annotations:—*Folld.* Miller v. Dell, [1891] 1 Q. B. 468. *Refd.* Baker v. Courage, [1910] 1 K. B. 56; Clayton v. Le Roy, [1911] 2 K. B. 1031. *Mentd.* *Re* Sale Hotel & Botanical Gardens, *Ex p.* Heskoth (1898), 78 L. T. 368; Sparenborg v. Edinburgh Life Assce. (1911), 81 L. J. K. B. 299.

272. ———.]—A lease belonging to pltf. was fraudulently taken from him by his son, & was deposited, without pltf.'s knowledge, with B. in 1881 as security for repayment of money lent by B. B. held the lease without knowledge of the fraud. B. having become bkpt., his trustee in 1889 assigned the debt to deft. & handed the lease over to him. Subsequently pltf. demanded the lease of deft., & upon his refusal to return it brought an action for detinue & conversion, to which deft. pleaded the Statute of Limitations:—*Held*: the Statute of Limitations began to run from the time when pltf. first had a complete cause of action against deft., irrespective of the question whether he had a previous cause of action against B.; the statute therefore only began to run from the date of the demand & refusal, & was no answer to the action.—MILLER v. DELL, [1891] 1 Q. B. 468; 60

263i. Trover—Time runs from date of conversion.]—JONES v. BAIN (1855), 12 U. C. R. 550.—CAN.

263ii. ———.]—SCOTT v. MCALPINE (1857), 6 C. P. 302.—CAN.

263iii. ———.]—BROCKET v. BOW-

TRUSTEES (1895), 13 N. Z. L. R. -N.Z.

PART II. SECT. 5, SUB-SECT. 3.—K. (b).

269i. Time runs from demand & refusal.]—After the redemption of a

mtge., the title deeds of the mortgaged premises were left with the mtgee. who refused to return them on demand made by the mtgor.:—*Held*: time began to run from the date of the mtgee.'s refusal.—SUBBAKKA v. MARUPPAKALA (1891), 1 L. R. 15 Mad. 157.—IND.

L. J. Q. B. 404; 63 L. T. 693; 39 W. R. 342; 7 T. L. R. 155, C. A.

Annotations:—*Reid*. London & Midland Bank v. Mitchell, [1899] 2 Ch. 161; Clayton v. Le Roy, [1911] 2 K. B. 1031; Bradford Old Bank v. Sutcliffe, [1918] 2 K. B. 833.

L. Waste.

See AGRICULTURE, Vol. II., p. 114, Nos. 964-967; LANDLORD & TENANT, Vol. XXXI., pp. 350 *et seq.*, & generally, REAL PROPERTY; SETTLEMENTS.

273. Timber wrongfully cut—Time runs from receipt of money by tenant for life.—In action for money had & received.]—No action lies by the reversioner & owner of the inheritance to recover the value of timber cut by the deceased tenant for life after a fine levied by her, whereby she acquired a base fee, & before the avoidance of such fine & base fee by the entry of the reversioner for that purpose; such entry not revesting the reversioner's old estate by relation during the continuance of the base fee thus created, so as to entitle him at law to the timber & other mesne profits taken during that interval. Even supposing that after Statute of Limitations had run against the appropriate action, by the reversioner against the tenant for life for mesne profits, or for waste, upon the original wrongful act of cutting down & converting the trees, an action of *assumpsit* for money had & received for the purchase-money of the trees sold, which was in fact paid to the former tenant for life within the six years, was maintainable against her representatives after her death.—*HUGHES v. THOMAS* (1811), 13 East, 474; 104 E. R. 454.

274. — Time runs from cutting of trees.—(1) If a tenant for life impeachable for waste cuts timber without the leave of the ct., he will never be permitted to derive any advantage from his wrongful act. In such a case, the act being wrongful, Statute of Limitations begins to run against the remainderman from the time of the cutting.

(2) If after Statute of Limitations has begun to run, the right to sue & the liability to be sued meet by act of law in the same person, the running of the statute is suspended. Where a debtor takes out administration to his creditor, the running of the statute will be suspended during the administration.—*SEAGRAM v. KNIGHT* (1867), 2 Ch. App. 628; 36 L. J. Ch. 918; 17 L. T. 47; 15 W. R. 1152, L. C.

Annotations:—As to (1) *Reid*. Dashwood v. Magniac, [1891] 3 Ch. 306. As to (2) *Reid*. *Re* Benzon, Bower v. Chetwynd (1914), 83 L. J. Ch. 658.

275. — — ——A tenant for life was extrix. of a preceding tenant for life, both being impeachable for waste, & both having committed waste by cutting timber:—*Held*: Statute of Limitations began to run against the remaindermen in fee from the time when the timber was cut, & not from the time of the death of the tenant for life.—*HIGGINBOTHAM v. HAWKINS* (1872), 7 Ch. App. 676; 41 L. J. Ch. 828; 27 L. T. 328; 20 W. R. 955, L. J. J.

Annotation:—*Reid*. Dashwood v. Magniac, [1891] 3 Ch. 306.

276. — Tenant for life also ultimate remainderman—Time runs from death of tenant for life.]—Where a tenant for life, impeachable for waste, cut timber, but there was no one to bring an action, because he also happened to be owner of the first estate of inheritance, & died:—*Held*: (1) a bill for an account would lie against his estate, at the suit of a tenant for life in possession, on the that cts. of equity will interfere where they find collusive waste going on between a

tenant for life & the owner of the first estate of inheritance; & so, also where the two characters of tenant for life & remainderman in tail or in fee happen to meet in the same person; (2) such a bill also must be brought within six years of the death of the tenant for life.—*BIRCH-WOLFE v. BIRCH* (1870), L. R. 9 Eq. 683; 39 L. J. Ch. 345; 23 L. T. 216; 18 W. R. 594.

SUB-SECT. 4.—DISABILITIES.

A. To What Actions Applicable.

See Statute of Limitations, 1623 (c. 16), s. 7; Mercantile Law Amendment Act, 1856 (c. 97), ss. 10-12, 14.

277. Assumpsit.—The privileges by reason of infancy & other impediments are saved, in an action on the case on *assumpsit*, by Statute of Limitations, 1623 (c. 16), & that action is within the equity of the saving clause thereof, though it is named in the limiting clause only.—*CHANDLER v. VILETT* (1670), 2 Wms. Saund. 117; 1 Sid. 453; 85 E. R. 833.

Annotations:—*Reid*. Roche v. Hepman (1729), 1 Barn. K. B. 172; Gage v. Bulkeley (1745), Ridg. temp. H. 278; Piggott v. Rush (1836), 4 Ad. & El. 912; Rhodes v. Smethurst (1840), 6 M. & W. 351; Inglis v. Halgh (1841), 8 M. & W. 769; Towns v. Mead (1855), 16 C. B. 123. *Mentd.* R. v. Drake (1705), 2 Salk. 660; Collins v. Brook (1860), 5 H. & N. 700; Sinclair v. Brougham, [1914] A. C. 398.

278. — — ——The proviso in Statute of Limitations, 1623 (c. 16), saving the rights of infant plffs., extends to actions of *assumpsit*.—*CROSIER v. TOMLINSON* (1676), Freem. K. B. 208; 2 Mod. Rep. 71; 89 E. R. 147.

Annotations:—*Reid*. Piggott v. Rush (1836), 4 Ad. & El. 912; Towns v. Mead (1855), 16 C. B. 123.

279. — — ——*GERY v. COKE* (1692), 1 Lut. 242; 125 E. R. 127.

280. — — ——[An action of] *assumpsit* is within the equity of the exception in Statute of Limitations, 1623 (c. 16).—*ANON.* (1729), Fitz-G. 81; 94 E. R. 663.

281. — — ——*ROCHE v. HEPMAN* (1729), 1 Barn. K. B. 172; 94 E. R. 118.

282. — — ——An action of *assumpsit* for unliquidated damages is within the saving clause of Statute of Limitations, 1623 (c. 16), s. 7.—*PIGGOTT v. RUSH* (1836), 4 Ad. & El. 912; 2 Har. & W. 28; 6 Nev. & M. K. B. 376; 6 L. J. K. B. 272; 111 E. R. 1027.

Annotations:—*Reid*. Story v. Fry (1842), 1 Y. & C. Ch. Cas. 603; Towns v. Mead (1855), 16 C. B. 123; Harnett v. Fisher (1926), 135 L. T. 724.

283. All actions on the case.—*CHANDLER v. VILETT*, No. 277, *ante*.

Extent of application of limitation generally, see Part II., Sect. 1, *ante*.

B. Disability of Co-Plaintiff.

284. Time runs from accrual of cause of action.—If one pltf. be abroad, & the others in England, the action must be brought within six years after the cause of action arises.

This statute [Limitations, 1623 (c. 16)] having been always considered as a beneficial law for the public, we ought not to extend the exceptions in it to a case which does not require it (*ASHHURST, J.*).—*PERRY v. JACKSON* (1792), 4 Term Rep. 516; 100 E. R. 1150.

Annotations:—*Expld.* Fannin v. Anderson (1845), 7 Q. B. 811. *Reid.* Perham v. Raynal (1824), 2 Bing. 306; Towns v. Mead (1855), 16 C. B. 123.

PART II. SECT. 5, SUB-SECT. 3.—L.

Timber wrongfully cut—Time runs from appropriation of timber—Not from time of cutting.]—*AIYAPPA REDDI v. KUP-REDDI* (1905), I. L. R. 28 Mad. 20.—*IND.*

Sect. 5.—When time begins to run: Sub-sect. 4, C.

C. Particular Disabilities.

(a) Absence Beyond the Seas.

i. In General.

285. Meaning of "beyond the seas" words in Statute of Limitations, 1623 (c. 16), s. 7, "beyond the seas," are synonymous, in legal import, with the words "out of the realm," or "out of the land," or "out of the territories," and are not to be construed literally.

v. LULLOOBHOY MOTTICHUND (1852), 8 Moo. P. C. C. 4; 5 Moo. Ind. App. 234; 22 L. T. O. S. 203; 14 E. R. 2, P. C.

286. — What countries included—Ireland.]—Dublin or any other place in Ireland is beyond sea within the meaning of Statute of Limitations.—*NIGHTINGALE v. ADAMS* (1688), Holt, K. B. 426; 1 Show. 91; 90 E. R. 1135.

Annotations:—*Reid. Battersby v. Kirk* (1836), 2 Bing. N. C. 584; *Lane v. Bennett* (1836), 1 M. & W. 70; *Ruckmaboye v. Lulloobhoy Mottichund* (1852), 8 Moo. P. C. C. 4.

287. — Ireland is beyond sea, within Statute of Limitations.—*ANON.* (1688), 1 Show. 91; 89 E. R. 471.

Annotation:—*Reid. Ruckmaboye v. Lulloobhoy Mottichund* (1852), 8 Moo. P. C. C. 4.

288. — Ireland is still a place beyond the seas, within 4 Ann. c. 3, s. 19, notwithstanding the Act of Union, & Civil Procedure Act, 1833 (c. 42), s. 7 (a).—*LANE v. BENNETT* (1836), 1 M. & W. 70; 1 Gale, 368; Tyr. & Gr. 441; 150 E. R. 350; *sub nom. LANE v. CONNELL*, 5 L. J. Ex. 98.

Annotations:—*Consd. Ruckmaboye v. Lulloobhoy Mottichund* (1852), 8 Moo. P. C. C. 4. *Mentd. Mather v. Brown* (1876), 1 C. P. D. 596.

289. — Scotland.]—(1) Statute of Limitations, 1623 (c. 16), extends to persons in Scotland.

(2) The Statute of Limitations ought to be construed liberally (*WILMOT, J.*).—*KING v. WALKER* (1761), 1 Wm. Bl. 286; 96 E. R. 159.

Annotations:—*Consd. Lane v. Bennett* (1836), 1 M. & W. 70; *Ruckmaboye v. Lulloobhoy Mottichund* (1852), 8 Moo. P. C. C. 4.

—.]—*See, now, Mercantile Law Amendment Act, 1856* (c. 97), s. 12.

290. Mercantile Law Amendment Act, 1856 (c. 97), s. 12—Whether retrospective.]—*FLOOD v. PATTERSON*, No. 310, *post*.

291. Effect of temporary presence in England.]—Where a debtor, at the time of contracting a debt, is abroad, his return to this country, though for a very short time, a day or two, for instance, without any intention to remain, & without the knowledge of the creditor, is yet a return within the meaning of 4 Ann. c. 3, s. 19; & the time reckoned by Statute of Limitations will thereupon begin to run.—*GREGORY v. HURRILL* (1826), 5 B. & C. 341; 8 Dow. & Ry. K. B. 270; 4 L. J. O. S. K. B. 262; 108 E. R. 127.

Annotation:—*Consd. Harnett v. Fisher* (1926), 135 L. T. 724.

292. —.]—Where a debtor has resided abroad for some years, but came to Dover for two days only, viz. one Saturday & Sunday in the year 1838, so landing in England is not such a cessation of residence abroad beyond the jurisdiction of the ct. as that Statute of Limitations would run from that period.—*Re BULLER* (1846), 8 L. T. O. S. 4.

PART II. SECT. 5, SUB-SECT. 4.—C. (a) i.

285 i. Meaning of "beyond the seas."—"Beyond the seas," in the various Imperial Statutes of Limitation, is to be read "out of the territory."—*GRIFFITH v. 294.—AUS.*

285 ii. —.]—The expression "be-

yond the seas" in the Statutes of Limitation means "out of the territory," or "beyond the jurisdiction."—*KASSON v. HOLLEY* (1871), 1 Man. L. R. 1.—CAN.

PART II. SECT. 5, SUB-SECT. 4.—C. (a) ii.

h. No disability.]—The liability of

293. —.]—*A. & B., bankers at Frankfort, sued C. on a bill of exchange which became due Dec. 2, 1848. Deft. pleaded Statute of Limitations; to which plffs. replied, that, at the time of the accruing of the causes of action, they were beyond the seas, & that they did not, nor did either of them, come to this country until within six years before the commencement of the action. In support of the replication, A. was called. He stated that he was not in England at any time between the maturity of the bill & the year 1851; & that his partner, B., had never been in England. Upon cross-examination, he admitted that B. was occasionally absent from Frankfort for three or four days, & sometimes for a week or a month together:—Held: this was evidence to go to the jury; & it was necessary to call B. himself to negative his having been in England.—Koch & Gogel v. Shepherd* (1856), 18 C. B. 191; 27 L. T. O. S. 108; 4 W. R. 529; 139 E. R. 1340.

ii. Of Creditor.

See Statute of Limitations, 1623 (c. 16), s. 7; & *now, Mercantile Law Amendment Act, 1856* (c. 97), s. 10.

294. Mercantile Law Amendment Act, 1856 (c. 97), s. 10—No disability.]—*CORNILL v. HUDSON*, No. 317, *post*.

295. —.]—The above sect. is retrospective; & therefore, even where the cause of action has accrued before the statute was passed, no person is entitled to any time within which to commence an action beyond the time fixed by Statute of Limitations, by reason of such person being beyond the seas when the cause of action accrued.—*PARDO v. BINGHAM* (1869), 4 Ch. App. 735; 39 L. J. Ch. 170; 20 L. T. 464; 34 J. P. 38; 17 W. R. 419, L. C.

Annotations:—*Reid. Re Chapman, Cocks v. Chapman*, [1896] 1 Ch. 323; *West v. Gwynne* (1911), 80 L. J. Ch. 578; *R. v. Southampton Income Tax Comrs., Ex p. Singer*, [1916] 2 K. B. 249. *Mentd. Hicks v. Powell* (1869), 4 Ch. App. 741; *In the Goods of Ewing* (1881), 6 P. D. 19; *O'Grady v. Wilmot*, [1916] 2 A. C. 231.

296. Former law.]—*ROCHTSCHILT v. LEIBMAN* (1729), 2 Stra. 836; *STRITHORST v. GRAEME* (1770), 3 Wils. 145; *WILLIAMS v. JONES* (1811), 13 East, 439; *LE VEUX v. BERKELEY* (1844), 5 Q. B. 836; *TOWNSEND v. DEACON* (1849), 3 Exch. 706; *LAFOND v. RUDDOCK* (1853), 13 C. B. 813; *REIMERS v. DRUCE* (1857), 23 Beav. 158, n.

iii. Of Debtor.

See Statute of Limitations, 1623 (c. 16), s. 7; 4 & 5 Ann. c. 3, s. 19; *Mercantile Law Amendment Act, 1856* (c. 97), s. 11.

297. Whether statute runs in favour of debtor.]

(1) In trover & conversion plff. may reply, to a plea of Statute of Limitations, that deft. transported the goods beyond the sea by consent, & that he afterwards converted them to his own use, & remained in parts beyond the seas, by reason of which plff. could not sue him. *Qu.*: if Statute of Limitations operates while a debtor is abroad.

(2) Trover is an action within Statute of Limitations.

(3) Request & non-delivery of goods sold abroad is a new conversion of them when deft. comes to

a deft., beyond the seas at the time the cause of action accrued, to be sued within six years after his return, is not affected by plff.'s absence from the jurisdiction or the fact that plff. has never been within the jurisdiction.—*KASSON v. HOLLEY* (1871), 1 Man. L. R. 1.—CAN.

England.—*SWAYN v. STEPHENS* (1633), Cro. Car. 24, 833; W. Jo. 252; 79 E. R. 815, 892.

Annotations:—As to (1) *Apld. Roche v. Hepman* (1729), 1 Barn. K. B. 172. As to (2) *Consd. Philpott v. Kelley* (1835), 3 Ad. & El. 106. Generally, *Mentd. Cage v. Acton* (1699), 12 Mod. Rep. 288.

]—*DAVIS v. YALE* (1699), 2 Lut. 946; 125 E. R. 528.

Annotation:—*Mentd. Mostyn v. Fabrigas* (1775), 1 Cowp. 161.

299. —.]—If the creditor is beyond the sea Statute of Limitations will not take place. So it is by 4 & 5 Ann. if debtor is beyond the sea.—*JOLLIFFE v. PITT* (1715), 2 Vern. 694; 23 E. R. 1050, L. C.

Annotations:—*Refd. Murray v. East India Co.* (1821), 5 B. & Ald. 204. *Mentd. Douglas v. Forrest* (1828), 4 Bing. 686; *Rhodes v. Smethurst* (1840), 6 M. & W. 351.

300. — Time runs from return to jurisdiction.]—*BEVEN v. CLAPHAM* (1664), 1 Lev. 143; 83 E. R. 339; *sub nom. BEVIN v. CHAPMAN*, 1 Sid. 228; 1 Keb. 799.

Annotations:—*Refd. Kinsey v. Heyward* (1698), 1 Ld. Raym. 431; *Story v. Atkins* (1726), 2 Ld. Raym. 1427. *Mentd. Holyday v. Fletcher* (1727), 1 Barn. K. B. 29.

301. —.]—If a debtor be beyond sea at the time the cause of action arises, the creditor may sue after his return within the times limited by Statute of Limitations, 1623 (c. 16) & 4 & 5 Ann. c. 3.—*HALL v. WYBANK* (1690), 3 Mod. Rep. 311; Carth. 136; 2 Salk. 420; 1 Show. 98; 87 E. R. 205.

Annotations:—*Refd. Davis v. Yale* (1699), 2 Lut. 946; *Roche v. Hepman* (1729), 1 Barn. K. B. 172; *Beckford v. Wade* (1805), 17 Ves. 87.

302. —.]—To an *assumpsit* brought on a promise to pay May 1, deft. pleads Statute of Limitations. *Qu.*: if a replication stating that he was beyond sea when the cause of action accrued, & that the action was begun within six years after his return, be good.—*AUBRY v. FORTESCUE* (1714), 10 Mod. Rep. 205; 88 E. R. 695.

Annotation:—*Refd. Beckford v. Wade* (1805), 17 Ves. 87.

303. —.]—A creditor by 4 Ann. [c. 3] has the same privilege of debtor's being beyond sea as he had by Statute of Limitations, on his being beyond sea himself. These statutes must be so considered as if the clauses in the last had stood originally in the first.

Where a creditor who has been out of the kingdom returns, the time will run, & his going abroad again will give him no privilege, for that was gone by his having once returned after cause of action accrued.—*STURT v. MELLISH* (1743), 2 Atk. 610; 26 E. R. 765, L. C.

Annotation:—*Mentd. Wilson v. Bury* (1880), 5 Q. B. D. 518.

304. —.]—A replication under 4 Ann. c. 3, s. 19, to a plea of Statute of Limitations, need not allege that deft. has returned to this country, or that the action was commenced within six years after his return.

According to the true construction of the statute, the one party is not barred of his action unless the other party has returned & six years have elapsed since his return (*ALDERSON, B.*).—*FORBES v. SMITH* (1855), 11 Exch. 161; 3 C. L. R. 1304; 24

L. J. Ex. 299; 25 L. T. O. S. 148; 1 Jur. N. S. 503; 3 W. R. 476; 156 E. R. 628.

305. — Debtor dying abroad.]—A person, in satisfaction of a previous debt due from him, gave his creditor a bill of exchange, & before the bill arrived at maturity went to India, whence he never returned. As soon as circumstances would permit after his death in India his will was proved by his exors. in England; & within six years after his death a creditors' bill was filed against the exors.:—*Held*: pltf. was not barred by Statute of Limitations.

Qu.: whether, when a debtor dies abroad & the cause of action or suit has not accrued in his lifetime, a suit may not be instituted for the administration of his effects at any time within six years after probate of his will.—*STORY v. FRY* (1842), 1 Y. & C. Ch. Cas. 603; 11 L. J. Ch. 373; 6 Jur. 1029; 62 E. R. 1035.

Annotation:—*Consd. Towns v. Mead* (1855), 16 C. B. 123.

306. — Effect of power to serve writ out of jurisdiction—R. S. C., Ord. 11.]—(1) The immunity of the ambassador of an independent sovereign from being sued extends during such period as he is accredited to such sovereign & is in this country, & during such a reasonable time after he has presented his letters of recall as is necessary to enable him to hand over his office & to return to his country & in neither of such cases does Statute of Limitations, 1623 (c. 16), s. 19, begin to run against his creditors.

(2) R. S. C., Ord. 11, which enables pltf., by leave to obtain an order for service of a writ of summons or of notice of a writ of summons out of the jurisdiction certain cases, does not repeal 4 & 5 Ann. c. 3, s. 19, so as to prevent pltf. from bringing an action against deft. after his return from beyond the seas within the time limited for bringing such action by Statute of Limitations, 1623 (c. 16).—*MUSURUS BEY v. GADBAN*, [1894] 2 Q. B. 352; 63 L. J. Q. B. 621; 71 L. T. 51; 42 W. R. 545; 10 T. L. R. 493; 38 Sol. Jo. 511; 9 R. 519, C. A.

Annotations:—Generally, *Mentd. Re Republic of Bolivia Exploration Syndicate*, [1914] 1 Ch. 139; *Re Suarez, Suarez v. Suarez*, [1918] 1 Ch. 176; *The Tervaeete*, [1922] P. 259.

307. One of several co-contractors abroad—Remainder within jurisdiction.]—Declaration, in *assumpsit*, reciting a writ issued on Nov. 25, 1843, charged that heretofore, "to wit, on Dec. 29, A.D. 1830," deft. contracted that he would, "within twelve months from a certain day, to wit, the day & year aforesaid," supply pltf. with certain articles. Plea: that the cause of action did not accrue within six years next before the commencement of the suit:—*Held*: (1) the declaration was substantially good, the averments showing that twelve months had elapsed before the action; & further, the plea might be resorted to, as showing that the twelve months had so elapsed; (2) the rejoinder was no answer to the replication; for, under 4 Ann. c. 3, s. 19, if a right of action accrue against several persons, one of whom is beyond seas, Statute of Limitations does not run till his return, though the others have never been absent

PART II. SECT. 5, SUB-SECT. 4.— C. (a) iii.

300 i. Whether statute runs in favour of debtor—Time runs from return to jurisdiction.]—*GRIFFITH v. BLOCH* (1878), 4 V. L. R. L. 294.—AUS.

300 ii. —.]—4 & 5 Ann. c. 3, applies as against a debtor who has never been within the jurisdiction at all.—*KASSON v. HOLLEY* (1871), 1 Man. L. R.

300 iii. —.]—*MURPHY v. SWEE-NEY*, 20 C. L. T. Occ. N. 338.—CAN.

300 iv. —.]—To make the Statute of Limitations run in deft.'s favour, his return from beyond the seas must be open & of sufficiently long duration to have enabled the creditor, if he had known of it to bring an action, though the creditor's knowledge is not essential.—*BOULTON v. LANGMUIR* (1897), 24 A. R. 618.—CAN.

300 v. —.]—UNITED STATES

SAVING & LOAN CO. v. RUTLEDGE (Y. T.) (1905), 2 W. L. R. 471.—CAN.

300 vi. —.]—*MAHOMED MUSEEH-OD-DEEN KHAN v. MUSEEH-OD-DEEN* (1870), 2 N. W. 173.—IND.

300 vii. —.]—*VAN COLLIER & DE VILLIERS v. MALAN* (1904), O. R. C. 78.—S. AF.

From accrual of cause of action.]—*RUTLEDGE v. UNITED STATES SAVINGS & LOAN CO.* (1906), 37 S. C. R. 546.—CAN.

Sect. 5.—When time begins to run: Sub-sect. 4, C. 10. iii (b), (c), (d) & (e). Sect. 6: Sub-sect. 1.]

Jur. 969; 115 E. R. 693.

Annotations:—As to (2) *Appld.* *Towns v. Mead* (1855), 16 C. B. 123. *Consd.* *Roddam v. Morley* (1857), 1 De G. 1. *Refd.* *Coope v. Cresswell* (1866), 2 Ch. App. 112.

308. ———.]—Under 4 Ann. c. 3, s. 19, if a right of action accrue against several persons, one of whom is beyond seas, Statute of Limitations does not run till his return or death, though the others have never been absent from the kingdom.—*TOWNS v. MEAD* (1855), 16 C. B. 123; 3 C. L. R. 381; 24 L. J. C. P. 89; 24 L. T. O. S. 238; 1 Jur. N. S. 355; 3 W. R. 178; 139 E. R. 702.

Annotations:—*Consd.* *Roddam v. Morley* (1857), 1 De G. & J. 1. *Refd.* *Coope v. Cresswell* (1866), 2 Ch. App. 112.

One of several debtors abroad.]—See Mercantile Law Amendment Act, 1856 (c. 97), s. 11.

309. Temporary return of debtor—Time runs from return.]—*STURT v. MELLISH*, No. 303, *ante*.

310. ———.]—(1) Mercantile Law Amendment Act, 1856 (c. 97), s. 12, is not retrospective.

(2) A person resident in Jersey died in 1850 indebted to a person resident in England. He appointed his wife extrix., & she proved the will in Jersey alone. The extrix. had in 1851 been in England for three weeks, & had, while in Jersey, received a sum due to her testator in this country:—*Held*: in 1860, the Statute of Limitations did not apply, the extrix. not having been liable to be sued in this country, & having done no act here to constitute herself an English extrix.—*FLOOD v. PATTERSON* (1861), 29 Beav. 295; 30 L. J. Ch. 486; 4 L. T. 78; 7 Jur. N. S. 324; 9 W. R. 294; 54 E. R. 640.

Annotation:—As to (2) *Refd.* *Musurus Bey v. Gadban* (1893), 38 Sol. Jo. 59.

(b) Coverture.

See Statute of Limitations, 1623 (c. 16), s. 7; Married Women's Property Act, 1882 (c. 75), s. 1 (2).

311. Time within which married woman may sue.]—A married woman being administratrix received a sum of money in that character, & lent the same to her husband, & took in return for it the joint & several promissory note of her husband & two other persons, payable to her with interest:—*Held*: although she could not have maintained any action upon the note during the lifetime of her husband, yet that he having died, & it having been given for a good consideration, it was a chose in action surviving to the wife, & she might maintain an action upon it against either of the other makers at any time within six years after the death of her husband, & recover interest from the date of the note.—*RICHARDS v. RICHARDS* (1831), 2 B. & Ad. 447; 9 L. J. O. S. K. B. 319; 109 E. R. 1208.

Annotations:—*Consd.* *Scarpellini v. Atcheson* (1845), 7 Q. B. 864. *Refd.* *Hart v. Stephens* (1845), 6 Q. B. 937. *Mentd.* *Rose v. Poulton* (1831), 2 B. & Ad. 822; *Gaters v. Madeley* (1840), 6 M. & W. 423; *Sherrington v. Yates* (1844), 12 M. & W. 855; *Beecham v. Smith* (1858), E. B. & E. 442; *Fleet v. Perrins* (1869), L. R. 4 Q. B. 500.

312. ———.]—Declaration on a promissory note by payee against maker. Plea, Statute of Limitations. Replication thereto, that when the cause of action accrued to pltf. she was a *feme covert*, the wife of B., & so remained until his death, when she became *discoverd*, & that the action was commenced within six years after B.'s death. Rejoinder, that the note was payable to the order of S., the pltf.; that after it was made, & before it became payable, B., then the husband of pltf., authorised her to indorse it in her own name &

deliver, & that she did by such authority indorse & deliver the note to F., for value by him paid; that when the note became due, it was in the hands of G., holder & indorsee thereof, & entitled to sue thereon, who then presented it for payment, & the note came into pltf.'s possession from G. by delivery, he being such holder & indorsee, & entitled to sue thereon. On special demurrer to the rejoinder:—*Held*: ill; because (1) if it intended to allege that the note was satisfied when it came to pltf.'s hands, & that she had no cause of action, it was a departure from the plea; (2) because it was no answer to the replication, as it contained no denial of the death of B., within six years of the commencement of the suit.—*SCARPELLINI v. ATCHESON* (1845), 7 Q. B. 864; 14 L. J. Q. B. 333; 9 Jur. 827; 115 E. R. 713.

Annotations:—*Generally, Mentd.* *Dalton v. Mid. Ry.* (1853), 21 L. T. O. S. 102; *Lowe v. Peskett* (1855), 3 C. L. R. 1264.

313. ———.]—A fund to which a married woman was, under her marriage settlement, entitled for life in reversion, expectant on the death of her husband, was in 1848 paid over to the husband with the wife's written consent by D., who had notice of the trust. In Dec. 1862, the husband having died in the Jan. preceding, a new trustee of the settlement, who had then very recently become acquainted with the fact of the breach of trust, joined with the widow in filing a bill against the present owner of D.'s real estate the whole of his personality having been administered under a decree of the ct.:—*Held*: the consent of the wife to the disposal of her reversionary interest never having been confirmed by her when she became *discoverd*, was invalid; & neither the wife, her disability having ceased only in 1862, nor her trustee, was barred by Statute of Limitations.—*CRESSWELL v. DEWELL* (1863), 4 Giff. 460; 3 New Rep. 148; 10 L. T. 22; 10 Jur. N. S. 354; 12 W. R. 123; 66 E. R. 787.

314. ———.]—Married Women's Property Act, 1882 (c. 75).]—Statute of Limitations, 1623 (c. 16), s. 7, provides that, in the case of a married woman, her right to bring an action in respect of the matters specified in that statute shall commence from the time when she becomes *discoverd*. Married Women's Property Act, 1882 (c. 75), s. 1 (2), provides that a married woman shall be capable of suing & being sued, either in contract or in tort or otherwise, in all respects as if she were *feme sole*:—*Held*: inasmuch as, by Statute of Limitations, a married woman's right to sue was reserved until she became *discoverd*—in other words, until she could sue in her own name—& as Married Women's Property Act, 1882, gave her a right to sue in her own name in all respects as if she was a *feme sole*, a married woman's right to bring an action in respect of a cause which accrued before the passing of Married Women's Property Act, 1882, & while she was a married woman, commences from the date of the coming into operation of that Act, *i.e.* Jan. 1, 1883, & she can bring her action within the statutable period from that date.—*WELDON v. NEAL* (1884), 51 L. T. 289; 32 W. R. 828, D. C.

315. ———.]—Action for tort committed before 1882.]—The effect of Married Women's Property Act, 1882 (c. 75), is to make a married woman *discoverd* from the date of the passing of that Act in respect of torts committed against her during coverture, & she is entitled to bring an action in respect of a tort committed during coverture & before 1882, which would otherwise be barred by Statute of Limitations, 1623 (c. 16), s. 3; for that statute begins to run only from the date of the passing of the Act of 1882.—*LOWE v. FOX* (1885),

15 Q. B. D. 667; 54 L. J. Q. B. 561; 53 L. T. 886; 50 J. P. 244; 34 W. R. 144, C. A.; *on appeal* (1887), 12 App. Cas. 206, H. L.

Annotations.—*Reid*. Hulley v. Silversprings Bleaching & Dyeing Co., [1922] 2 Ch. 268. *Mentd.* *Re* Smith's Estate, Clements v. Ward (1887), 35 Ch. D. 589.

316. ———.]—*BECK v. PIERCE*, No. 189, *ante*.

(c) *Imprisonment*.

See, now, Mercantile Law Amendment Act, 1856 (c. 97), s. 10.

317. *Retrospective effect of Mercantile Law Amendment Act, 1856 (c. 97), s. 10.*—The above sect. which enacts that a party who shall be entitled to bring an action limited by Statutes of Limitation there mentioned shall not be entitled to any time beyond the period so limited by reason of his having been imprisoned at the time when the cause of action accrued, applies to cases where the cause of action accrued before the above Act came into operation & no action is commenced till after that.—*CORNILL v. HUDSON* (1857), 8 E. & B. 429; 27 L. J. Q. B. 8; 3 Jur. N. S. 1257; 120 E. R. 160; *sub nom.* *COMILL v. HUDSON*, 30 L. T. O. S. 130; 6 W. R. 37.

Annotations.—*Apprvd.* *Pardo v. Bingham* (1869), 4 Ch. App. 735. *Mentd.* *Lofft v. Dennis* (1859), 28 L. J. Q. B. 168; *De Wolf v. Linsdell* (1868), 16 W. R. 324; *Re* Pulborough School Board *Petn.*, *Bourke v. Nutt* (1893), 70 L. T. 25; *West v. Gwynne* (1911), 104 L. T. 277.

(d) *Infancy*.

See Statute of Limitations, 1623 (c. 16), s. 7.

Operation of statute in favour of infant plaintiff.]

—*See* Nos. 277–279, *ante*.

Time already running against ancestor—Continues against infant.—*See* Nos. 323, 328, *post*.

(e) *Lunacy*.

See Statute of Limitations, 1623 (c. 16), s. 7; & *generally*, LUNATICS.

Person entitled becoming insane.—*See* No. 329, *post*.

SECT. 6.—WHEN TIME CONTINUES TO RUN.

SUB-SECT. 1.—“TIME ONCE BEGUN CONTINUES TO RUN.”

318. *General rule.*—By Tithe Commutation Act, 1836 (c. 71), s. 46, any person claiming an interest in lands or tithes, who shall be dissatisfied with any decision of the comrs. (deciding upon an amount above £20), may, within three months after notice to him of the decision, bring an action, by feigned issue, to dispute the decision.

A comr. decided in favour of a parochial *modus*. Notice was given to the rector of the parish, who died one month after, without bringing an action. The successor was not presented for more than nineteen calendar months afterwards & within eight weeks after his induction, he issued a writ for the purpose of disputing the decision:—*Held*: he was too late; & the ct., on motion, set aside the writ & all subsequent proceedings.

In this part the statute bears the closest analogy to the general Statute of Limitations;

with regard to them, it is a well known & settled rule, that, where the time has once begun to run, no subsequent disability, however involuntary, will suspend their operation (LORD DENMAN, C.J.).—*HOMFRAY v. SCROOPE* (1849), 13 Q. B. 509; 18 L. J. Q. B. 138; 13 Jur. 623; 116 E. R. 1357.

Annotation.—*Mentd.* *R. v. Leicestershire JJ.* (1850), 14 Jur. 550.

319. *Courts closed—Civil war.*—*PRIDEAUX v. WEBBER* (1661), 1 Lev. 31; 1 Keb. 204; 83 E. R. 282.

Annotations.—*Apld.* *Gray v. Mendez* (1723), 1 Stra. 556. *Consd.* *Rhodes v. Smethurst* (1840), 6 M. & W. 351. *Apld.* *Homfray v. Scroope* (1849), 13 Q. B. 509. *Consd.* *Harnett v. Fisher* (1924), 135 L. T. 724. *Reid.* *Lloyd v. Vaughan* (1746), 2 Stra. 125. *Mentd.* *Hele v. Exeter (Bp.)* (1690), 2 Salk. 539.

320. ———.]—*BENYON v. EVELYN*, No. 134, *ante*.

321. ——— *Special statutory provision.*—*SNODE v. WARD* (1690), 3 Lev. 283; 2 Vent. 197; 83 E. R. 691.

Annotation.—*Reid.* *Rhodes v. Smethurst* (1838), 7 L. J. Ex. 273.

322. ——— *War.*—Though the Cts. of Justice were shut up in time of war, so that no original could be sued out, Statute of Limitations continued to run.—*BECKFORD v. WADE* (1805), 17 Ves. 87; 34 E. R. 34, P. C.

Annotations.—*Mentd.* *Cholmondeley v. Clinton* (1820), 2 Jac. & W. 1; *A.-G. v. Aspinall* (1837), 1 Jur. 812; *Wedderburn v. Wedderburn* (1838), 4 My. & Cr. 41; *Re* Manchester Gas Act, *Ex p. Hasell* (1839), 3 Y. & C. Ex. 617; *Portlock v. Gardner* (1842), 6 Jur. 795; *Toft v. Stephenson* (1848), 7 Hare, 1; *A.-G. v. Murdoch* (1852), 1 De G. M. & G. 86; *Eager v. Barnes & Bridger* (1862), 7 L. T. 408; *Re* Agriculturists' Cattle Insee., *Smallcombe's Case* (1867), L. R. 3 Eq. 769; *Phillips v. Eyre* (1870), L. R. 6 Q. B. 1; *Drummond v. Sant* (1871), L. R. 6 Q. B. 763; *Soar v. Ashwell*, [1893] 2 Q. B. 390; *Taylor v. Davies*, [1920] A. C. 636.

323. *Infancy—Time already running against ancestor—Continues to run against infant.*—Disseizor levies a fine with proclamations, disseizee after three years, & within five years, dies, his heir being within age, who after the five years expired becomes of full age, & within a year after his full age enters, & adjudged that his entry was not lawful, for here the five years given by the statute of 4 Hen. 7, first attached in his ancestor, & in such case being once commenced there shall not be any intermission or interruption of them, but the heir, though within age, must claim within those five years, or he shall be barred, & he shall not have other five years after his full age.—*STOWEL v. ZOUCHE (LORD)* (1569), 1 Plowd. 353; 75 E. R. 536, Ex. Ch.

Annotations.—*Consd.* *Benyon v. Evelyn* (1664), O. Bridg. 324; *Beckford v. Wade* (1805), 17 Ves. 87; *Tolson v. Kaye* (1843), 6 Man. & G. 536. *Reid.* *Lampet's Case* (1612), 10 Co. Rep. 46 b; *Seymour's Case* (1612), 10 Co. Rep. 95 b; *Bartholomew v. Belfield* (1613), Cro. Jac. 332; *Magdalen College, Cambridge Case* (1616), 11 Co. Rep. 66 b; *Fawkeners v. Bellingham* (1627), Cro. Car. 80; *King v. Dilliston* (1688), 3 Mod. Rep. 221; *Dighton v. Greenvil* (1693), 2 Vent. 321; *Kinsey v. Heyward* (1697), 1 Ld. Raym. 431; *Buckinghamshire v. Drury* (1762), Wilm. 177; *Doe d. Tarrant v. Hellier* (1789), 3 Term Rep. 162; *Doe d. George v. Jesson* (1805), 6 East, 80; *Ruckmaboye v. Lulloobhoy Mottichund* (1852), 5 Moo. Ind. App. 234. *Mentd.* *Bedford's Case* (1586), 7 Co. Rep. 7 b; *Dormer's Case* (1593), 5 Co. Rep. 40 a; *Penryn v. Corbet* (1596), Cro. Eliz. 464; *Bingham's Case* (1600), 2 Co. Rep. 82 b; *Case of Fines*

subsequent disability.—*DOE d. DIXON v. GRANT* (1834), 3 O. S. 511.—CAN.

318 II. ———.]—*BRADBURY v. BAILLIE* (1850), 1 All. 690.—CAN.

318 III. ———.]—*THIR SING v. VENKATA RAMIER* (1880), I. L. R. 3 Mad. 92.—IND.

o. Absence on military service.—*DALY v. BRENNAND*, [1921] 2 W. W. R. 658; 16 Alta. L. R. 503.—CAN.

PART II. SECT. 5, SUB-SECT. 4.—C. (d).

1. *Time runs from majority.*—Under Statute of Limitations, 1623, an infant has six years after attaining his majority to bring an action for work & labour performed by him during his infancy.—*TAYLOR v. PARNELL* (1878), 43 U. C. R. 239.—CAN.

m. ———.]—*CRANE v. BLACKADAR*

(1894), 40 N. S. R. 100.—CAN.

n. ———.]—*RUDRA KANT SURMA SIRCAR v. NOBO KISHORE SURMA BISWAS, SAMOD ALI v. MAHOMED KASSIM* (1883), I. L. R. 9 Calc. 663; 12 C. L. R. 269.—IND.

PART II. SECT. 6, SUB-SECT. 1.

318 I. *General rule.*—When the Statute of Limitations once begins, it continues to run, notwithstanding any

LIMITATION OF ACTIONS.

Sect. 6.—When time continues to run: Sub-sects. 1 & 2. A. & B. Sect. 7.]

(1602), 3 Co. Rep. 84 a; Whittingham's Case (1602), 8 Co. Rep. 42 b; Calvin's Case (1608), 7 Co. Rep. 110; Lechford's Case (1610), 8 Co. Rep. 99 a; Parliament in Ireland Case (1613), 12 Co. Rep. 110; Stone v. Newman (1635), Cro. Car. 427; Clayton v. Kinaston (1697), 1 Ld. Raym. 419; Boulton v. Bull (1795), 2 Hy. Bl. 463; Horn v. Horn (1806), 7 East, 529; Wells v. Iggulden (1824), 3 B. & C. 186; Lane v. Bennett (1836), 1 M. & W. 70; Sussex Peerage (1844), 11 Cl. & Fin. 85; Cox v. Beavan (1849), 8 C. B. 334; Newry & Enniskillen Ry. v. Coombe (1849), 3 Exch. 565; N. W. Ry. v. M'Michael, Birkenhead, Lancashire, & Cheshire Junction Ry. v. Pilcher (1851), 5 Exch. 114; Knowlden v. R. (1864), 5 B. & S. 532; Income Tax Special Purposes Comrs. v. Pemsel, [1891] A. C. 531; R. v. City of London Court Judge, [1892] 1 Q. B. 273; Powell v. Kempton Park Racecourse Co., [1897] 2 Q. B. 242; G. W. Ry. & Mid. Ry. v. Bristol Corpn. (1918), 87 L. J. Ch. 414; Bourne v. Keane, [1919] A. C. 815; Thomson v. St. Catharine's College, Cambridge, etc., [1919] A. C. 468.

324. ———.]—A. mortgages in 1639, & in 1663, his heir brings a bill to redeem; he dying the suit is revived by his co-heirs who obtain a decree in 1672, but do not prosecute it, & B. having purchased the equity of redemption of them, he now brings a bill to have the benefit of the former decrees. Bill dismissed by reason of the difficulty of the account & length of time.

Though infancy may be an answer to the objection of the time in not coming to redeem a mtge.; yet where the time begins upon the ancestor, it shall run on against his infant heir, as in a fine at common.—**ST. JOHN v. TURNER** (1700), 2 Vern. 418; 23 E. R. 868.

Annotations:—**Refd.** Heaton v. Hugell (1729), 1 Barn. K. B. 272; Whiting v. White (1792), 2 Cox, Eq. Cas. 290. **Mentd.** Hercy v. Dinwoody (1793), 4 Bro. C. C. 257.

325. ———.]—**KNOWLES v. SPENCE** (1729), 1 Eq. Cas. Abr. 315; Mos. 225; 21 E. R. 1070, L. C.

326. ———.]—The time incurred in the life of the ancestor shall run upon the infant.—**FRANCO v. ALVARES** (1746), 3 Atk. 342; 26 E. R. 998, L. C.

Annotations:—**Mentd.** Tollner v. Marriott (1830), 4 Sim. 19; **Re** Hartley, Stedman v. Dunster (1887), 34 Ch. D. 742; Schiller v. Petersen, [1924] 1 Ch. 394.

327. ———.]—Tenant in tail dies leaving issue in tail a granddaughter a *feme covert*, the granddaughter dies *covert*, leaving issue in tail two sons, infants, the elder attains the age of twenty-one years & dies, the younger attains his age of twenty-one, & fourteen years after issues out a writ of formedon in the descender:—**Held:** he is barred by Statute of Limitations, 1623 (c. 16).—**COTTERELL v. DUTTON** (1813), 4 Taunt. 826; 128 E. R. 557.

Annotations:—**Consd.** Tolson v. Kaye (1822), 3 Brod. & Bing. 217. **Refd.** Abergavenny v. Brace (1872), L. R. 7 Exch. 145; Murray v. Watkins (1890), 62 L. T. 796.

328. ———. Time already running against infant—Not affected by subsequent disability.]—When once the five years allowed to an infant to make an entry for the purpose of avoiding a fine, begin, the time continues to run, notwithstanding any subsequent disability.

Statutes of limitation are of the greatest importance inasmuch as they are statutes of repose (**KENYON, C.J.**).—**DOE d. DUROURE v. JONES** (1791), 4 Term Rep. 300; 100 E. R. 1031.

Annotations:—**Consd.** Cotterell v. Dutton (1813), 4 Taunt. 826; Rhodes v. Smethurst (1840), 6 M. & W. 351.

PART II. SECT. 6, SUB-SECT. 2.—A.

p. Prior action—Whether operating as suspension.]—**KERR v. SQUIRES** (1883), 22 N. B. R. 448.—**CAN.**

q. ———.]—**FRADETTE v. R. Que.** (1918), 17 Exch. C. R. 137; 40 L. R. 699.—**CAN.**

entitled, in computing the period of limitation, to deduct the time occupied in prosecuting a former suit, depends upon the question whether the former suit was brought upon the same cause of action as the new suit.—**JOTARAM BECHAR v. BAI GANGA** (1871), 8 Bom.

.]—Whether pltf. is

Mentd. Collingwood v. Pace (1661), O. Bridg. 410; **De Geer v. Stone** (1882), 22 Ch. D. 243; **R. v. Speyer**, [1916] 2 K. B. 858; **Fasbender v. A.-G., Kramer v. A.-G.**, [1922] 2 Ch. 850.

329. Insanity—Person entitled becoming insane.]—**DOE d. GRIGGS v. SHANE** (1787), 4 Term Rep. 306, n.; 100 E. R. 1034.

330. Person entitled going abroad.]—If pltf. be in England at the time the cause of action accrues, the time of limitation begins to run, so that if he, or, if he dies abroad, his exor. or administrator, do not sue within six years, they are barred by the statute.—**SMITH v. HILL** (1746), 1 Wils. 134; 95 E. R. 535.

331. Receiver appointed.]—Statute of Limitations will run notwithstanding the appointment of a receiver.—**ANON.** (1737), 2 Atk. 15; 26 E. R. 406, L. C.

Death before action brought.]—See Sect. 7, *post*. **Suspension of cause of action.**]—See Sub-sect. 2, *post*.

SUB-SECT. 2.—SUSPENSION OF CAUSE OF ACTION.

A. In General.

332. Letter of licence to debtor.]—(1) In taking the accounts in an administration suit, any creditor may object that another creditor's debt is barred by Statute of Limitations; but, *semble*: such an objection cannot be taken to pltf.'s debt, which is the foundation of the decree.

(2) A mere letter of licence by a creditor to his debtor does not suspend the operation of Statute of Limitations.

(3) An acknowledgment to take a case out of Statute of Limitations must be made to the creditor, & *semble*: one to his agent is sufficient.—**FULLER v. REDMAN** (No. 2) (1859), 26 Beav. 614; 53 E. R. 1035.

Annotations:—**As to** (1) **Refd.** *Re* Lacy, Howard v. Lightfoot (1906), 51 Sol. Jo. 67. **Generally, Mentd.** Fox v. Garrett, Miles v. Fox (No. 1) (1860), 28 Beav. 16.

333. Right to sue & liability to be sued meeting in one person—By act of law—Debtor taking out administration for creditor.]—**SEAGRAM v. KNIGHT**, No. 274, *ante*.

334. Composition deed—Default in payment of compensation.]—On default made by a debtor in the payment of a composition under a composition deed the ct. implies a fresh promise on his part to pay the original debts, & Statute of Limitations does not commence to run until such default.—**Re STOCK, Ex p. AMOS** (1896), 68 L. J. Q. B. 146; 75 L. T. 422; 45 W. R. 480; 41 Sol. Jo. 113; 3 Mans. 324, D. C.

B. Bankruptcy and Winding up.

335. Whether bankruptcy suspends running of time—As against trustees of bankrupt.]—Statute of Limitations runs notwithstanding a bkpcy.—**GRAY v. MENDEZ** (1723), 1 Stra. 556; 93 E. R. 697; *sub nom.* **GREY v. MENDEZ**, 8 Mod. Rep. 171.

Annotation:—**Refd.** *Ex p.* Dewdney, *Ex p.* Seaman (1809), 15 Ves. 479.

336. ———.]—(1) Statute of Limitations no plea where the bill charges a fraud; but then it should be charged by the bill, that the fraud was discovered within six years before the bill was filed.

A. C. 228.—**IND.**

t. ———.]—**RAJENDRO KISHORE SINGH v. BULAKY MAHTON** (1881), L. L. R. 7 Calo. 367.—**IND.**

u. Administration decree.]—**CANNON v. HOWLAND** (1889), Cass. Dig., 2nd ed. 111.—**CAN.**

(2) Though the assignee of the effects of a bkpt. claims under the Act of Parliament; yet as Statute of Limitations might be pleaded against the bkpt., by the same reason it is pleadable against such assignee.—*SOUTH SEA CO. v. WYMONDSELL* (1732), 3 P. Wms. 143; 24 E. R. 1004, L. C.

Annotations:—*As to* (1) *Consd. Eccl. Comrs. for England v. N. E. Ry.* (1877), 4 Ch. D. 845. *Refd. Re Baillie & Jaffray, Ex p. Bolton* (1832), 1 Deac. & Ch. 556; *Brooks-bank v. Smith* (1836), 2 Y. & C. Ex. 58; *Gibbs v. Guild* (1882), 9 Q. B. D. 59; *Molloy v. Mutual Reserve Life Insee.* (1906), 94 L. T. 756. *As to* (2) *Refd. Re Mansell, Ex p. Norton* (1892), 66 L. T. 245.

337. ———.]—(1) Statute of Limitations, 1623 (c. 16), applies to bar a motion in bkpcy. made under Bkpcy. Act, 1869 (c. 71), s. 72, in the same manner as it applies to bar an action at law.

(2) Service of the notice of motion is equivalent to the commencement of an action, & must be made within the same time as an action must be commenced.

(3) Such a motion being only a substitute for an action at law, Statute of Limitations runs against a trustee in bkpcy. in the same manner as it would run against bkpt. himself. Thus where application was made in the Bkpcy. Ct. by the trustee in a liquidation by arrangement for an order that a solr. should pay over certain rents of the property of the liquidating debtor which had been received by him subsequent to the commencement of the liquidation, but the notice of motion was served more than six years after the rents had been so received:—*Held*: Statute of Limitations was a bar to the motion in the Bkpcy. Ct. by the trustee.—*Re MANSELL, Ex p. NORTON* (1892), 66 L. T. 245; 9 Morr. 198, C. A.

338. ——— *As against creditors of bankrupt.*]—After a commission has issued, Statute of Limitations does not affect debts not previously barred.—*Re COLES, Ex p. Ross* (1827), 2 Gl. & J. 330, L. C.

Annotations:—*Refd. Re Emmings* (1849), 14 L. T. O. S. 208; *Re Benzon, Bower v. Chetwynd*, [1914] 2 Ch. 68; *Re Cullwick, Ex p. London Senior Official Receiver*, [1918] 1 K. B. 646.

339. ——— *Claims in administration of bankrupt's estate.*]—The donee of a general testamentary power of appointment over a fund of £15,000 was adjudicated bkpt. in Jan., 1890, & a small dividend was paid. Early in 1892 the donee was again adjudicated bkpt., but no dividend was paid. The donee never obtained his discharge in either bkpcy., & died in July, 1911, having by his will duly exercised his power of appointment. In an action for the administration of his estate, which consisted almost entirely of the appointed fund, the creditors in the bkpcies. claimed to be paid the balance still remaining unsatisfied of their respective debts:—*Held*: although the appointment & death gave creditors a new fund from which to get payment & a new mode of proceeding in order to get it, yet that was merely a new remedy & not a new cause of action, the cause being really the old debt; Statute of Limitations having begun to run against applts. before the commencement of the bkpcy., continued to run notwithstanding the bkpcy.; & the claims of applts., not being claims in the bkpcy., were barred by lapse of time.—*Re BENZON, BOWER v. CHETWYND*, [1914]

2 Ch. 68; 83 L. J. Ch. 658; 110 L. T. 926; 30 T. L. R. 435; 58 Sol. Jo. 430; 21 Mans. 8, C. A. *Annotation*:—*Refd. Re Lee, Ex p. Grunwaldt*, [1920] 2 K. B. 200.

340. ——— *Debt proved under commission.*]—A surviving assignee is liable for the payment of dividends, if his co-assignee ever admitted the proof of the debt, although the creditor has failed to apply for the dividends for many years; unless it can be proved that the creditor has received them—the *onus* of the proof of payment lying on the assignee.

Statute of Limitations does not attach to a debt proved under a commission or fiat of bkpcy.—*Re NORRIS, Ex p. HEALEY* (1832), 1 Deac. & Ch. 361; 3 Mont. & A. 154, n.

341. *Claim under winding-up order — Debt barred before claim established.*]—Where a claim & an affidavit in support of it were carried into the master's office, under a winding-up order, on behalf of a creditor whose debt was not barred at the time by Statute of Limitations, & a year elapsed without the creditor making any further attempt to establish the debt before the master, or to enforce payment of it; & in the meantime six years had elapsed from the time when the debt accrued due:—*Held*: the claim ought not to have been disallowed by the master as being barred by Statute of Limitations.—*Re GREAT WESTERN EXTENSION ATMOSPHERIC RY. CO., WRYGHT'S CASE* (1852), 5 De G. & Sm. 244; 22 L. J. Ch. 183; 18 L. T. O. S. 299; 16 Jur. 812; 64 E. R. 1100.

Annotation:—*Refd. Re Warwick & Worcester Ry.* (1858), 27 L. J. Ch. 735.

Effect of statutes of limitation on debts provable in winding up.]—*See COMPANIES*, Vol. X., p. 933, Nos. 6398, 6399.

SECT. 7.—PROCEEDINGS BY AND AGAINST REPRESENTATIVE.

342. *Failure of executor to sue—Infant cestui que trust bound.*]—If an exor., administrator, or trustee for an infant neglects to sue within six years Statute of Limitations shall bind the infant.—*WYCH v. EAST INDIA CO.* (1734), 3 P. Wms. 309; 24 E. R. 1078.

343. *Whether time ceases to run till legal personal representative constituted.*]—Where a creditor of a firm in India died there before his right of action was barred by lapse of time, & his personal representative in Scotland brought an action there, against a partner of the firm, twenty-three years after the creditor's death:—*Held*: the English Statute of Limitations did not take effect, the action having been brought within six years after English probate or letters of administration were taken out to deceased creditor.—*FERGUSON v. FYFFE* (1841), 8 Cl. & Fin. 121; 8 E. R. 49, H. L.

Annotations:—*Mentd. Crosskill v. Bower, Bower v. Turner* (1863), 32 Beav. 86; *Williamson v. Williamson* (1869), 20 L. T. 389; *Barfield v. Loughborough* (1872), 8 Ch. App. 1.

]—*See EXECUTORS*, Vol. XXIII., p. 363, Nos. 4311–4318.

— *Creditor taking out administration.*]—*See EXECUTORS*, Vol. XXIII., p. 238, No. 2899.

Choses in action accruing in life time of deceased.]

but continues to run although there be no representative of the debtor whom the creditor could sue.—*HOWLETT v. LAMBERT* (1840), 2 I. Eq. R. 254.—*IR. a. Action against representative lunatic.*]—An action may be commen

PART II. SECT. 6, SUB-SECT. 2.—B.

339 i. *Whether bankruptcy suspends running of time—As against creditors of bankrupt—Claims in administration of bankrupt's estate.*]—*Re BREALEY* (1900), 26 V. L. R. 209.—*AUS.*

PART II. SECT. 7.

343 i. *Whether time ceases to run till legal personal representative constituted.*]—*Semble*: where time has begun to run against a debt in the debtor's life-time, it does not stop upon his death

Sect. 7.—Proceedings by and
Sect. 8: Sub-sects. 1 & 2, A., B., C., D., E., F.,
G. & H.]

—See EXECUTORS, Vol. XXIII., pp. 298, 299, Nos. 3637-3641.

Choses in action accruing after death.]—See EXECUTORS, Vol. XXIII., p. 302, Nos. 3668-3673.

Actions by representative.]—See EXECUTORS, Vol. XXIV., p. 721, Nos. 7487-7494.

Actions against representative.]—See EXECUTORS, Vol. XXIV., pp. 649, 737, Nos. 6758-6762, 7653-7659.

Creditors' actions.]—See EXECUTORS, Vol. XXIV., pp. 808, 809, Nos. 8384-8390.

SECT. 8.—ACKNOWLEDGMENTS IN WRITING.

SUB-SECT. 1.—IN WHAT CASES APPLICABLE.

344. Only to actions for debt—Not contract to perform act.]—If a cause of action arising from the breach of a contract to do an act at a specific time, is once barred by Statute of Limitations, a subsequent acknowledgment by the party, that he broke the contract, will not take the case out of the statute.—BOYDELL v. DRUMMOND (1808), 2 Camp. 157, N. P.; *affd.* on other grounds (1809), 11 East, 142.

Annotations:—Mentd. Bracegirdle v. Heald (1818), 1 B. & Ald. 722; Mavor v. Pyne (1825), 3 Bing. 285; Wells v. Horton (1826), 4 Bing. 40; Williams v. Jones (1826), 5 B. & C. 108; Marshall v. Broadhurst (1831), 9 L. J. O. S. Ex. 105; Donellan v. Read (1832), 3 B. & Ad. 899; Dobell v. Hutchinson (1835), 3 Ad. & El. 355; Souch v. Strawbridge (1846), 2 C. B. 808; M'Kay v. Rutherford (1848), 6 Moo. P. C. C. 413; Morgan v. Holford (1852), 17 Jur. 225; North Staffordshire Ry. v. Peek (1860), E. B. & E. 986; Crane v. Powell (1868), L. R. 4 C. P. 123; Scarisbrook v. Parkinson (1869), 17 W. R. 467; Eley v. Positive Government Security Life Assce. (1875), 33 L. T. 743; Edwards v. Aberayron Mutual Ship Insee. Soc. (1876), 1 Q. B. D. 563; Long v. Millar (1879), 48 L. J. Q. B. 596; McGregor v. McGregor (1888), 21 Q. B. D. 424; Oliver v. Hunting (1890), 44 Ch. D. 205; Lavalette v. Riches (1908), 24 T. L. R. 336; Reeve v. Jennings, [1910] 2 K. B. 522; Hanau v. Ehrlich, [1911] 2 K. B. 1056; Franco-British Ship Store Co. v. Compagnie des Chargeurs Française (1926), 42 T. L. R. 735.

345. — Not tort.]—Subsequent admission of having committed a trespass, will not take the case out of Statute of Limitations.—HURST v. PARKER (1817), 1 B. & Ald. 92; 2 Chit. 249; 106 E. R. 34.

Annotations:—Refd. Pittam v. Foster (1823), 1 B. & C. 248; Scales v. Jacob (1826), 3 Bing. 638; Tanner v. Smart (1827), 6 B. & C. 603; Wilby v. Henman (1834), 2 Cr. & M. 658; Spencer v. Hemmerde, [1922] 2 A. C. 507.

346. — — —.]—SHORT v. M'CARTHY, No. 249, *ante*.

347. — — — Action of assumpsit available on same matter.]—If a tenant for life, has rendered accounts to the remainderman of timber cut by him during a period of more than six years before a bill is filed against him for an account of such timber & of the value of it, Statute of Limitations cannot be pleaded to the bill; for though, if the remainderman had brought an action of trover,

the tenant for life might, notwithstanding the rendering of the accounts, have pleaded the statute, he could not have done so if the remainderman had brought an action of *assumpsit*.—HONY v. HONY (1824), 1 Sim. & St. 568; 57 E. R. 224.

Annotations:—Distd. Talmash v. Mugleston (1826), 4 L. J. O. S. Ch. 200. *Mentd.* Gent v. Harrison (1859), John. 517.

348. — — —.]—TANNER v. SMART, No. 490, *post*.

349. Whether one admission applicable to two distinct causes of action.]—*Qu.*: whether one admission of liability to pay a debt can be applied to two distinct causes of action between the same parties.—GREEN v. DAVIS (1824), 1 C. & P. 452, N. P.

SUB-SECT. 2.—BY WHOM MADE.

A. In General.

350. Must be by person competent to make acknowledgment.]—When the cts. determine that an acknowledgment is evidence of a new promise then made it must be of a promise made by a person competent to make it & to a person who is in existence to receive it (*per* CUR.).—WARD v. HUNTER (1815), 6 Taunt. 210; 128 E. R. 1015.

Annotations:—Apld. Pittam v. Foster (1823), 1 B. & C. 248. *Refd.* Scales v. Jacob (1826), 3 Bing. 638; Tanner v. Smart (1827), 6 B. & C. 603.

351. — Bankrupt — Whether binding on assignees.]—POTT v. CLEGG, No. 146, *ante*.

B. Agents of Debtor.

352. Whether sufficient—Agent accustomed to transact business—Wife.]—PALETHORP v. FURNISH (1783), 2 Esp. 511, n.

353. — — —.]—The admission of the wife, who was accustomed to conduct her husband's business, is sufficient to take the case out of Statute of Limitations in an action against the husband.—ANDERSON v. SANDERSON (1817), 2 Stark, 204; Holt, N. P. 591, N. P.

354. — — — Payment for work done.]—Where an agent has been employed to pay money for work done, & the workmen are referred to him for payment, & he assents to it, an acknowledgment or promise to pay by him, will after six years, take the case out of Statute of Limitations.—BURT v. PALMER (1804), 5 Esp. 145, N. P.

Annotation:—Mentd. Sybray v. White (1836), 1 M. & W. 435.

355. — Statute of Frauds Amendment Act, 1828 (c. 14)—Necessity for signature of debtor.]—The written acknowledgment required by sect. 1 of above Act, to take a case out of Statute of Limitations, must bear the actual signature of the party to be charged thereby: the signature of an agent will not suffice.—HYDE v. JOHNSON (1836), 2 Bing. N. C. 776; 2 Hodg. 94; 3 Scott, 289; 5 L. J. C. P. 291; 132 E. R. 299.

Annotations:—Refd. Clark v. Alexander (1844), 8 Scott, N. R. 147; Francis v. Hawksley (1859), 33 L. T. O. S. 182. *Mentd.* Toms v. Cumming (1844), Pig. & R. 140;

against the personal representative of an insane person within the like period after the death of the insane person as is allowed for bringing the action in ordinary cases, death being a removal of the disability.—FAIRWEATHER v. MCMONAGLE (1865), 6 All. 297.—CAN.

PART II. SECT. 8, SUB-SECT. 1.

b. Action for wages.]—SHATFORD v. FOLEY GOLD MINES Co., [1925] 3 D. L. R. 535; 57 O. L. R. 221; *affg.* [1925] 1 D. L. R. 596; 56 O. L. R. 230.—CAN.

PART II. SECT. 8, SUB-SECT. 2.—A.

350 i. Must be by person competent to make acknowledgment.]—BALL v. PARKER (1876), 39 U. C. R. 488.—CAN.

350 ii. —.]—UMA SHANKAR v. GOBIND NARAIN (1924), I. L. R. 46 All. 892.—IND.

c. Predecessor in interest.]—KRISHNA CHANDRA SAHA v. BHAIKAB CHANDRA SAHA (1905), I. L. R. 32 Calc. 1077; 9 C. W. N. 868.—IND.

PART II. SECT. 8, SUB-SECT. 2.—B.

d. Whether sufficient.]—DINOMOYI

DEBI v. ROY LUCHMIPUT SINGH (1879), L. R. 7 Ind. App. 8.—IND.

e. —.]—HEMCHAND KUBER v. VOHORA RAJI HAJI (1883), I. L. R. 7 Bom. 515.—IND.

f. —.]—ZAIB-UN-NISSA BIBI v. MAHARAJA OF BENARES (1911), I. L. R. 34 All. 109.—IND.

g. —.]—An acknowledgment in writing by an agent, after Mercantile Law Amendment Act, is sufficient to save from the bar of the Statute of Limitations a debt contracted before

Grant v. Maddox (1846), 15 L. J. Ex. 104; Davies v. Hopkins (1857), 3 C. B. N. S. 376; R. v. Kent JJ. (1873), L. R. 8 Q. B. 305; Williams v. Mason (1873), 28 L. T. 232; Swift v. Jewsbury (1874), L. R. 9 Q. B. 301; Re Whitley Partners (1886), 32 Ch. D. 337.

356. ———.]—BAYLEY v. ASHTON, No. 405, *post*.

C. Bankrupts and their Assignees.

357. Whether sufficient—Letter written by direction of assignees.]—POTT v. CLEGG, No. 146, *ante*.

D. Companies.

358. Acknowledgment by directors—Creditor present as director.]—Assuming that a resolution of a board of directors, signed by the chairman, would be sufficient to revive against a co. a debt barred by Statute of Limitations, *semble*: the acknowledgment will be vitiated if the resolution was come to by a board meeting, at which the creditor was himself present in his character of director.—LOWNDES v. GARNETT & MOSELEY GOLD MINING CO. OF AMERICA, LTD. (1864), 3 New Rep. 601; 33 L. J. Ch. 418; 10 L. T. 229; 8 Jur. N. S. 694; 12 W. R. 573.

E. Infants.

359. Whether statute excluded—Debt for necessities supplied.]—A written acknowledgment of a debt is an answer to a plea of Statute of Limitations, though made by an infant, if the debt was for necessities supplied to him.—WILLIAMS v. SMITH (1854), 4 E. & B. 180; 3 C. L. R. 16; 3 W. R. 22; 119 E. R. 70; *sub nom.* WILLIAMS v. SMITH, 24 L. J. Q. B. 62; 24 L. T. O. S. 90; 1 Jur. N. S. 163.

F. Legal Personal Representatives.

By sole representative.]—See EXECUTORS, Vol. XXIII., pp. 359, 360, Nos. 4268–4282.

Where several representatives.]—See EXECUTORS, Vol. XXIII., pp. 362, 363, Nos. 4294–4306.

G. Married Women.

360. How far binding on husband.]—PALETHORP v. FURNISH (1783), 2 Esp. 511, n., N. P.

361. ———.]—BECK v. PIERCE, No. 189, *ante*.

———.]—See, also, HUSBAND & WIFE, Vol. XXVII., p. 187, Nos. 1535–1539.

H. Persons Jointly Interested.

See, now, Statute of Frauds Amendment Act, 1828 (c. 14), s. 1.

362. Whether acknowledgment by one binds others—Joint & several promissory note.]—The acknowledgment of one out of several drawers of a joint & several promissory note, takes it out of Statute of Limitations, as against the others, & may be given in evidence on a separate action

against any of the others.—WHITCOMB v. WHITTING (1781), 2 Doug. K. B. 652; 99 E. R. 413.

Annotations:—Consd. Brandram v. Wharton (1818), 1 B. & Ald. 463; Goss v. Watlington (1821), 6 Moore, C. P. 355; Atkins v. Tredgold (1823), 2 B. & C. 23. Foll. Perham v. Raynal (1824), 2 Bing. 306. Apd. Burleigh v. Stott (1828), 8 B. & C. 36. Foll. Wyatt v. Hodson (1832), 8 Bing. 309; Channell v. Ditchburn (1839), 5 M. & W. 494. Refd. Carvick v. Vickery (1783), 2 Doug. K. B. 653, n.; Holme v. Green (1816), 1 Stark. 488; Pittam v. Foster (1823), 2 Dow. & Ry. K. B. 363; Bealy v. Greenslade (1831), 1 L. J. Ex. 1; Re Wolmershausen, Wolmershausen v. Wolmershausen (1889), 62 L. T. 541. Mentd. Pritchard v. Draper (1831), 1 Russ. & M. 191.

363. ———.]—An acknowledgment within six years by one of the joint makers of a promissory note will revive the debt against the other, although he has made no acknowledgment, & only signed the note as a surety.—PERHAM v. RAYNAL (1824), 2 Bing. 306; 9 Moore, C. P. 566; 3 L. J. O. S. C. P. 271; 130 E. R. 323.

Annotations:—Refd. Wyatt v. Hodson (1832), 8 Bing. 309; Re Wolmershausen, Wolmershausen v. Wolmershausen (1889), 62 L. T. 541.

364. ——— Joint promissory note—Acknowledgment must be clear & explicit.]—In order to take a case out of Statute of Limitations in an action on a promissory note, it is not sufficient to show a payment by a joint maker of the note to the payee within six years, so as to throw it upon debt. to show that the payment was not made on account of the note.

An acknowledgment by one partner to bind another in such case must be clear & explicit.—HOLME v. GREEN (1816), 1 Stark. 488, N. P.

Annotations:—Distd. Manderston v. Robertson & Reid (1829), 4 Man. & Ry. K. B. 440. Refd. Waters v. Tompkins (1835), 2 Cr. M. & R. 723; Nash v. Hodgson (1855), 6 De G. M. & G. 474.

365. ——— Acknowledgment by A. after marriage of B.—Husband of B. joined as co-defendant.]—Where an action was brought against A. & C., & B. his wife, upon a joint promissory note, made by A. & B. before her marriage, & the promise was laid by A., & B., before her marriage, & debts. pleaded Statute of Limitations, whereupon issue was joined:—Held: an acknowledgment of the note by A., within six years, but after the intermarriage of C. & B., was not evidence to support the issue.—PITAM v. FOSTER (1823), 1 B. & C. 248; 2 Dow. & Ry. K. B. 363; 1 L. J. O. S. K. B. 81; 107 E. R. 92.

Annotations:—Refd. Atkins v. Tredgold (1823), 2 B. & C. 23; Scales v. Jacob (1826), 3 Bing. 638; Tanner v. Smart (1827), 6 B. & C. 603; Kempe v. Gibbon (1846), 11 Jur. 299; Neve v. Hollands (1852), 18 Q. B. 262; Beck v. Pierce (1889), 23 Q. B. D. 316; Spencer v. Hemmerde, [1922] 2 A. C. 507.

See, generally, BILLS OF EXCHANGE, Vol. VI., pp. 323 *et seq.*, 389 *et seq.*

366. ——— Partners—Acknowledgment after dissolution of partnership—Debt contracted during partnership.]—An admission made by one of two partners, after the dissolution of the partnership,

that Act.—LELAND v. MURPHY (1865), 16 I. Ch. R. 500.—IR.

h. ——— Entry by Registrar of Supreme Court.]—The Registrar of the Supreme Ct. is not, speaking generally, an agent of the parties to an action, whose act can amount to an acknowledgment in writing affecting one of the parties, so as to take a case out of the Statute of Limitations.—LEWIS v. MACFARLANE (1873), 2 J. R. 1.—N.Z.

PART II. SECT. 8, SUB-SECT. 2.—C.

k. Whether sufficient.]—The enumeration of a debt in a schedule to a creditors' trust deed is an insufficient acknowledgment to take the debt out of Statute of Limitations.—

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COCKSHUTT PLOW CO., LTD. v. YOUNG, [1917] 1 W. W. R. 1441; 10 Sask. L. R. 68.—CAN.

l. ———.]—Re SUMMERS (1896), 1 L. R. 23 Calc. 592.—IND.

m. ———.]—BARRETT v. BIRMINGHAM, BARRETT v. MAHON (1842), 4 I. Eq. R. 537; Fl. & K. 556.—IR.

n. ———.]—DUGDALE v. VIZE (1843), 5 I. L. R. 568.—IR.

PART II. SECT. 8, SUB-SECT. 2.—H.

366 i. Whether acknowledgment by one binds others—Partners—Acknowledgment after dissolution of partnership—Debt contracted during partnership.]—SANDS v. KEATOR & THORNE (1847),

3 Kerr, 329.—CAN.

366 ii. ———.]—The acknowledgment, in reference to a debt due by the firm, of one partner, after the partnership has been dissolved, is sufficient to prevent the operation of Statute of Limitations.—BANK OF NOVA SCOTIA v. HALIBURTON (1855), 2 N. S. R. (James), 350.—CAN.

366 iii. ———.]—PREMIER LUDHA v. DOSSA DOONGERSEY (1886), 1 L. R. 10 Bom. 358.—IND.

366 iv. ———.]—After the dissolution of a partnership, an account by a member of the partnership authorised to wind up the affairs of the partnership, & signed by him

Sect. 8.—Acknowledgments in writing: Sub-sect. 2, H. & I.; sub-sect. 3.]

concerning joint contracts that took place during the partnership, is competent evidence to charge the other partner.—**WOOD v. BRADDICK** (1808), 1 Taunt. 104; 127 E. R. 771.

Annotations:—*Reid*. **Topham v. Braddick** (1809), 1 Taunt. 572; **Brandram v. Wharton** (1818), 1 B. & Ald. 463; **Lacy v. M'Neile** (1824), 4 Dow. & Ry. K. B. 7; **Perham v. Raynall** (1824), 9 Moore, C. P. 566; **Hills v. Thorowgood** (1836), 2 Har. & W. 102. **Mentd.** **Pritchard v. Draper** (1831), 1 Rusa. & M. 191; **Attwood v. Small** (1838), 6 Cl. & Fin. 232; **Wright v. Lockwood** (1841), 1 Y. & C. Ch. Cas. 113; **Rodriguez v. Speyer**, [1919] A. C. 59; **Goldfarb v. Bartlett & Kremer**, [1920] 1 K. B. 639.

367. ——— ——— ———.]—Where a man has ceased to be a partner, any admission, except by payment of principal or interest under Statute of Frauds Amendment Act, 1828 (c. 14), is not sufficient (**LORD ABINGER, C.B.**).—**HART v. ALEXANDER** (1837), 7 C. & P. 746, N. P.; *on appeal*, 2 M. & W. 484; **Murp. & H.** 63; 6 L. J. Ex. 129; 150 E. R. 848.

Annotations:—**Mentd.** **Benson v. Hadfield** (1844), 4 Hare, 32; **Ford v. Beech** (1848), 11 Q. B. 852; **Harris v. Farwell** (1851), 15 Beav. 31; **Lyth v. Ault** (1852), 7 Exch. 669; **Cochrane v. Green** (1860), 9 C. B. N. S. 448; **Redpath v. Wigg** (1866), L. R. 1 Exch. 335; **Maxted v. Paine** (1871), L. R. 6 Exch. 132; **Rouse v. Bradford Banking Co.**, [1894] 2 Ch. 32.

368. ——— ——— Bankruptcy.]—If one of two partners has become bkpt., & obtained his certificate, & after that he acknowledges a debt due to pltf. by his partner & himself; this acknowledgment is not sufficient to take the case out of Statute of Limitations, in an action against him & his partner for such debt, if his partner plead the Statute of Limitations, & he plead his bkpcy.—**MARTIN v. BRIDGES & ELMORE** (1828), 3 C. & P. 83.

369. ——— ——— Whether binding estate of deceased partner.]—The claim of a creditor against the assets of a deceased partner was held not to be barred under the circumstances, by Statute of Limitations.

Considering that . . . the surviving partners may, as to part transactions (in respect to which they are subject to liability in common with the estate of the deceased partner), be not unreasonably considered as acting not only for themselves, but also on account of the estate of the deceased partner, that the demand was clearly kept up against the surviving partners, that one of the surviving partners was one of the exors. of the deceased partner, acting as such, & also one of the legatees of the interest of the deceased partner in the concern, & that testators had made damages on his real estate for the payment of his debts, I think that the case, considering all the circumstances, does not fall within the operation of the statute (**LANGDALE, M.R.**).—**BRAITHWAITE v. BRITAIN** (1836), 1 Keen, 206; 48 E. R. 285.

Annotations:—*Reid*. **Winter v. Innes** (1838), 4 My. & Cr. 101; **Way v. Bassett** (1845), 5 Hare, 55; **Fordham v. Wallis** (1853), 10 Hare, 217.

See, further, PARTNERSHIP.

370. ——— Joint debtors.]—(1) Where money has been paid on account of two debts., an acknowledgment by one within six years shall prevent

Statute of Limitations from attaching as against the other.

(2) If debt. upon whom a demand is made, says, that he is protected by the length of time the money has been due; it is an acknowledgment of the debt, & shall charge him.—**CLARKE v. BRADSHAW** (1800), 3 Esp. 155, N. P.

— **Acknowledgment by one of several executors.]—***See* EXECUTORS, Vol. XXIII., pp. 362, 363, Nos. 4299–4301.

371. Acknowledgment by one — Necessity for fresh consideration.]—**BLAND v. HASELRIG** (1890), 2 Vent. 151; 86 E. R. 363.

Annotations:—*Consd.* **Atkins v. Tredgold** (1823), 3 Dow. & Ry. K. B. 200; **Perham v. Raynal** (1824), 2 Bing. 306. *Reid*. **Spencer v. Hemmerde**, [1922] 2 A. C. 507.

I. Solicitor.

Whether sufficient.]—Pltf. being dissatisfied with his solr., debt., instructed other solrs. & signed in 1888 a document by which he authorised & requested the new solrs. to obtain & receive from debt. all deeds & other documents belonging to pltf. in the possession, custody, or power of debt. as pltf.'s solr., & also to obtain & receive from debt. an account of his dealings & transactions with pltf.'s land, etc., "since he was appointed my solr. many years ago, or for such other period as you may think fit." Pltf. thereby authorised & requested debt. to deliver up to the new solrs. all such deeds, etc., & such account as aforesaid. The new solrs. wrote to debt., sending him a duplicate of this document & requesting him to comply with it. Some correspondence took place, in the course of which debt. wrote: "Does your client require my bill of costs from the date when I became his sole agent, or how otherwise?" The new solrs. on June 26 replied: "Our client only requires you to deliver particulars of any unsettled bill of costs you may have against him." On July 4, pltf. issued an originating summons against debt. asking for the delivery & taxation of debt.'s bill of costs & the delivery up of deeds, etc., & not containing any submission by pltf. to pay what should be found due on the taxation. On July 31, an order was made for the delivery to pltf. by debt. of a "bill of his fees & disbursements in all suits, causes, or other matters of business in which he has been employed as the attorney or solr. for appct.," for a reference to the taxing master to tax "the said bill," & for payment of the sum certified to be due from pltf. to debt. or debt. to pltf. Liberty was given to pltf. to pay into ct. £350, & upon doing so his documents were to be given up to him by debt., & debt.'s lien was to attach to the sum paid in. On the taxation of the bill delivered under this order the taxing master struck out certain items, without considering their propriety, on the ground that, having regard to their dates, they were barred by Statute of Limitations. On a summons to review the taxation:—**Held:** the letter of June 26, amounted to a sufficient acknowledgment to take the case out of Statute of Limitations; pltf.'s new solrs. had authority to make the acknowledgment on his behalf.

Statute-barred debts are due though payment

on the name of the firm, furnished to a creditor of the partnership, & admitting their liability to an extent therein stated:—**Held:** not sufficient evidence of a new contract, so as to remove the bar created by Statute of Limitations, & to make another member of the partnership liable on foot of it.—**BRISTOW v. MILLER** (1848), 11 L. L. R. 461.—**IR.**

o. Acknowledgment by one.]—**THOMPSON v. CUMMINGS** (1840), 2 Ont. Dig. 4027.—**CAN.**

PART II. SECT. 8, SUB-SECT. 2.—I.

372 i. Whether sufficient.]—**HOLDEN v. LAWES WITTEWRONGE**, [1911] V. L. R. 82.—**AUS.**

372 ii. ———.]—**RAM COOMAR KUR v.**

JAKUR ALI (1882), I. L. R. 8 Calc. 716; 10 C. L. R. 613.—**IND.**

372 iii. ———.]—**HINGAN LAL v. MANSA RAM** (1896), I. L. R. 18 All. 384.—**IND.**

372 iv. ———.]—**ARCHER v. LEONARD** (1863), 15 I. Ch. R. 267.—**IR.**

372 v. ———.]—**LELAND v. MURPHY** (1865), 16 I. Ch. R. 500.—**IR.**

of them cannot be enforced by action (COTTON, L.J.).—*CURWEN v. MILBURN* (1889), 42 Ch. D. 424; 62 L. T. 278; 38 W. R. 49, C. A.

Annotations:—*Mentd.* Budgett v. Budgett, [1895] 1 Ch. 202; *Re Margetts*, [1896] 2 Ch. 263; *Re Astley & Tyldesley Coal & Salt Co. & Tyldesley Coal Co.* (1899), 68 L. J. Q. B. 252; *Smith v. Betty*, [1903] 2 K. B. 317; *Re Brockman* (1909), 78 L. J. Ch. 460.

SUB-SECT. 3.—TO WHOM MADE.

See Statute of Frauds Amendment Act, 1828 (c. 14).

373. Person in existence to receive it.]—WARD v. HUNTER, No. 350, *ante*.

374. Third party.]—Deft. pleaded Statute of Limitations, *non assumpsit infra sex annos*. Evidence, it seems, came out on the trial, that he met a man in a fair, & said he went to the fair to avoid pltf., to whom he was indebted. This was within the six years, & was held a sufficient *assumpsit* to take it out of the statute, there being no other debt between them.—*RICHARDSON v. FEN* (1772), Loft, 86; 98 E. R. 546.

375. —.]—PETERS v. BROWN (1801), 4 Esp. 46, N. P.

Annotation:—*Reid.* Parmiter v. Parmiter (1860), 1 John & H. 135.

376. —.]—Where, in a deed between defts. & a third person, defts. acknowledged, within six years, the existence of a debt, & pltf. were wholly strangers to the deed:—*Held*: this was sufficient to take the case out of Statute of Limitations.—*MOUNTSTEPHEN v. BROOKE* (1819), 3 B. & Ald. 141; 106 E. R. 614.

Annotations:—*Reid.* Clark v. Hougham (1823), 2 B. & C. 149; *Tanner v. Smart* (1827), 6 B. & C. 603.

377. —.]—*Semble*: since Statute of Frauds Amendment Act, 1828 (c. 14), an acknowledgment of a debt by the debtor to a third person is not sufficient to take the case out of Statute of Limitations.—*GRENFELL v. GIRDLESTONE* (1837), 2 Y. & C. Ex. 662; 1 Jur. 940; 160 E. R. 560; *sub nom.* GREENFELL v. GIRDLESTONE, 7 L. J. Ex. Eq. 42.

Annotations:—*Reid.* Godwin v. Culley, Edwards & Godwin v. Culley (1859), 4 H. & N. 377. *Mentd.* Bolding v. Lane (1862), 3 Giff. 561.

378. —.]—In answer to an application for payment of a debt, debtor wrote: "I hope to be at H. soon, when I trust everything will be arranged with W. (the creditor) agreeable to her wishes":—*Held*: a sufficient promise to take the case out of Statute of Limitations.—*EDMONDS v. GOATER* (1852), 15 Beav. 415; 21 L. J. Ch. 290; 51 E. R. 598.

Annotations:—*Mentd.* Collis v. Stack (1857), 1 H. & N. 605; *Rackham v. Marriott* (1857), 29 L. T. O. S. 145; *Fuller v. Rodman* (No. 2) (1859), 26 Beav. 614; *Chasemore v. Turner* (1875), 33 L. T. 323.

379. — Minute entered in book of debtor—Public authority.]—Certain comrs., being in debt, appointed a finance committee to investigate the

accounts & report thereon. The committee made a report, to which was appended a schedule of liabilities, in which the arrears of salary to the clerk were inserted. The comrs., by a minute of their proceedings, ordered "that the report be accepted, with thanks to the committee for the trouble taken in the preparation":—*Held*: there was no acknowledgment by the comrs. to take the case out of Statute of Limitations.—*BUSH v. MARTIN* (1863), 2 H. & C. 311; 2 New Rep. 287; 33 L. J. Ex. 17; 8 L. T. 509; 9 Jur. N. S. 851; 11 W. R. 1078; 159 E. R. 129.

Annotations:—*Mentd.* *Re Jones* (1887), 36 Ch. D. 105; *A.-G. v. Newcastle-on-Tyne Corpn. & N. E. Ry.* (1889), 23 Q. B. D. 492.

380. — Admission in cross-examination.]—*Re BEYNON*, *BEYNON v. BEYNON*, [1873] W. N. 186, L. C.

381. Co-debtor.]—In an action against A. on the joint & several promissory notes of himself & B., to take the case out of Statute of Limitations, it is enough to give in evidence a letter written by A. to B. within the six years, desiring him to settle the money.—*HALLIDAY v. WARD* (1811), 3 Camp. 32, N. P.

382. Creditor.]—FULLER v. REDMAN (No. 2), No. 332, *ante*.

383. Agent of creditor.]—(1) A., by means of a misrepresentation, received of B. & several other persons, his tenants, various sums of money, to which he was not entitled. B. applied to him to have the money which he had so paid returned, saying that he & the other tenants had been induced to pay more than was due. A. replied, that if there was any mistake it should be rectified:—*Held*: this obviated Statute of Limitations as to payments made by the other tenants as well as by B.

(2) Pltf., an administratrix, after the death of intestate, made one such wrongful payment as before mentioned, out of the assets:—*Held*: she might recover it in her representative character.—*CLARK v. HOUGHAM* (1823), 2 B. & C. 149; 3 Dow. & Ry. K. B. 322; 1 L. J. O. S. K. B. 249; 107 E. R. 339.

Annotations:—*As to* (1) *Consd.* A'Court v. Cross (1825), 11 Moore, C. P. 198. *Generally, Mentd.* Gibbs v. Guild (1882), 46 L. T. 248.

384. —.]—FULLER v. REDMAN (No. 2), No. 332, *ante*.

385. Partner.]—An acknowledgment of a debt being due to one partner of a firm, held sufficient acknowledgment of a debt being due to a firm, so as to take it out of Statute of Limitations.—*WHITE v. WILLIAMS* (1838), 1 Will. Woll. & H. 52.

386. —.]—An acknowledgment of a debt contained in a letter from one partner to another, undertaking to assign to the latter the debts & liabilities of the firm, upon his satisfying debts due to a person named in the letter & others, or "obtaining a release of my liabilities in respect of such debts":—*Held*: not to amount to a

PART II. SECT. 8, SUB-SECT. 3.

374 i. Third party.]—An acknowledgment of a debt, not being a debt by specialty, to be sufficient under Statute of Limitations, must be made to the creditor or to his agent. A general acknowledgment of liability or an acknowledgment to a third person, is not sufficient.—*GOODMAN v. BOYES* (1890), 17 A. R. 528.—CAN.

374 ii. —.]—*KING v. ROGERS* (1900), 20 C. L. T. 209; 31 O. R. 573.—CAN.

374 iii. —.]—*RAMAN v. VAIRAVAN* (1883), 1 L. R. 7 Mad. 392.—IND.

382 i. Creditor.]—*MAHALAKSHIMIBAI v. NAGESHWAR PURSHOTAM* (FIRM OF) (1886), 1 L. R. 10 Bom. 71.—IND.

382 ii. —.]—An acknowledgment of a debt to be operative under Limitation Act, s. 19, must be addressed or communicated to the creditor or to some one on his behalf.—*IMAM ALI v. BAIJ NATH RAM SAHU* (1906), 1 L. R. 33 Calc. 613; 10 C. W. N. 551.—IND.

382 iii. —.]—An acknowledgment of a debt barred by the Statute of Limitations, & given by the debtor to a person who was neither agent of, nor in privity with, the creditor, is insufficient as a promise to pay the debt so as to enable the creditor to sue the debtor.—*ROGERS v. QUINN* (1889), 26 L. R. Ir. 136.—IR.

382 iv. —.]—*BROGAN v. PUBLIC*

TRUSTEE (1915), 34 N. Z. L. R. 548.—N.Z.

383 i. Agent of creditor.]—*LYON v. TIFFANY* (1865), 16 C. P. 197.—CAN.

p. Trustee.]—An acknowledgment to a party's trustee is sufficient to take a case out of the Statute of Limitations.—*MCINTYRE v. CANADA CO.* (1871), 18 Gr. 367.—CAN.

q. Personal representative.]—*BEARD v. KETCHUM* (1847), 5 U. C. R. 114.—CAN.

r. —.]—An acknowledgment of indebtedness by letter written after the creditor's decease by deft. to the person who is entitled to take out letters of administration to the

Sect. 8.—Acknowledgments in writing: Sub-sects. 3, 4 & 5, A. & B.; sub-sect. 6, A.]

promise to pay the debts & therefore not to take the debts out of Statute of Limitations.—*Re HINDMARSH* (1860), 1 Drew. & Sm. 129; 1 L. T. 475; 8 W. R. 203; 62 E. R. 327.

Annotations:—*Consd.* *Burdick v. Garrick* (1870), 5 Ch. App. 233. *Refd.* *Watson v. Woodman* (1875), L. R. 20 Eq. 721. *Mentd.* *Bean v. Wade* (1885), 2 T. L. R. 157; *Re Friend, Friend v. Friend* (1897), 66 L. J. Ch. 737; *North American Land & Timber Co. v. Watkins*, [1904] 1 Ch. 242; *Cheese v. Keen*, [1908] 1 Ch. 245; *Henry v. Hammond* (1913), 108 L. T. 729.

SUB-SECT. 4.—TIME FOR MAKING.

387. Before or after commencement of action.]

—A promise made after the commencement of an action is not sufficient to sustain a replication that debt., who had pleaded infancy, ratified his contract after he came of age.

Where Statute of Limitations has run, a new promise revives the debt *ab initio*, & that is equally the case whether the promise is made before or after the commencement of the action (*HOLROYD, J.*).—*THORNTON v. ILLINGWORTH* (1824), 2 B. & C. 824; 4 Dow. & Ry. K. B. 545; 2 L. J. O. S. K. B. 175; 107 E. R. 589.

Annotations:—*Refd.* *Bateman v. Pinder* (1842), 3 Q. B. 574. *Mentd.* *Belton v. Hodges* (1832), 9 Bing. 365; *Williams v. Moor* (1843), 11 M. & W. 256; *Re Purser, Ex p. Stevenson* (1868), 19 L. T. 23; *Cowern v. Nield* (1912), 81 L. J. K. B. 865.

388. Whether after action brought.]—*WHITE v. GRUBBE* (1641), March, 105; 82 E. R. 432.

389. —.]—*HEYLIN v. HASTINGS*, No. 600, *post*.

390. —.]—*WILLIAMS v. GUN* (1710), Fortes. Rep. 177; 92 E. R. 808.

391. —.]—A debt acknowledged after an action is brought, takes it out of Statute of Limitations.—*YEA v. FOURAKER* (1760), 2 Burr. 1099; 97 E. R. 730.

Annotations:—*Consd.* *Bateman v. Pinder* (1842), 3 Q. B. 574. *Refd.* *Thornton v. Illingworth* (1824), 4 Dow. & Ry. K. B. 545; *Scales v. Jacob* (1826), 11 Moore, C. P. 553; *Tanner v. Smart* (1827), 6 B. & C. 603; *Buckmaster v. Russell* (1861), 10 C. B. N. S. 745; *Spencer v. Hemmerde*, [1922] 2 A. C. 507.

392. —.]—*LLOYD v. MAUND*, No. 415, *post*.

393. — Statement in affidavit.]—*RUCKER v. HANNAY* (1789), 4 East, 604, n.; 102 E. R. 962; *previous proceedings*, 3 Term Rep. 124.

Annotations:—*Refd.* *Swann v. Sowell* (1819), 2 B. & Ald. 759. *Mentd.* *Maddocks v. Holmes* (1798), 1 Bos. & P. 228.

394. —.]—*THORNTON v. ILLINGWORTH*, No. 387, *ante*.

395. — Account stated.]—A case cannot be taken out of Statute of Limitations by proof of an account stated after action brought, whereby a balance was admitted to be due to pltf. from debt.—*BIRD v. LIVERMORE* (1847), 8 L. T. O. S. 480, N. P.

creditor's estate, & who does, after the receipt of the letter, take out such letters, is a sufficient acknowledgment within Statute of Limitations.—*ROBERTSON v. BURRILL* (1895), 22 A. R. 356.—CAN.

t. —.]—*HOLMES v. SMITH* (1857), 7 I. C. L. R. 461.—IR.

a. *Agent of indorsee of note—Creditor being indorser.*—*JOHN WATSON MANUFACTURING Co. v. SAMPLE* (1899), 12 Man. L. R. 373.—CAN.

PART II. SECT. 8, SUB-SECT. 4.

b. *After expiration of statutory period.*—*Re WILLIAMS* (1903), 24 C. L. T. 91; 7 O. L. R. 156; 1 O. W. R.

534; 2 O. W. R. 47; 3 O. W. R. 251.—CAN.

PART II. SECT. 8, SUB-SECT. 5.—A.

a. *Necessity for.*—*EXECUTOR, TRUSTEE & AGENCY Co. OF SOUTH AUSTRALIA, LTD. v. THOMPSON* (1919), 27 C. L. R. 162.—AUS.

d. —.]—*MCCORMICK v. BERZEY* (1845), 1 U. C. R. 388.—CAN.

e. —.]—An oral acknowledgment of title made during the twenty years will not save the Statute of Limitations.—*DOE d. PERRY v. HENDERSON* (1847), 3 U. C. R. 486.—CAN.

f. —.]—*SPALDING v. PARKER*

396. — Acknowledgment amounting to new promise.]—An acknowledgment of the debt bars Statute of Limitations, because it amounts to a new promise, &, therefore, if made after action brought, it is no bar.—*BATEMAN v. PINDER* (1842), 3 Q. B. 574; 2 Gal. & Dav. 790; 11 L. J. Q. B. 281; 6 Jur. 714; 114 E. R. 627.

Annotation:—*Expld.* *Spencer v. Hemmerde*, [1922] 2 A. C. 507.

SUB-SECT. 5.—FORM.

A. Writing.

See, now, Statute of Frauds Amendment Act, 1828 (c. 14), s. 1.

397. Necessity for original promise within Statute of Frauds—Subsequent promise by parol.]—Deft., having entered into a guarantee in writing, & become liable upon it at a period of more than six years before the commencement of the suit, verbally promised within six years that the matter should be arranged: & afterwards on an action being brought pleaded *actio non accrevit*, etc.:—*Held*: Stat. Frauds having been once satisfied by the original promise being in writing, it was not necessary, in order to take the case out of the Statute of Limitations, that the latter promise should also be in writing.—*GIBBONS v. M'CASLAND* (1818), 1 B. & Ald. 690; 106 E. R. 253.

398. — Statute of Frauds Amendment Act, 1828 (c. 14), s. 1.]—If, since Statute of Frauds Amendment Act, 1828 (c. 14), debt. by a letter admit a balance to be due, without stating the amount, this will take the case out of the Statute of Limitations, so as to entitle pltf. to nominal damages.

The object of Statute of Frauds Amendment Act, 1828 (c. 14), was to procure that in writing for which words were previously sufficient.—*DICKENSON v. HATFIELD* (1831), 5 C. & P. 46; 1 Mood. & R. 141, N. P.

Annotations:—*Consd.* *Lochinore v. Fletcher* (1833), 1 Cr. & M. 623; *Edmunds v. Downes* (1834), 2 Cr. & M. 459. *Refd.* *Dodson v. Mackey* (1835), 8 Ad. & El. 225; *Cheslyn v. Dalby* (1836), 2 Y. & C. Ex. 170; *Bird v. Gammon* (1837), 3 Bing. N. C. 883; *Routledge v. Ramsay* (1838), 3 Nev. & P. K. B. 319; *Hartley v. Wharton* (1840), 11 Ad. & El. 934; *Waller v. Lacy* (1840), 8 Dowl. 563.

399. — —.]—*JONES v. RYDER*, No. 617, *post*.

400. — —.]—The whole effect of Lord Tenterden's Act [Statute of Frauds Amendment Act, 1828 (c. 14), s. 1], was, that whereas before the statute there might have been an acknowledgment of a debt by parol, which might amount to a promise to pay, & therefore be a new cause of action, that statute provides that no such mere verbal acknowledgment shall have that effect, but the acknowledgment must be in writing; that was the whole effect of that statute; & so the matter stood so far as respected simple con-

(1846), 3 U. C. R. 66.—CAN.

g. —.]—An oral admission by a person holding under an agreement to purchase, that he is holding as tenant at will to the vendor, will not prevent the Statute of Limitations running against such vendor.—*ANDERSON v. ANDERSON* (1906), 37 N. B. R. 432; 1 E. L. R. 443.—CAN.

h. —.]—*AMUTHU v. MUTHAYYA* (1892), 1 L. R. 16 Mad. 339.—IND.

k. —.]—*PERIAVENKAN UDAYA TEVAR v. SUBRAMANIAN CHETTI, SUBRAMANIAN CHETTI v. PERIAVENKAN UDAYA TEVAR* (1896), 1 L. R. 20 Mad. 239.—IND.

l. —.]—An acknowledgment of

tract debts (KINDERSLEY, V.-C.).—MOODIE v. BANNISTER (1859), 4 Drew. 432; 28 L. J. Ch. 881; 32 L. T. O. S. 376; 5 Jur. N. S. 402; 7 W. R. 278; 62 E. R. 166.

Annotations:—*Mentd.* Fuller v. Redman (No. 2) (1859), 26 Beav. 614; Gopeekishen Goshamee v. Brindabunchunder Sircar Chowdhry (1869), 13 Moo. Ind. App. 37; Lucas v. Dixon (1889), 58 L. J. Q. B. 161; Trevor v. Hutchins, [1896] 1 Ch. 844; *Re* Lacey, Howard v. Lightfoot, [1907] 1 Ch. 330.

B. Signature.

See, now, Statute of Frauds Amendment Act, 1828 (c. 14), s. 1.

401. Necessity for.—A banker stated the balance of the account with his customer, who became a lunatic; during the lunacy, balances were struck in the pass-book from time to time; a lucid interval occurred, & after a relapse, there was an unsigned statement, in writing, of the balance, & a memorandum of payment to the son of the committee. The customer never subsequently recovered his reason. In an action by the administrator, on an account stated with the lunatic:—*Held*: there was no evidence of an account stated with him, & the statement, not being signed by the banker, could not operate as a revival of the original debt, so as to prevent the application of Statute of Limitations.—TARBUCK v. BISPHAM (1836), 2 M. & W. 2; 6 L. J. Ex. 49; 150 E. R. 643.

402. —.—]—POTT v. CLEGG, No. 146, *ante*.

403. —.—]—An unsigned letter, acknowledging a debt, written by a debtor's wife at his dictation, & sent to the creditor in the same envelope with a letter to the creditor, written & signed by the wife, & which referred to the unsigned letter, is not a sufficient acknowledgment of a debt by a duly authorised agent of the debtor, so as to take the case out of Statute of Limitations.—INGRAM v. LITTLE (1883), Cab. & El. 186.

404. Sufficiency of—Signature of agent.—HYDE v. JOHNSON, No. 355, *ante*.

405. —.—]—In *assumpsit* for money lent to debt. for his father's benefit, an entry made by debt., as clerk of pltf., in pltf.'s ledger, wherein pltf. gives debt. credit for a part payment within six years by his father, is not a sufficient writing signed by the party, within Statute of Frauds Amendment Act, 1828 (c. 14), to rebut a plea of Statute of Limitations.—BAYLEY v. ASHTON (1840), 12 Ad. & El. 493; 4 Per. & Dav. 204; 9 L. J. Q. B. 376; 4 Jur. 890; 113 E. R. 898.

Annotations:—*Dttd. & Follid.* Maghee v. O'Neil (1841), 7 M. & W. 531; Eastwood v. Saville (1842), 9 M. & W. 615. *Refd.* Clark v. Alexander (1844), 8 Scott, N. R. 147; Wainman v. Kynman (1847), 1 Exch. 118.

406. —.— **Name of debtor in debtor's handwriting—At top of document—Surname only.**—The following note "Mr. S. begs to inform Mr. L. that he will take an early opportunity of settling his account, but Mr. S. objects to give his bill. Mr. S. regrets that he has been prevented answering Mr. L.'s letter before. Crescent, Saturday," without other date or signature, the letter referred to not being produced after notice:—*Held*: sufficient to render a certificated bkpt. liable to a

a debt does not take the case out of the Statute unless made in some writing signed by the party chargeable thereby.—BELL & MOORE v. SWART (1899), 16 S. C. 404.—S. AF.

m. —.—]—NEETHLING v. DE WIT, [1910] C. P. D. 205.—S. AF.

PART II. SECT. 8, SUB-SECT. 5.—B.

401 i. Necessity for.—MAHALAKSHMIBAI v. NAGESHWAR PURSHOTAM (FIRM OF) (1886), I. L. R. 10 Bom. 71.—IND.

401 ii. —.—]—GANGADHARRAO VENKATESH v. SHIDRAMAPA BALAPA DESAI (1894), I. L. R. 18 Bom. 586.—IND.

401 iii. —.—]—In order that an acknowledgment of a debt should be effectual to save limitation it must be signed by the person to be bound thereby.—DHARAM DAS v. GANGA DASI (1907), I. L. R. 29 All. 773.—IND.

404 i. Sufficiency of — Signature of agent.—BALL v. PARKER (1876), 39 C. R. 488.—CAN.

debt incurred before his bkpcy. under 6 Geo. 4, c. 16, s. 131.—LOBB v. STANLEY (1844), 5 Q. B. 574; Dav. & Mer. 635; 13 L. J. Q. B. 117; 2 L. T. O. S. 366; 8 Jur. 462; 114 E. R. 1366.

Annotations:—*Consd.* Holmes v. Mackrell (1858), 3 C. B. N. S. 789. *Mentd.* Bennett v. Brumfit (1867), L. R. 3 C. P. 28; Caton v. Caton (1867), L. R. 2 H. L. 127.

407. —.—]—HOLMES v. MACKRELL, No. 549, *post*.

408. —.— **Handwriting of debtor not proved.**—In order to take the case out of the Statute of Limitations, pltf. produced in evidence annual statements of account which had been transmitted to him from the debt.'s house at Calcutta, from the year 1816 to the year 1832, both inclusive. These accounts were made up to Apr. 30, in each year, & bore the signature of the firm, "A. & co." at the foot thereof. The credit side of the last account, which was dated Apr. 30, 1832 (within six years of the commencement of the action—the writ having been sued out on Apr. 26, 1838), contained three items—the first dated May 1, 1831. "By balance of last account, 83,246 sicca rupees"—the second, of the same date, gave credit for the omission of a sum in the account of a former year—the third, dated Apr. 30, 1832, was, "balance of interest account." The debit side consisted of various items of payments made by A. & co. between May 2, 1831, & April 2, 1832; after which followed two items dated Apr. 30, 1832, viz. "Postage & petty charges, 2 sicca rupees" & "Commission on the disbursement of a certain sum, 60 sicca rupees": & the balance was then brought down, viz. 83,547 sicca rupees, 14 annas, for which the action was brought. The signature of "A. & co." at the foot of the account of Apr. 30, 1832, was not proved to be the handwriting of debt., nor that of any member of the firm:—*Held*: (1) this was not a sufficient signature by the party chargeable to bring the case within the exception of 9 Geo. 4, c. 24, s. 1; (2) the account did not disclose any payment within the Act.

Qu.: whether it would have sufficed to charge debt. if it had been proved to have been the signature of a partner.—CLARK v. ALEXANDER (1844), 8 Scott, N. R. 147; 13 L. J. C. P. 133; 8 Jur. 496.

Annotations:—*As to* (1) *Refd.* Swift v. Winterbotham (1873), L. R. 8 Q. B. 244. *Generally, Mentd.* Callander v. Howard (1850), 10 C. B. 290.

SUB-SECT. 6.—WHAT ACKNOWLEDGMENTS ARE SUFFICIENT.

NOTE.—By Statute of Frauds Amendment Act, 1828 (c. 14), s. 1, all acknowledgments must be in writing. Several of the cases quoted below refer to verbal acknowledgments, but are nevertheless retained here as the same reasoning would probably apply had the acknowledgment been in writing.

A. In General.

409. Necessity for promise to pay—Express or Implied.—EVERETT v. ROBERTSON, No. 513, *post*.

404 ii. —.—]—MATHURA DAS v. BARU LAL (1878), I. L. R. 1 All. 683.—IND.

PART II. SECT. 8, SUB-SECT. 6.—A.

409 i. Necessity for promise to pay—Express or implied.—DOUGALL v. CLINE (1850), 6 U. C. R. 546.—CAN.

409 ii. —.—]—LYON v. TIFFANY (1865), 16 C. P. 197.—CAN.

409 iii. —.—]—An acknowledgment of a debt without an express or

Sect. 8.—Acknowledgments in writing: Sub-sect. 6, A., B. & C.]

410. ———.]—LEE v. WILMOT, No. 514, post.

411. ———.]—BUCKET v. CHURCH, No. 414, post.

412. ———.]—M. agreed with a co. to build for them, at specified prices, certain ships, to be delivered at certain times, & to be paid for by certain instalments. In case of delay in delivery of the ships, certain fortnightly sums were to be paid as liquidated damages, & the co. were to be at liberty to deduct them from the unpaid purchase-money. The agreement contained a provision for referring all disputes to arbitration. The ships having been supplied, M., who had received some instalments, sent in at the end of 1861 an account, showing the final balance which he claimed. The co. insisted that he was liable to deductions for delay to an amount exceeding this balance, & that nothing was due to him. A correspondence ensued, & the co. proposed, pursuant to the stipulations of the contract, to refer the dispute to arbitration; & in 1863, a draft reference having been approved, they named an arbitrator on their part, but M. would not name one on his. On Feb. 19, 1867, the managing director wrote to M. saying that M.'s account omitted all the deductions to which the co. were entitled, & which would leave the balance in their favour, but that they were still willing to have all questions decided by arbitration, according to the contract, & called on M. to concur in referring them. This letter was expressed to be "without prejudice." M. did not answer this letter, nor take any steps to proceed to arbitration. A petition to wind up the co. was presented in Oct. 1869, & an order was made. M. claimed to prove for his balance, which was resisted, on the ground of Statute of Limitations, 1623 (c. 16):—*Held*: (1) the above letter did not contain an acknowledgment taking the case out of Statute of Limitations, 1623 (c. 16), for that (a) it did not contain any admission of a debt, since under the contract the liquidated damages were a deduction from the price, & not merely matter of set-off: *Semble*: even the admission of a debt, if coupled with a claim to a set-off of larger amount, would not take a case out of the statute, as no promise to pay could be implied from it; (b) nor did it contain any unconditional promise to pay; (c) nor did it contain any promise to pay upon a condition which had since been performed; for on its fair construction it contained at most only a promise to pay what should be found due on an arbitration under the contract, if M. named an arbitrator within a reasonable time, which he had not done.

There must be one of these three things to take the case out of the statute [Statute of Limitations, 1623 (c. 16)]. Either there must be an acknowledgment of the debt, from which a promise to pay is to be implied; or secondly, there must be an

unconditional promise to pay the debt; or thirdly, there must be a conditional promise to pay the debt, & evidence that the condition has been performed (MELLISH, L.J.).

(2) *Semble*: as the letter expressed to be without prejudice, & the proposal contained in it was not accepted, it could not be used against the writer.—*Re RIVER STEAMER CO., MITCHELL'S CLAIM* (1871), 6 Ch. App. 822; 25 L. T. 319; 19 W. R. 1130, L. JJ.

Annotations:—*As to* (1) *Consd.* *Morgan v. Rowlands* (1872), L. R. 7 Q. B. 493; *Skeet v. Lindsay* (1877), 2 Ex. D. 314. *Distd.* *Banner v. Berridge* (1881), 18 Ch. D. 254. *Consd.* *Firth v. Slingsby* (1888), 58 L. T. 481; *Curwen v. Milburn* (1889), 42 Ch. D. 424. *Appld.* *Nichols v. Regent's Canal Co.* (1894), 63 L. J. Q. B. 641; *Barrett v. Davies* (1904), 91 L. T. 736; *Lusher v. Hassard* (1904), 20 T. L. R. 563; *Maniram v. Rupchand* (1906), 22 T. L. R. 619. *Co.* *Fettes v. Robertson* (1921), 37 T. L. R. 581. *Ref.* *Quincey v. Sharpe* (1876), 1 Ex. D. 72; *Re Bethell*, *Bethell v. Bethell* (1887), 34 Ch. D. 561; *Re Fleetwood & District Electric Light & Power Syndicate*, [1915] 1 Ch. 486.

413. ———.]—Re WOLMERSHAUSEN, WOLMERSHAUSEN v. WOLMERSHAUSEN, No. 696, post.

B. Construction of Acknowledgments.

414. Whether question for judge or jury.]—

(1) The acknowledgment in writing to take a case out of Statute of Limitations must either amount to a distinct promise to pay, or to a distinct acknowledgment that the sum is due.

(2) *Semble*: there is some doubt whether it is a question for the judge or for the jury to determine, whether a letter written by deft. be or be not a sufficient acknowledgment for this purpose; & till that point is settled, the learned judge will, to save the parties expense, express his own opinion with respect to the document, & also leave it to the jury.—*BUCKET v. CHURCH* (1840), 9 C. & P. 209, N. P.

415. ——— Jury.]—A letter written by a deft. who pleaded Statute of Limitations to pltf.'s attorney on being served with a writ, couched in ambiguous terms, neither expressly admitting nor denying the debt, should be left to the jury to consider whether it amount to an acknowledgment of the debt, so as to take it out of Statute of Limitations.—*LLOYD v. MAUND* (1788), 2 Term Rep. 760; 100 E. R. 410.

Annotations:—*Distd.* *Blacknell v. Keppel* (1804), 1 Bos. & P. N. R. 20. *Fold.* *Frost v. Bengough* (1823), 1 Bing. 266; *Bird v. Gammon* (1837), 3 Bing. N. C. 883. *Dbtd.* *Morrell v. Frith* (1838), 3 M. & W. 402. I have always doubted the correctness of the doctrine laid down in *Lloyd v. Maund* (PARKER, B.). *Consd.* *Bucket v. Church* (1840), 9 C. & P. 209; *Spencer v. Hemmerde*, [1922] 2 A. C. 507. *Refd.* *Swann v. Sowell* (1819), 2 B. & Ald. 759; *Tanner v. Smart* (1827), 6 B. & C. 603; *Fearn v. Lewis* (1830), 8 L. J. O. S. C. P. 95; *Brigstocke v. Smith* (1833), 3 Tyr. 445; *Poynder v. Bluck* (1837), Will. Woll. & Dav. 191; *Gardner v. M'Mahon* (1842), 6 Jur. 712.

416. ———.]—In an action on a promissory note, deft. having pleaded Statute of Limitations, pltf. gave in evidence, as proof of an acknowledgment within six years, the following letter from deft. to pltf.: "Business calls me to

implied promise to pay the whole debt claimed is not sufficient to take a case out of Statute of Limitations.—*LYMANS v. GAGNER* (1915), 31 W. L. R. 700.—CAN.

409 iv. ———.]—COCKSHUTT PLOW CO., LTD. v. FLOEN, [1921] 2 W. W. R. 476; 14 Sask. L. R. 255.—CAN.

409 v. ———.]—APPA RAO v. SURYAPRAKASA RAO (1899), 1 L. R. 23 Mad. 94.—IND.

409 vi. ———.]—GOBIND DAS v. SARJU DAS (1908), 1 L. R. 30 All. 268.—IND.

409 vii. ———.]—OTTO v. GROVE (1871), N. L. R. 32.—S. AF.

n. ———.]—HODGKISS v. RIVAZ (1876), 10 S. A. L. R. 79.—AUS.

o. ———.]—HEPBURN v. M'DONNELL (1917), 17 S. R. N. S. W. 567; 34 N. S. W. W. N. 212.—AUS.

p. ———.]—GRANTHAM v. POWELL (1850), 6 U. C. R. 494.—CAN.

q. ———.]—BANK OF MONTREAL v. LINGHAM (1904), 24 C. L. T. 123; 7 O. L. R. 164; 3 O. W. R. 182.—CAN.

r. ———.]—WOOD v. TROMANHAUSER (1914), 32 O. L. R. 370; 7 O. W. N. 375.—CAN.

t. ———.]—ROYAL BANK v. ANDERSON, [1923] 1 D. L. R. 387; *aff.*, 52

O. L. R. 549.—CAN.

a. ———.]—GUPIKISHEN GOSWAMI v. BRINDABAN CHANDRA SIKKAR CHOWDHRY (1869), 3 B. L. R. P. C. 37.—IND.

b. ———.]—NAND LAL v. PARTAB SINGH (1922), 1 L. R. 3 Lah. 326.—IND.

PART II. SECT. 3, SUB-SECT. 6.—B.

414 i. Whether question for judge or jury.]—HARRISON v. HOPE (1872), 9 E. R. Ap. 43.—IND.

415 i. ——— Jury.]—SHANLY v. GRAND JUNCTION RY. CO. (1883), 4 O. R. 156.—CAN.

Liverpool. Should I be fortunate in my adventures, you may depend on seeing me in Bristol; otherwise, I must arrange matters with you as circumstances will permit." Deft. did not show that there were any other matters besides the promissory note to which the letter could refer:—*Held*: it was properly left to the jury to decide whether this letter referred to the matter of the promissory note, & was a sufficient acknowledgment to take the case out of the statute.—*FROST v. BENGOUGH* (1823), 1 Bing. 266; 8 Moore, C. P. 180; 1 L. J. O. S. C. P. 96; 130 E. R. 107.

Annotations:—*Distd.* *Fearn v. Lewis* (1829), 4 C. & P. 173; *Brigstocke v. Smith* (1833), 1 Cr. & M. 483. *Fold.* *Bird v. Gammon* (1837), 3 Bing. N. C. 883. *Reid.* *Tanner v. Smart* (1827), 6 B. & C. 603.

417. ———.]—*LINSELL v. BONSOR*, No. 580, *post*.

418. ———.]—*BIRD v. GAMMON*, No. 557, *post*.

419. ———.]—*CIRCUIT v. DIXON* (1844), 2 L. T. O. S. 376.

420. ——— Judge.]—*SNOOK v. MEARS*, No. 584, *post*.

421. ———.]—*COLLIS v. STACK*, No. 466, *post*.

422. ——— Unless document to be explained by extrinsic evidence.]—(1) The following letter from deft. to pltf's. attorney was held not to be a sufficient acknowledgment of a debt to take the case out of Statute of Limitations: "Since the receipt of your letter, & indeed for some time previously, I have been in almost daily expectation of being enabled to give a satisfactory reply to your application respecting the demand of Messrs. M. against me. I propose being in Oxford tomorrow, when I will call upon you on the matter."

This letter contains nothing that can be construed as an acknowledgment of the debt; the utmost that can be said of it is that it is evasively worded so as to avoid any direct acknowledgment (*LORD ABINGER, C.B.*).

The document, in order to take the case out of the statute, must either contain a promise to pay or an acknowledgment from which such promise is to be inferred (*PARKE, B.*).

(2) The construction of a doubtful document, given in evidence to defeat Statute of Limitations, is for the ct., & not for the jury. If it be explained by extrinsic facts, they are for the consideration of the jury.—*MORRELL v. FRITH* (1838), 3 M. & W. 402; 1 Horn & H. 100; 7 L. J. Ex. 172; 2 Jur. 619; 159 E. R. 1201.

Annotations:—*As to* (1) *Distd.* *Humphreys v. Jones* (1845), 14 L. J. Ex. 254. *Reid.* *Liddell v. Robinson* (1851), 17 L. T. O. S. 61; *Spencer v. Hemmerde*, [1922] 2 A. C. 507.

423. ———.]—(1) J., a debtor, having sums due to him, handed the accounts to his creditor, & wrote "I give the above accounts to you, so you must collect them & pay yourself, & you & I will then be clear. J." :—*Held*: this acknowledgment did not imply a promise to pay,

& was no answer, under Statute of Frauds Amendment Act, 1828 (c. 14), to a plea of Statute of Limitations.

(2) Whether such a written acknowledgment be conditional or unconditional is a question for the ct., not the jury, except where the document is connected with other evidence affecting the construction.—*ROUTLEDGE v. RAMSEY* (1838), 8 Ad. & El. 221; 3 Nev. & P. K. B. 319; 1 Will. Woll. & H. 232; 7 L. J. Q. B. 156; 2 Jur. 789; 112 E. R. 821.

Annotations:—*As to* (1) *Appld.* *Holland v. Clark* (1842), 1 Y. & C. Ch. Cas. 151. *Reid.* *Read v. Price* (1909), 78 L. J. K. B. 1137.

424. ———.]—A deed was executed by C. & D., reciting that C. was indebted to D. in various sums, but that the precise balance was not yet ascertained, & that C. was willing to pay to D. the balance that might be due to him, "such balance to be ascertained & paid in manner hereinafter mentioned." It then provided for submitting the accounts to arbitrators named in the deed. The arbitrators died before they made their award:—*Held*: this constituted an absolute promise to pay the amount due; & therefore, notwithstanding that clause, these recitals, coupled with extrinsic parol evidence as to the amount, were sufficient to take the case out of the operation of Statute of Limitations. This is a question of fact to be determined upon an examination of the whole instrument.—*CHESLYN v. DALBY, DALBY v. CHESLYN* (1840), 4 Y. & C. Ex. 238; 10 L. J. Ex. Eq. 21; 160 E. R. 993.

Annotations:—*Distd.* *Spong v. Wright* (1842), 9 M. & W. 629; *Hales v. Stevenson* (1862), 1 New Rep. 23. *Reid.* *Williams v. Griffith* (1849), 3 Exch. 335; *Re Astley & Tyldesley Coal & Salt Co. & Tyldesley Coal Co.* (1899), 68 L. J. Q. B. 252.

425. ———.]—*SMITH v. THORNE*, No. 518, *post*.

C. Unconditional Acknowledgments.

426. Bare acknowledgment.]—The confession or acknowledgment of a debt will avoid Statute of Limitations.

Promise of payment within the six years, though the debt were contracted long before, will evade Statute of Limitations; but confession or only acknowledgment that he owed pltf. so much will not do it (*SCROGGS, C.J.*).—*DICKSON v. THOMSON* (1680), 2 Show. 126; 89 E. R. 835.

Annotations:—*Consd.* *Scales v. Jacob* (1826), 3 Bing. 638; *Spencer v. Hemmerde*, [1922] 2 A. C. 507.

427. ——— Evidence of promise to pay.]—Where an action is barrable by Statute of Limitations, 1623 (c. 16), a new promise will revive it; so it is of an acknowledgment, because that is evidence of a promise.—*MORSE v. BRAXTON* (1700), 3 Salk. 228; 91 E. R. 793.

428. ———.]—*WILLIAMS v. GUN* (1710), Fortes. Rep. 177; 92 E. R. 808.

429. Acknowledgment amounting to promise to pay.]—*DICKSON v. THOMSON*, No. 426, *ante*.

420 i. ——— Judge.]—*MARSHALL v. SMITH* (1870), 20 C. P. 356.—CAN.

c. Acknowledgment made before debt barred.]—An acknowledgment made before the debt is barred by the Statute of Limitations is construed more liberally than one made afterwards.—*BARRETT v. SCOTT* (1877), 3 V. L. R. (L.) 222.—AUS.

PART II. SECT. 3, SUB-SECT. 6.—C.

426 i. Bare acknowledgment.]—*CARSLY v. MCFARLANE* (1893), 26 N. S. R. 48.—CAN.

426 ii. ———.]—An unconditional acknowledgment of the existence of a debt in a letter from debtor to

creditor, coupled with a request for time to pay is sufficient to prevent the barring of the debt by Statute of Limitations.—*WADDELL v. CALDWELL* (1914), 14 E. L. R. 332; 17 D. L. R. 411.—CAN.

426 iii. ———.]—An admission or acknowledgment in writing is sufficient to give a new period of limitation, although a promise to pay on request is not inferable from it.—*NIJAMUDIN v. MAHAMMADALI* (1869), 4 Mad. 385.—IND.

426 iv. ———.]—*UMESH CHANDRA MOOKERJEE v. SAGEMAN* (1869), 5 B. L. R. 633, n.; 12 W. R. 2.—IND.

429 i. Acknowledgment amounting to

promise to pay.]—The law implies a promise to pay where the acknowledgment of the debt is unconditional, so as to prevent the claim being barred by Statute of Limitations.—*BANK OF VANCOUVER (IN LIQUIDATION) v. KENNEDY (B. C.)*, [1919] 3 W. W. R. 51.—CAN.

429 ii. ———.]—*Re HEFFREN (Man.)*, [1922] 2 W. W. R. 1038; 68 D. L. R. 766.—CAN.

429 iii. ———.]—*DITTMER v. FRYER* (1899), 16 S. C. 473.—S. AF.

d. Offer to confess judgment.]—A letter of deft. in which there is an offer to confess judgment for a debt constitutes a sufficient acknowledgment

Sect. 8.—Acknowledgments in writing: Sub-sect. 6, C. & D.]

430. —.—*MORSE v. BRAXTON*, No. 427, *ante*.

431. —.—If a party, when he is arrested, say, "I shall go to my attorney's & pay the debt & settle it," such statement is sufficient to take the case out of Statute of Limitations.—*TRIGGS v. NEWNHAM* (1825), 1 C. & P. 631, N. P.; *subsequent proceedings*, 10 Moore, C. P. 249.

432. —.—*BUCKET v. CHURCH*, No. 414, *ante*.

433. —.—*BATEMAN v. PINDER*, No. 396, *ante*.

434. —.—*PHILIPS v. PHILIPS*, No. 515, *post*.

435. —.—A. gave to B. a promissory note, dated Oct. 1834, for £837 1s. 6d., payable on demand. In Dec. 1834, demand was made, & A. then promised to pay interest, & signed an unstamped memorandum, dated Dec. 2, 1834, as follows: "I promise to pay to B. £837, with £4 per cent. interest thereon.—A." Neither principal nor interest was paid; but, in Jan. 1848, A. wrote to B. a letter referring to a promissory note for a debt which he acknowledged, & promised thereby to pay:—*Held*: in the absence of proof of the existence of any other promissory note to which it could relate, the letter of 1848 must be taken to refer to the promissory note of Oct. 1834, & thus to take it out of Statute of Limitations.—*SPICKERNELL v. HOTHAM* (1854), Kay, 669; 2 Eq. Rep. 1103; 2 W. R. 638; 69 E. R. 285.

Annotations:—*Reid*. *McGuffie v. Burleigh* (1898), 78 L. T. 264. *Mentd.* *Mills v. Borthwick* (1865), 35 L. J. Ch. 31; *Re Dixon*, *Heynes v. Dixon*, [1900] 2 Ch. 561; *Re Plumptre's Marriage Settlement*, *Underhill v. Plumptre*, [1910] 1 Ch. 609; *Pullan v. Koe*, [1913] 1 Ch. 9; *Re Cavendish Browne's Settlement*, *Trusts*, *Horne v. Rawle* (1916), 61 Sol. Jo. 27.

436. —.—*Re RIVER STEAMER CO., MITCHELL'S CLAIM*, No. 412, *ante*.

437. —.—*BARTLEY v. LEES* (1895), 11 T. L. R. 243.

438. General acknowledgment.]—*BAILLIE v. INCHQUIN (LORD)*, No. 608, *post*.

439. Promise to pay part of debt—Part recoverable.]—*WILLIAMS v. GUN* (1710), Fortes. Rep. 177; 92 E. R. 808.

—Where amount disputed.]—*See* Nos. 563-567, *post*.

440. Acknowledgment of signature—Promissory note.]—*ANON.* (1717), 12 Vin. Abr. 192.

441. Receipt—For further advance—Indorsed on promissory note for first advance—Whether good acknowledgment of first advance.]—The borrower of money gave the lender the following memorandum: "I owe you £100, C. R., July 30, 1821"; underneath was written, "Aug. 17, received £50, C. R.":—*Held*: the latter item, which was within six years of the commencement of the suit, did not amount to such an acknowledgment of the existence of the prior debt, so as to take it out of Statute of Limitations.—*ROBARTS v. ROBARTS* (1828), 3 C. & P. 296; 1 Moo. & P. 487; 6 L. J. O. S. C. P. 117.

442. —.—"Received of A. £150, which I promise to pay on demand, with interest," is a promissory note, & requires to be stamped as such. Where, therefore, an instrument in these words, on being produced in evidence, was stamped with a receipt stamp:—*Held*: an acknowledgment by deft., that he owed the party to whom it was given, the sum mentioned in the note, was sufficient to entitle the exors. of the latter to recover on an account stated, although the consideration for which the note was given,

was goods sold & delivered, for which there was no count in the declaration.—*ASHBY v. ASHBY* (1829), 3 Moo. & P. 186; 7 L. J. O. S. C. P. 221.

Annotation:—*Mentd.* *Breckon v. Smith* (1834), 1 Ad. & El. 488.

443. —.—In an action for money lent, evidence was given of an acknowledgment of a debt of from £150 to £180, & a document was also put in as follows: "Received the sum of £170 for which I promise to pay interest at the rate of £5 per cent." :—*Held*: (1) this was not a promissory note nor an agreement of the value of £20 but an acknowledgment of a debt of £170 so as to take the debt out of Statute of Limitations; (2) this document did not require to be stamped either as a receipt, a promissory note, or an agreement.—*TAYLOR v. STEELE* (1847), 16 M. & W. 665; 16 L. J. Ex. 177; 11 Jur. 806; 153 E. R. 1357; *sub nom.* *TAYLOR v. FIELD*, 2 New Pract. Cas. 221; 9 L. T. O. S. 79.

444. Request by debtor to creditor to deduct debt from contra account.]—(1) An attorney who has several demands against his client, some of which are barred by Statute of Limitations, has no right to appropriate, in payment of the demands so barred, a sum received by him on account of his client for damages recovered in an action.

(2) In an action of *assumpsit*, deft. pleaded a set-off, to which pltf. replied the Statute of Limitations:—*Held*: a letter by pltf., giving deft. credit for a sum of money received on his account, & requesting him to deduct the amount of his cross demand upon him, from his bill, without specifying that amount, was a sufficient acknowledgment to take the case out of Statute of Limitations.—*WALLER v. LACY* (1840), 8 Dowl. 563; 1 Man. & G. 54; 1 Scott, N. R. 186; 9 L. J. C. P. 217; 4 Jur. 435; 133 E. R. 245.

Annotations:—*As to* (1) *Consd.* *Smith v. Betty*, [1903] 2 K. B. 317. *As to* (2) *Distd.* *Williams v. Griffith* (1849), 3 Exch. 335. *Reid*. *Courtenay v. Williams* (1844), 3 Hare, 539; *Sidwell v. Mason* (1857), 2 H. & N. 306. *Generally*, *Mentd.* *Ivimey v. Marks* (1847), 16 M. & W. 843; *Cook v. Gillard* (1852), 1 E. & B. 26; *Haigh v. Ousey* (1857), 7 E. & B. 578; *Pigot v. Cadman* (1857), 1 H. & N. 837; *Pilgrim v. Hirschfeld* (1863), 3 New Rep. 36; *Re Mercantile Lighterage Co.*, [1906] 1 Ch. 491; *Cobbett v. Wood*, [1908] 2 K. B. 420; *Re Osborn & Osborn*, [1913] 3 K. B. 862.

445. Bill of exchange—Given for statute barred debt.]—A bill of exchange was given by a bkpt. to a creditor, in consideration of an advance of money made more than six years before the bill was given. Five years after the proof was made & dividends had been received upon it, the comrs. ordered the proof to be expunged on the ground that the bill was not such an acknowledgment as took the case out of Statute of Limitations:—*Held*: the bill was sufficient for that purpose & the proof must be restored.—*Re BENTLEY, Ex p. WILSON, Ex p. WYMAN* (1841), 1 Mont. D. & De G. 586, Ct. of R.

Annotation:—*Mentd.* *Re Tait, Ex p. Harper* (1882), 21 Ch. D. 537.

446. Promise to give credit in contra account.]—In 1845, J. lent pltf. £200, on the security of the joint & several promissory note of himself & two sureties. Between Nov. 1845, & Feb. 1847, J. bought of pltf. goods to the amount of £17. In July, 1847, pltf. remitted J. £10 for interest due on the note, & at the same time sent his bill for the goods. J. wrote in answer: "I beg to acknowledge the receipt of £10 cash, & the bill, amounting to £17, both of which sums I have placed to your credit. I have inclosed your bill;

to deprive deft. of the benefit of Statute of Limitations.—*WESTERN FOUNDRY & METAL CO., LTD. v. STEVENS (H. I.)*

Co., [1919] 3 W. W. R. 1021; 15 Alta. L. R. 134.—*CAN.*
e. *Promissory note operates as*

acknowledgment—& promise.—*FAGUY v. CARRIER* (1922), 68 D. L. R. 598; 64 S. C. R. 31.—*CAN.*

receipt it, & return it to me by post." It did not appear whether pltf. had sent back the bill receipted. In Feb. 1853, & after the death of J., the promissory note was paid by one of the sureties, without taking credit for the £17. In May, 1853, pltf. sued the administratrix of J. for the £17, when she pleaded Statute of Limitations:—*Held*: the above letter was a sufficient promise within Statute of Frauds Amendment Act, 1828 (c. 14), to take the case out of Statute of Limitations.—*EVANS v. SIMON* (1853), 9 Exch. 282; 23 L. J. Ex. 16; 18 J. P. 9; 156 E. R. 121; *sub nom. SIMON v. EVANS*, 2 C. L. R. 416; 2 W. R. 40; *sub nom. SYMONS v. EVANS*, 22 L. T. O. S. 122.

447. Agreement by one debtor—To creditor's taking dividend under assignment of bankrupt debtor—"Without prejudice to creditor's claim for balance."—*COCKRILL v. SPARKES*, No. 695, *post*.

448. Indorsement by maker of promissory note—Signature of debtor & date.—L. in 1846, promised to pay, three months after date, to B. or to C., his wife, the sum of £500. B. died in 1863, leaving C. surviving. There was an indorsement on the note in L.'s handwriting of his name & the year 1866. C. died in 1868:—*Held*: it was not intended to make a new note, & there was a sufficient acknowledgment to exclude Statute of Limitations.—*BOURDIN v. GREENWOOD* (1871), L. R. 13 Eq. 281; 41 L. J. Ch. 73; 25 L. T. 782; 20 W. R. 166.

449. Necessity for statement that debt owed by writer of acknowledgment.—J. was a trustee of a settlement by which the T. estate was settled on the wife of deft. for life to her separate use without power of anticipation. J. lent money to deft., & for some time, with the wife's consent, the rents of the T. estate were applied towards payment of the debt, the wife giving receipts for them. In Oct. 1879, deft. wrote to J., "I thank you for your very kind intention to give up the rent of T. next Christmas, but I am happy to say at that time both principal & interest will have been paid in full":—*Held*: this was not an acknowledgment which would take the debt out of Statute of Limitations.

It is not enough for the writing of an acknowledgment to refer to a debt as being due from somebody, but the letter on its fair construction as read by the light of surrounding circumstances must be an admission that the writer himself owes the debt.—*GREEN v. HUMPHREYS* (1884), 26 Ch. D. 474; 53 L. J. Ch. 625; 51 L. T. 42, C. A.

Annotations:—*Consd. Firth v. Slingsby* (1888), 58 L. T. 481. *Apld. Re Buskin, Ex p. Farlow* (1894), 15 R. 117. *Consd. Fettes v. Robertson* (1921), 37 T. L. R. 581; *Spencer v. Hemmerde*, [1922] 2 A. C. 507. *Refd. Curwen v. Milburn* (1889), 42 Ch. D. 424.

D. Conditional Promises.

450. Whether sufficient—On fulfilment of condition.—*TANNER v. SMART*, No. 490, *post*.

451. ———.—*KENNETT v. MILBANK*, No. 551, *post*.

PART II. SECT. 8, SUB-SECT. 6.—D.

450 i. Whether sufficient—On fulfilment of condition.—To take a case out of the Statute, slight evidence is sufficient, but the recognition of liability must be unequivocal, or the promise must be unconditional, or the condition performed.—*CARPENTER v. VANDERLIP* (1840), 2 Ont. Dig. 4029.—CAN.

450 ii. ———.—*YOUNG v. MOORE* (1864), 23 U. C. R. 151.—CAN.

450 iii. ———.—*ROBLIN v. MCMAHON* (1889), 18 O. R. 219.—CAN.

450 iv. ———.—In order to take

a case out of the operation of Statute of Limitations the writing signed by the party chargeable must be either an express acknowledgment of the debt, an unconditional promise to pay the same, or a conditional promise to pay, the condition of which has been fulfilled.—*MCNEILL v. MOEACHREN* (P. E. I.) (1914), 14 E. L. R. 247; 20 D. L. R. 971.—CAN.

450 v. ———.—*YOUNG v. MANGALAPILLY RAMAIA* (1867), 3 Mad. 308.—IND.

450 vi. ———.—*ARUNACHELLA ROW BAHADUR v. RANGIAH APPA ROW*

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out of the statute, must be absolute; or, if conditional, the condition must be proved to have been performed. Where, therefore, a party stated, "These sums I mean honourably to pay, & I shall not avail myself of the Statute of Limitations. When I may be able to pay you I cannot now say":—*Held*: if any promise at all, that this was only conditional, & pltf. must prove deft.'s ability.—*WOODHAM v. HOLLIS* (1833), 3 L. J. K. B. 70.

453. ———.—*A.* having signed, as surety for B., a joint & several promissory note made by A. & B., & being called upon after B.'s death for payment of the money due upon it, requested the holder to apply to B.'s extrix., stating, in writing that "what she should be short he would assist to make up." The extrix. having been applied to, but not paying anything:—*Held*: A.'s conditional promise of payment became thereby absolute, & rendered him liable in an action brought against him on the note more than six years after its date, & after a reasonable time for payment by the extrix. had elapsed.—*HUMPHREYS v. JONES* (1845), 14 M. & W. 1; 14 L. J. Ex. 254; 9 Jur. 333; 153 E. R. 364.

454. ———.—*HAMMOND v. SMITH*, No. 176, *ante*.

455. ———.—*LEE v. WILMOT*, No. 514, *post*.

456. ———.—In the year 1859 deft. B., together with his two brothers, made a joint & several promissory note to secure a sum of money advanced by pltf. to one of the brothers. No acknowledgment of liability was made by him until Sept. 1870, when the brother to whom the money was advanced having failed to pay the amount, pltf. applied for payment to the said B., who, in reply, wrote to pltf. as follows: "I suppose I & my brother Thomas signed the note of hand to serve my brother Robert, therefore we trust you will use such means that you know will make him pay, he having plenty by him before you ask us, you being able to do that which we should not like to take in law with a brother. Please don't let him know you have applied for the money, & oblige, yours respectfully, B. Mitchell. You had better send him a writ at once":—*Held*: this was a sufficient acknowledgment, or promise to prevent the operation of the Statute of Limitations [Statute of Frauds Amendment Act, 1828 (c. 14)].—*FISK v. MITCHELL* (1871), 24 L. T. 272; 19 W. R. 798.

457. ———.—*Re RIVER STEAMER Co., MITCHELL'S CLAIM*, No. 412, *ante*.

458. ———.—In May, 1874, deft., in answer to a demand of a debt incurred by him, wrote to pltf. as follows: "I shall be glad as soon as my position becomes somewhat better, to begin again & continue with my instalments." In Sept. 1876, he again wrote: "Since the present year I find myself in a more hopeful sphere, which, as soon as the general commercial crisis gives way, will render to me more than

BAHADUR (1906), I. L. R. 29 Mad. 519.—IND.

450 vii. ———.—*HODGENS v. GRAHAM* (1831), Ale & N 49.—IR.

450 viii. ———.—*MAUNSELL v. HEDGES & DAVIES* (1851), 2 I. C. L. R. 88; 4 Ir. Jur. 93.—IR.

450 ix. ———.—*HOLMES v. SMITH* (1857), 7 I. C. L. R. 461.—IR.

450 x. ———.—*DRIVER v. LEARMOUTH* (1872), 1 J. R. 41.—N.Z.

i. ———.—*Offer of payment in particular manner.*—A letter, simply acknowledging a debt, implies a promise to pay; but if it also points

Sect. 8.—Acknowledgments in writing: Sub-sect. 6, D. & E. (a).]

necessary for living." At the trial deft. admitted that in one year since 1874 his income was greater by £14 than it had been in that year; but no proof was adduced that the "general commercial crisis" alluded to in deft.'s letter of Sept. 1876, had given way:—*Held*: if deft.'s letters constituted such acknowledgments as to warrant the inference of promises to pay, they were conditional promises only, & there was no proof of the substantial fulfilment of the conditions.—*MEYERHOFF v. FROELICH* (1878), 4 C. P. D. 63; 48 L. J. Q. B. 43; 39 L. T. 620; 27 W. R. 258, C. A.

v. Davies, Same v. Withers (1904), 90 L. T. 460.

459. ———.]—On July 24, 1882, K. gave a promissory note payable on demand for £3,000 to the Duke of B. The money was not actually advanced till Sept. 8, 1882. The money was intended to buy a seat for K. on the New York Stock Exchange, & between July 24 & Sept. 8, 1883, K. had gone to New York. In 1883 K. returned to England. On Apr. 16, 1884, the Duke of B. died, having by his will appointed his exors. & pltf., the present duke, his residuary legatee. On Nov. 19, 1885, K. wrote to pltf. in the following terms: "The great kindness of your father on every occasion, & more especially the money that he loaned me to purchase my seat on the New York Stock Exchange place me now in your debt. . . . I must now leave it entirely to your generosity whether you will have me liquidate the loan I have mentioned on the sale of my seat in New York." K. sold his seat in 1887, & died in Apr. 1888. In Dec. 1888, pltf. brought this action on the promissory note against the extrix. of K. to recover £3,000 & interest:—*Held*: the letter of Nov. 19, 1885, was an acknowledgment of the debt sufficient to take the case out of the Statute of Limitations, 1823 (c. 16).

I am of opinion that, at any rate, putting the letter in the most favourable light for deft., that amounts to a conditional promise to pay upon the sale taking place, & in point of fact the sale has taken place (KAY, J.).—*BUCCLEUCH (DUKE) v. EDEN* (1889), 61 L. T. 360; 5 T. L. R. 690.

460. ———.]—The promoters of a scheme for making a railway, & for the purchase in connection therewith of a certain canal, in 1880 appointed pltf. to act as their solrs. upon the terms that they, pltf., "would give their services gratis in the event of the application to Parliament failing, or the capital not being raised," & pltf. agreed on the condition that, if an Act were obtained & "the capital raised," they should be paid their professional charges. Pltf. took the necessary steps for the obtaining of an Act, & in 1882 an Act was passed incorporating the co. By the Act the co. were authorised to make the canal undertaking & capital separate, & to create a separate "canal capital" which they did. In 1883 the "canal capital" was wholly issued, but the residue of the capital, the "railway capital," had not yet been issued. After incorporation, pltf., by arrangement acted for the co.

on the same terms as they had done previously for the promoters. A dispute arose as to whether pltf. were entitled to their professional charges before the issuing of the "railway capital" & within six years before action brought the co. wrote to pltf. that "no application for further payment can be entertained until your outstanding bills of costs have been delivered to the co. for their examination & consideration"; & again that "the board cannot entertain your application for a further payment until the taxation of your several bills of costs has been completed." The bills had been delivered & taxed, & in an action for the recovery of the same:—*Held*: in answer to a defence of the Statute of Limitations, if the six years' limitation applied, the letters amounted to a conditional promise to pay the bills when taxed, & as the condition had been performed there was a sufficient acknowledgment to take the case out of the statute, & as pltf. were not employed for reward by the promoters, they could maintain an action for these costs against the co. under sect. 204 of the Act, that "all costs, etc., of & incident to the preparing for, obtaining, & passing of the Act should be paid by the co.," & the period of limitation would in that case be twenty years.—*NICHOLS v. REGENT'S CANAL CO.* (1894), 63 L. J. Q. B. 641; 71 L. T. 249; 38 Sol. Jo. 581; *on appeal, sub nom. NICHOLS v. NORTH METROPOLITAN RY. & CANAL CO.* (1896), 74 L. T. 744, H. L.

461. ———.]—Debtor before the expiration of six years after a debt was incurred wrote to the creditor as follows: "I am willing to sell the 5,230 shares that I hold in" a certain co. "for the sum of £816 4s. 8d., & in the event of my doing so I will with the money pay the 10s. call due on 629 of the above shares, amounting to £314 10s., & the balance in settlement of my account with" the creditor "amounting at Dec. 31 last to £501 14s. 8d." Deft. did not sell the shares:—*Held*: this letter contained merely a conditional promise to pay the debt, & as the condition had not been performed the letter did not take the case out of the Statute of Limitations.—*BARRETT (R.) & SON, LTD. v. DAVIES* (1904), 91 L. T. 736; 21 T. L. R. 21, C. A.

462. ——— Offer of payment in particular manner—Offer not accepted.]—*BUCKMASTER v. RUSSELL*, No. 595, *post*.

See, also, Nos. 507–514, post.

E. Expressions of Present Inability to Pay.

(a) Where Unconditional Acknowledgment.

463. Definite promise to pay—By instalments.]—A promise by a deft. to pay a debt by instalments, when he is able is sufficient to take a case out of Statute of Limitations, without proof of time being given, or of the ability of the party. *THOMPSON v. OSBORNE* (1817), 2 Stark. 98, N. P. *Annotations*:—*Consd. Scales v. Jacob* (1826), 3 Bing. 638. *Refd. Irving v. Veitch* (1837), 3 M. & W. 90.

464. ———.]—*LEE v. WILMOT*, No. 514, *post*.

465. ——— At definite future date.]—A., having become bkpt. in Aug. 1819, wrote, in Nov. 1826, a letter to B., in which he spoke of a debt of £98 15s.

a particular mode of payment, is thereby qualified, & will not take a simple contract debt out of Statute of Limitations.—*Re LITTLES* (1847), 10 T. L. R. 207.

461 i. ———.]—Where a party, in

acknowledgment to take the case out of the Statute.—*BILLINGS v. RUST* (1838), 1 Thom., 1st ed. 61; 2nd ed. 88.—CAN.

(1859), 17 U. C. R. 388.—CAN.

461 iii. ———.]—*WALSH v. HERMAN*, 13 B. C. R. 314; 7 W. L. R. —CAN.

461 iv. ———.]—*EYRE v. McFARLANE* (1910), 14 W. L. R. 247.—CAN.

PART II. SECT. 8, SUB-SECT. 6.—E. (a).

463 i. Definite promise to pay—By instalments.]—*HEPBURN v. McDONNELL*, [1915] 25 O. L. R. 199; 35 N. S. W. W. N. 118.—AUS.

due from him to B., & said (*inter alia*) as follows: "By the end of next month I shall have my bankers' account here, & I shall remit the sum due to you in a draft on them." In *indebitatus assumpsit* by B. against A. for the sums mentioned:—*Held*: the letter contained a sufficient promise to answer a plea of Statute of Limitations, & a plea of bkpcy.; & also to render the plea of bkpcy. applicable to the case, it must be shown that the debt existed prior to the bkpcy.—*LANG v. MACKENZIE* (1830), 4 C. & P. 463, N. P.

466. ———.]—(1) Pltf. having applied to debt. for payment of a debt debt. wrote in answer, "I shall repeat my assurance to you of the certainty of your being repaid your generous loan. Let matters remain as they are for a short time & all will be right. The works I have been appointed to, but they are not yet worked with the full complement of labour; this term will decide the matter":—*Held*: a sufficient acknowledgment in answer to a plea of Statute of Limitations. The question in these cases is, whether the statement as to the time of payment is merely an excuse or the condition on which payment is to be made.

(2) The construction of letters of this kind is for the ct. (*WATSON, B.*).—*COLLIS v. STACK* (1857), 1 H. & N. 605; 26 L. J. Ex. 138; 28 L. T. O. S.

Everett v. Robertson (1858), 28 L. J. Q. B. 23. *Distd. Buckmaster v. Russell* (1861), 8 Jur. N. S. 155. *Refd. Cornforth v. Smithard* (1859), 29 L. J. Ex. 228; *Chasemore v. Turner* (1875), L. R. 10 Q. B. 500.

467. ———.]—The statement in a letter "I am really sorry to keep you so long waiting for your money, but I shall be taking some money next month, I think, without fail, & will then try & settle with you," is sufficient admission to take a debt out of Statute of Limitations, & is not conditional.—*PRYKE v. HILL* (1898), 79 L. T. 738. *Annotation*:—*Refd. Fettes v. Robertson* (1921), 37 T. L. R. 581.

468. ———.]—To an action for recovery of a debt due on a bill of exchange debt. pleaded Statute of Limitations. Shortly before the commencement of the action & after the time fixed by the statute had run, debt. wrote, in answer to a formal demand for payment by pltf.'s solrs., "I admit I owe your client the sum of £210 5s. but I cannot meet this liability at the moment although I hope to call upon you within fourteen days to make a definite proposal for repayment of that amount with interest from date of loan":—*Held*: this was a sufficient acknowledgment to prevent the operation of the statute.—*COOPER v. KENDALL*, [1909] 1 K. B. 405; 78 L. J. K. B. 580; 100 L. T. 251; 53 Sol. Jo. 243, C. A.

Annotations:—*Refd. Brown v. Mackenzie* (1913), 29 T. L. R. 310; *Fettes v. Robertson* (1921), 37 T. L. R. 581; *Spencer v. Hemmerde*, [1922] 2 A. C. 507.

469. ———.]—Qualified by request for time.]—*DODSON v. MACKEY*, No. 553, *post*.

470. ———.]—At early date in future.]—*EDMONDS v. GOATER*, No. 378, *ante*.

471. ———.]—*CHAPPLE v. MEGGISON* (1886), 2 T. L. R. 808.

470 i. ———.]—At early date in future. "I will pay your account as soon as possible, but I cannot do it now," & "I had meant to pay you, but I cannot until something turns up at B.," are such acknowledgments of debt as to prevent a claim being prescribed under Law 14 of 1861.—*CLARK v. JEE'S EXECUTRIX* (1894), 15 N. L. R. 118.—S. AF.

—.]—*MULLINS v. BEDDY*

472. ———.]—*CHAPPLE v. MEGGISON* (1886), 2 T. L. R. 808.

473. ———.]—"As soon as affairs can be arranged."—*CHASEMORE v. TURNER*, No. 531, *post*.

474. Definite acknowledgment of sum being due.]—"I beg to say I cannot comply with your request. The best way for you would be to send me the bill you hold, & draw another for the balance of your money, £30 9s. 9d."—*Held*: a sufficient acknowledgment that £30 9s. 9d. was due, to take the case out of Statute of Limitations.—*DABBS v. HUMPHRIES* (1834), 10 Bing. 446; 4 Moo. & S. 285; 3 L. J. C. P. 139; 131 E. R. 977.

475. ———.]—*COLLIS v. STACK*, No. 466, *ante*.

476. ———.]—The following letter was held to be an acknowledgment from whence a promise to pay might be implied, so as to rebut Statute of Limitations: "In reply to your statement of account received, I am ashamed the account has stood so long. I must beg to trespass on your kindness a short time longer till a turn in the trade takes place, as for some time things have been very flat, yours, J. S."—*CORNFORTH v. SMITHARD* (1859), 5 H. & N. 13; 29 L. J. Ex. 228; 8 W. R. 8; 157 E. R. 1081.

Annotations:—*Consd. Chasemore v. Turner* (1875), L. R. 10 Q. B. 500; *Firth v. Slingsby* (1888), 58 L. T. 481. *Refd. Lee v. Wilmot* (1866), 35 L. J. Ex. 175.

477. ———.]—Pltf., a married woman, had lent debt. £20 (her own money) during her husband's lifetime, for which debt., shortly after the husband's death, viz., on July 16, 1867, gave pltf. an I.O.U. On Oct. 12, 1870, debt. wrote to pltf.'s agent, "Yours of the 10th instant received, respecting Mrs. W.'s claim upon me. It is totally out of my power at the present time to liquidate the whole or even part of same. I am in the anticipation of a better position, & should I be successful, Mrs. W.'s claim shall have my first consideration. Meanwhile, I shall be pleased to pay a reasonable interest on the amount. Show this letter to Mrs. W., & tell her the claim has not been forgotten by me, & shall be liquidated at the earliest opportunity possible": & on Mar. 6, 1871, debt. again wrote, "At present it is utterly out of my power to do anything. I am willing to endeavour to pay it (the debt) off by easy instalments; or I am willing to pay you any reasonable interest to let the matter remain for the present," etc. In an action for money lent, with a count upon a promise to pay in consideration of pltf.'s forbearance to sue upon the I.O.U.:—*Held*: these letters amounted to a sufficient promise, founded upon a good consideration to take the case out of Statute of Limitations.—*WILBY v. ELGEE* (1875), L. R. 10 C. P. 497; 44 L. J. C. P. 254; 32 L. T. 310.

478. ———.]—A debtor wrote in reply to a demand by his creditor for payment, "I don't see how it is possible for me to be indifferent on the matter of this debt. If I were able in any way to reduce it further, you may be quite sure I should do so":—*Held*: a sufficient acknowledgment to take the debt out of Statute of Limitations.—*Re BUSKIN, Ex p. FARLOW* (1894), 15 R. 117.

(1874), 6 N. W. 150.—IND.

474 i. Definite acknowledgment of sum being due.]—*GRANT v. CAMERON* (1891), 18 S. C. R. 716.—CAN.

474 ii. ———.]—*SILVER v. BUTLER* (1893), 40 N. S. R. 46.—CAN.

474 iii. ———.]—An acknowledgment of debt to stop running of Statute of Limitations against the debt is sufficient if it either expressly or by implication amount to an unconditional acknow-

ledgment of the debt or to a promise to pay. The mere fact that a letter expresses an inability to pay at present does not make the acknowledgment conditional.—*Re HEFFREN (Man.)*, [1922] 2 W. W. R. 1038; 68 D. L. R. 766.—CAN.

474 iv. ———.]—*MARTIN v. GREGG* (1850), 13 I. L. R. 403.—IR.

474 v. ———.]—*HOPF v. LINDBERG* (1901), 8 Nfld. L. R. 504.—NFLD.

Sect. 8.—Acknowledgments in writing: Sub-sect. 6, E. (a) & (b).]

479. —.]—WHITCOMBE v. STEERE (1903), 19 T. L. R. 697.

Annotation :—*Reid*. Fettes v. Robertson (1921), 37 T. L. R. 581.

480. —.]—COOPER v. KENDALL, No. 468, *ante*.

481. —.]—Pltf. sued deft. for money lent. To the defence that the claim was barred by Statute of Limitations, pltf. relied on the following letter written to him by deft. as being a sufficient acknowledgment to prevent the operation of the statute: "I do not forget, old friend, the debt I owe you & which I do wish I could wipe out. Why, it must be at least six years since you cabled me promptly the help I then needed":—*Held*: this letter constituted a sufficient acknowledgment to prevent the operation of Statute of Limitations.—BROWN v. MACKENZIE (1913), 29 T. L. R. 310.

Annotation :—*Reid*. Fettes v. Robertson (1921), 37 T. L. R. 581.

482. —.]—To an action brought by pltf. to recover the amount due upon a promissory note deft. pleaded Statute of Limitations. Pltf. relied upon two letters written by deft. as taking the case out of the statute. In the first, written in reply to a letter from pltf.'s solrs. demanding payment, deft. wrote, "If I could pay Miss Parson even the smallest portion of the sum I owe her, there would be no necessity for pressure: it would be a great pleasure to do so, & come what may, if I am ever in a position to do so, it will be done promptly." In reply to a further letter from pltf.'s solr. deft. wrote, "I can say nothing different to what I did before. I unfortunately owe thousands, & I have no means of any sort or description, whatever; if I could, I should gladly pay Miss Parson something":—*Held*: upon the construction of the letters, there was an admission by deft. of the debt; no condition was attached to the promise to pay implied by law from such admission; & pltf. was therefore entitled to recover.—PARSON v. NESBITT (1915), 85 L. J. K. B. 654; 113 L. T. 1159; 60 Sol. Jo. 89.

483. —.]—SPENCER v. HEMMERDE, No. 484, *post*.

—.]—*See, also*, No. 572, *post*.

(b) Where No Unconditional Acknowledgment.

484. General rule.—In 1915 a debtor, upon being pressed for payment of a loan granted to him in 1910 & interest thereon, wrote to the lender, in explanation of a former letter: "It is not that I won't pay you, but that I can't do so. . . . What I wrote was not that I saw no prospect at present of being able to repay the capital, but that I saw no prospect of being able to repay the capital at present." The debtor never paid any part of the principal or interest. In answer to an action brought against him in 1920 for payment of the debt the debtor pleaded Statute of Limitations:—*Held*: the letter was a sufficient acknowledgment to take the case out of the Statute.

Since *Tanner v. Smart*, No. 490, *post*, the whole of the words used must be considered to see (a) whether there is an acknowledgment at all; (b) whether that acknowledgment is limited or

made subject to any condition, mere words of hope or fear, mere prayers for mercy, not amounting to such a limitation or negating the technical implication of a new *assumpsit* to call the old one out of abeyance (LORD SUMNER).—SPENCER v. HEMMERDE, [1922] 2 A. C. 507; 91 L. J. K. B. 941; 128 L. T. 33; 38 T. L. R. 869; 66 Sol. Jo. 692, H. L.

485. Bare denial of ability to pay.—Where upon demand made of payment of two promissory notes overdue ten years, deft. said: "I cannot afford to pay my new debts, much less my old ones":—*Held*: the jury were warranted in negating this as evidence of a subsisting debt to take the case out of Statute of Limitations.—KNOTT v. FARREN (1824), 4 Dow. & Ry. K. B. 179; 2 L. J. O. S. K. B. 122.

Annotations :—*Reid*. A'Court v. Cross (1825), 11 Moore, C. P. 198; Poynder v. Bluck (1837), Will. Woll. & Dav. 191.

486. —.]—The following acknowledgment of a debt which accrued more than six years before action brought was set up as sufficient to take the case out of the operation of the Statute: "I was in hopes of being able to send you some coin by small instalments." The letter went on to say that deft. had been unfortunate & had not been able to send any:—*Held*: the letter was not an acknowledgment sufficient to take the case out of the operation of the Statute.—JUPP v. POWELL (1884), 1 T. L. R. 27; Cab. & El. 349.

487. Conditional promise to pay—On ability to pay—Necessity for proof of ability.—(1) Where to a demand of a debt above six years standing, the party, on being applied to for payment, says, "I think I am bound in honour to pay the money, & shall do it when I am able," is a conditional promise only, & not an absolute one to take it out of Statute of Limitations.

(2) Where a deft. has made a promise to pay a debt when he is able, it must be shown that he was able at the time when the action was brought.—DAVIES v. SMITH (1801), 4 Esp. 36, N. P.

Annotations :—*As to* (1) *Reid*. Scales v. Jacob (1826), 3 Bing. 638; Irving v. Veitch (1837), Murp. & H. 313. *As to* (2) *Reid*. Scales v. Jacob (1826), 3 Bing. 638.

488. —.]—Where, to a plea of Statute of Limitations, pltf. replies a promise within six years, & proves a promise to pay when of ability, made three years after the original cause of action accrued, & within six years of the commencement of the action:—*Held*: he must also prove deft.'s ability.—SCALES v. JACOB (1826), 3 Bing. 638; 11 Moore, C. P. 553; 4 L. J. O. S. C. P. 209; 130 E. R. 660.

Annotations :—*Consd.* Roberts v. Roberts (1828), 1 Moo. & P. 487. *Expld.* Gould v. Shirley (1829), 2 Moo. & P. 581. *Reid*. Pierce v. Brewster (1827), 12 Moore, C. P. 515; Brigstocke v. Smith (1833), 1 Cr. & M. 483.

489. —.]—Deft. being applied to pay a debt barred by Statute of Limitations, said he should be happy to pay it if he could:—*Held*: pltf. must show deft.'s ability to pay.—AYTON v. BOLT (1827), 4 Bing. 105; 12 Moore, C. P. 305; 5 L. J. O. S. C. P. 109; 130 E. R. 707.

Annotations :—*Folld.* Edmunds v. Downes (1834), 2 Cr. & M. 459. *Reid*. Brigstocke v. Smith (1833), 1 Cr. & M. 483.

490. —.]—In *assumpsit* brought to recover a sum of money, deft. pleaded Statute

PART II. SECT. 8, SUB-SECT. 6.—E. (b).

485 i. Bare denial of ability to pay.—A letter written by the maker of a note to the payee, in answer to an application for payment, stating that it was not in his power then to do anything in the way of payment, is not sufficient to take the case out of Statute

of Limitations.—CHARLOTTE COUNTY BANK (PRESIDENT, ETC.) v. ROSS (1863), 5 All. 627.—CAN.

487 i. Conditional promise to pay—On ability to pay—Necessity for proof of ability.—Proof of a promise to pay as "soon as possible" is not sufficient to take a case out of Statute of Limitations without proof of deft.'s ability

to pay.—MURDOCH v. PITTS (1854), James, 258.—CAN.

487 ii. —.]—BLAIR v. ALBEE (1854), 3 All. 9.—CAN.

487 iii. —.]—GEMMELL v. COLTON (1856), 6 C. P. 57.—CAN.

487 iv. —.]—WATSON v. YATES (1887), 1 L. R. 11 Bom. 580.—IND.

of Limitations, 1623 (c. 16), & upon that issue was joined. At the trial pltf. proved the following acknowledgment by deft., within six years: "I cannot pay the debt at present, but I will pay it as soon as I can"—*Held*: this was not sufficient to entitle pltf. to a verdict, no proof being given of deft.'s ability to pay.

Though this statute puts all these actions upon the same footing, it is only in actions of *assumpsit* that an acknowledgment has been held an answer (LORD TENTERDEN, C.J.).—TANNER v. SMART (1827), 6 B. & C. 603; 9 Dow. & Ry. K. B. 549; 5 L. J. O. S. K. B. 218; 108 E. R. 573.

Annotations:—*Appld.* Brydges v. Plumptre (1827), 9 Dow. & Ry. K. B. 746. *Distd.* Burleigh v. Stott (1828), 6 L. J. O. S. K. B. 232. *Folld.* Gould v. Shirley (1829), 2 Moo. & P. 581; Haydon v. Williams (1830), 7 Bing. 163. *Appld.* Fearn v. Lewis (1830), 4 Moo. & P. 1. *Consd.* Brigstocke v. Smith (1833), 1 Cr. & M. 483; Irving v. Veitch (1837), 3 M. & W. 90. *Appld.* Bateman v. Pinder (1842), 3 Q. B. 574; Hart v. Prendergast (1845), 14 M. & W. 741; Smith v. Thorne (1852), 18 Q. B. 134; Holmes v. Mackrell (1858), 3 C. B. N. S. 789; Buckmaster v. Russell (1861), 10 C. B. N. S. 745; Morgan v. Rowlands (1872), L. R. 7 Q. B. 493. *Folld.* Chasemore v. Turner (1875), L. R. 10 Q. B. 500. *Appld.* Quincey v. Sharpe (1876), 1 Ex. D. 72; Green v. Humphreys (1884), 26 Ch. D. 474. *Folld.* Re Bethell, Bethell v. Bethell (1887), 34 Ch. D. 561. *Consd.* Firth v. Slingsby (1888), 58 L. T. 481. *Apprvd.* Stamford, Spalding & Boston Banking Co. v. Smith, [1892] 1 Q. B. 765. *Distd.* Cooper v. Kendall, [1909] 1 K. B. 405. Brown v. Mackenzie (1913), 29 T. L. R. 310. *Consd.* Fettes v. Robertson (1921), 37 T. L. R. 581. *Appld.* Spencer v. Hemmerde, [1922] 2 A. C. 507. *Refd.* Pierce v. Brewster (1827), 12 Moore, C. P. 515; Woodham v. Hollis (1833), 3 L. J. K. B. 70; Eicke v. Nokes (1834), 1 Mood. & R. 359; Wilby v. Henman (1834), 2 Cr. & M. 658; Linsell v. Bonsor (1835), 2 Bing. N. C. 241; Cheslyn v. Dalby (1840), 4 Y. & C. Ex. 238; Gardner v. McMahon (1842), 3 Q. B. 561; Fordham v. Wallis (1853), 10 Hare, 217; Deacon v. Gridley (1854), 3 C. L. R. 129; Goate v. Goate (1856), 1 H. & N. 29; Sidwell v. Mason (1857), 2 H. & N. 306; Everett v. Robertson (1858), 1 E. & E. 16; Hales v. Stevenson (1862), 7 L. T. 317; Cockrell v. Sparke (1863), 9 Jur. N. S. 307; Lee v. Wilmot (1866), 14 L. T. 627; Skeet v. Lindsay (1877), 2 Ex. D. 314; Meyerhoff v. Froehlich (1878), 4 C. P. D. 63; Re Hollingshead, Hollingshead v. Webster (1888), 37 Ch. D. 651; Re Macdonald, Dick v. Fraser, [1897] 2 Ch. 181; Mowbray v. Appleby (1899), 80 L. T. 805; Lusher v. Hassard (1903), 20 T. L. R. 31; Barrett v. Davies, Same v. Withers (1904), 90 L. T. 460.

491. ———.]—On deft.'s being applied to for payment of a debt of £20, barred by Statute of Limitations, he said he was going to H. in the course of the week, & he would help pltf. to £5, if he could:—*Held*: this was a mere conditional promise, & it was incumbent on pltf. to show deft. was of ability to pay.—GOULD v. SHIRLEY (1829), 2 Moo. & P. 581; 7 L. J. O. S. C. P. 117.

492. ———.]—WOODHAM v. HOLLIS, No. 452, *ante*.

493. ———.]—EDMUNDS v. DOWNES, No. 611, *post*.

494. ———.]—HAMMOND v. SMITH, No. 176, *ante*.

495. ———.]—MORRELL v. FRITH, No. 422, *ante*.

496. ———.]—*Re* BETHELL, BETHELL v. BETHELL, No. 169, *ante*.

497. ———.]—LUSHER v. HASSARD, No. 573, *post*.

See, also, No. 518, *post*.

498. ——— Conditional on debtor being given time to arrange affairs.]—"Pltf.'s claim, with that of others, shall receive that attention that, as an honourable man, I consider them to deserve, & it is my intention to pay them; but I must be allowed time to arrange my affairs, & if I am proceeded against, any exertion of mine will be rendered abortive":—*Held*: not an unqualified acknowledgment from which the ct. could imply a sufficient promise to pay to take a case out of Statute of Limitations.—FEARN v. LEWIS (1830),

6 Bing. 349; 4 Moo. & P. 1; 8 L. J. O. S. C. P. 95; 130 E. R. 1314.

Annotations:—*Distd.* Chasemore v. Turner (1875), L. R. 10 Q. B. 500. *Consd.* Mowbray v. Appleby (1899), 80 L. T. 805. *Refd.* Brigstocke v. Smith (1833), 1 Cr. & M. 483.

499. ——— Conditional on terms of payment being arranged.]—MOWBRAY v. APPLEBY, No. 567, *post*.

500. Expression of hope of future ability to pay.]—The following letter was written by deft. to a clerk of pltf., in answer to an application for payment of the debt: "I will not fail to meet Mr. H. (ptf.) on fair terms, & have now a hope that before perhaps a week from this date I shall have it in my power to pay him, at all events, a portion of the debt, when we shall settle about the liquidation of the balance":—*Held*: not sufficient to defeat a plea of Statute of Limitations.—HART v. PRENDERGAST (1845), 14 M. & W. 741; 1 New Pract. Cas. 308; 15 L. J. Ex. 223; 6 L. T. O. S. 173; 153 E. R. 674.

Annotations:—*Consd.* Sidwell v. Mason (1857), 2 H. & N. 306; Chasemore v. Turner (1875), L. R. 10 Q. B. 500; Mowbray v. Appleby (1899), 80 L. T. 805. *Refd.* Liddell v. Robinson (1851), 17 L. T. O. S. 61; Lee v. Wilmot (1866), 4 H. & C. 469; Re Buskin, *Ex p.* Farlow (1894), 15 R. 117; Spencer v. Hemmerde, [1922] 2 A. C. 507.

501. ———.]—MAITLAND v. BELL (1850), 15 L. T. O. S. 86.

502. ———.]—The fifth count alleged that the claims in the first, third, & fourth counts, being in effect counts for the non-restoration of shares in a railway co. trover, & detainee for the shares, had arisen, & deft. had requested time & forbearance for the satisfaction of such claims, which pltf. had granted; that deft., being then insolvent, for the purpose of obtaining further time, wrote to pltf. thus: "I know how worthless are promises of reparation... how wholly disregarded are entreaties for indulgence; yet will I say that the most anxious endeavour & hope of every future day shall be to prove my regard & gratitude by restoring to you all that I owe." Averment, that pltf. gave time, & that deft. became able to pay. Breach, non-payment of the claims in the first, third, & fourth counts:—*Held*: the fifth count was bad; because, first, the letter showed no request of forbearance; & secondly, the letter, even if it contained a promise, amounted to a mere promise to pay existing claims not barred by Statute of Limitations, & therefore showed no new cause of action.—DEACON v. GRIDLEY (1854), 15 C. B. 295; 3 C. L. R. 129; 24 L. J. C. P. 17; 24 L. T. O. S. 113; 3 W. R. 27; 139 E. R. 436.

503. ———.]—In answer to an application for payment of a debt the debtor wrote as follows: "I do not wish to avail myself of Statute of Limitations to refuse payment of the debt. I have not the means of payment & must crave a continuance of your indulgence. My situation as a clerk does not afford me the means of laying by a shilling; but in time I may reap the benefit of my services in an augmentation of salary that may enable me to propose some satisfactory arrangement. I am much obliged to you for your forbearance":—*Held*: the letter contained no sufficient acknowledgment or promise to take the case out of Statute of Limitations.—RACKHAM v. MARRIOTT (1857), 2 H. & N. 196; 26 L. J. Ex. 315; 29 L. T. O. S. 145; 3 Jur. N. S. 495; 5 W. R. 572; 157 E. R. 81, Ex. Ch.

Annotation:—*Consd.* Sidwell v. Mason (1857), 2 H. & N. 306.

504. ———.]—In an action in which deft. pleaded Statute of Limitations:—*Held*: in deft.'s letters, which contained words of hope & expectancy about his being able to pay the debt, & which

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also contained expressions amounting to an admission of the debt, the particular words of hope & expectancy so qualified the admission that there could not be inferred an unqualified promise to pay made within six years before the issue of the writ.—*FERTES v. ROBERTSON* (1921), 37 T. L. R. 581; 65 Sol. Jo. 433, C. A.

Annotation:—*Consd. Spencer v. Hemmerde*, [1922] 2 A. C. 507.

505. Promise to try to give account serious consideration.]—A letter written by a debtor to his creditor, in answer to one asking for security by mtge. of the debtor's property, & objecting to that proposal, but saying, "I will endeavour, before any great length of time, to give your account my serious consideration, & see what can be done with it," is not a sufficient acknowledgment to take the case out of the Statute.—*LIDDELL v. ROBINSON* (1851), 17 L. T. O. S. 61.

506. Expression of willingness to pay had funds been available.]—In a letter from the drawer to the holder of a bill of exchange, he said: "If in funds, I would immediately pay the money & take the bill out of your hands":—*Held*: this was insufficient to take the case out of Statute of Limitations.—*RICHARDSON v. BARRY* (1860), 29 Beav. 22; 54 E. R. 533.

F. Promise to Pay in Particular Manner.

507. General rule.]—*PHILIPS v. PHILIPS*, No. 515, *post*.

508. Offer of payment through agent—Accountant.]—To take a case out of Statute of Limitations evidence of conversations, in which one of depts. had admitted the debt, & said: "that it was hard that he should be called upon individually to pay the debts of the firm, when so many outstanding debts due to them were uncollected; that he had put the debts into the hands of an accountant, who would settle the business; & that he might refuse to pay altogether, but would not act in that way":—*Held*: sufficient to constitute an absolute promise to pay.

It is perfectly clear that where a man simply admits that he owes a debt, & at the same time affirms that he will not pay it, such an acknowledgment does not amount to a promise to pay so as to take the case out of the statute (*BEST, C.J.*).—*PIERCE v. BREWSTER* (1827), 12 Moore, C. P. 515.

509. —.]—Statute of Limitations is not barred by a letter in which debt. states, "That family arrangements have been making to enable him to discharge the debt; that funds have been appointed for that purpose, of which A. is trustee; & that debt. has handed pltf.'s account to A.; that some time must elapse before payment, but that debt. is authorised by A. to refer pltf. to him for any further information." For, by Statute of Frauds Amendment Act, 1828 (c. 14), s. 1, the acknowledgment in writing to bar the statute must be signed by the party chargeable thereby, & such letter does not charge debt.—*WHIPPY v. HILLARY* (1832), 3 B. & Ad. 399; 5 C. & P. 209; 1 L. J. K. B. 178; 110 E. R. 143.

Annotations:—*Appld. Routledge v. Ramsay* (1838), 8 Ad. & El. 221. *Expld. Holland v. Clark* (1842), 1 Y. & C. Ch. Cas. 151. *Reid. Bird v. Gammon* (1837), 3 Bing. N. C. 883.

510. Offer to assign book debts.]—*ROUTLEDGE v. RAMSEY*, No. 423, *ante*.

511. Offer to insure life for creditor's benefit.]—A letter, expressing debt.'s inability to pay the debt, but offering to insure his life for a larger amount, for pltf.'s benefit, & to keep up the payment of the premium, is not a sufficient acknowledgment of a debt to take the case out of Statute of Limitations.

There must be an express promise to pay, or an acknowledgment of the debt, from which the law would infer a promise to pay. Here there is neither the express promise nor that simple acknowledgment of a debt from which the law will imply a promise; but there is an offer to insure his life, which rebuts any such inference (*LORD CAMPBELL, C.J.*).—*SINGLETON v. BREE* (1850), 15 L. T. O. S. 279.

512. Offer to supply goods.]—The following letter addressed by debt. to pltf. within six years, respecting a debt otherwise barred by Statute of Limitations, was held not a sufficient acknowledgment of the debt to take the case out of the statute: "I am much surprised at receiving a letter from H., pltf.'s attorney, this morning, for the recovery of your debt. I must candidly tell you once for all I never shall be able to pay you in cash, but you may have any of the goods we have at the Pantehcon, by paying the expenses incurred thereon, without which they cannot be taken out, as before agreed when Mr. F., one of pltf's., was in town."—*CAWLEY v. FURNELL* (1851), 12 C. B. 291; Cox, M. & H. 514; 20 L. J. C. P. 197; 17 L. T. O. S. 201; 15 J. P. 499; 15 Jur. 908; 138 E. R. 915.

Annotation:—*Mentd. Cuthbertson v. Parsons* (1852), 12 C. B. 304.

513. Offer to assign all estate & effects to trustees.]—In answer to a plea of Statute of Limitations, 1623 (c. 16), in an action for a debt, pltf. proved that, within six years of action brought, debt. had presented a petition for arrangement with his creditors, under 7 & 8 Vict. c. 70, & had inserted the debt upon which the action was brought in the account of his debts: & his proposal was, that, "for the future payment or compromise of such debts & engagements," he proposed to assign all his estate & effects to trustees:—*Held*: not to be sufficient to take the case out of the statute, as not showing that from which the ct. could infer an unconditional promise or a promise upon a condition fulfilled.

To take the case out of Statute of Limitations, 1623 (c. 16), there ought to be that, whether in express terms or not, which the law can treat as a promise to pay. The law infers a promise from an absolute admission. But it has been repeatedly held that if the admission be coupled with that which prevents a promise from being inferred, the statute is not barred (*LORD CAMPBELL, C.J.*).—*EVERETT v. ROBERTSON* (1858), 1 E. & E. 16; 28 L. J. Q. B. 23; 32 L. T. O. S. 74; 4 Jur. N. S. 1083; 7 W. R. 9; 120 E. R. 813.

Annotations:—*Consd. Re River Steamer Co., Mitchell's Claim* (1871), 6 Ch. App. 822. *Reid. Re Levey, Ex p. Topping* (1865), 4 De G. J. & Sm. 551; *Morgan v. Rowlands* (1872), 41 L. J. Q. B. 187; *Chasemore v. Turner* (1875), L. R. 10 Q. B. 500; *Banner v. Berridge* (1881), 18 Ch. D. 254; *Fettes v. Robertson* (1921), 37 T. L. R. 581.

514. Offer of payment by instalments.]—Deft. being indebted to pltf. wrote to pltf., before the debt was barred by Statute of Limitations, 1623 (c. 16), a letter containing these words: "I will try to pay you a little at a time if you will let me. I am sure that I am anxious to get out of your debt. I will endeavour to send you a little next

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h. Offer of composition.]—*M'DONNELL v. BRODERICK*, [1896] 2 I. R. 136, 166.—*IR.*

week":—*Held*: a sufficient acknowledgment in writing within Statute of Frauds Amendment Act, 1828 (c. 14), s. 1.

To take a case out of the statute [Statute of Frauds Amendment Act, 1828 (c. 14), s. 1], there must be a promise or acknowledgment in writing. . . . If there be a distinct acknowledgment it is not necessary that it should contain a promise in explicit terms, but from the acknowledgment a promise may be inferred, unless it be accompanied by a refusal to pay, or by any other circumstance which excludes that inference (CHANNELL, B.).—*LEE v. WILMOT* (1866), L. R. 1 Exch. 364; 4 H. & C. 469; 35 L. J. Ex. 175; 14 L. T. 627; 12 Jur. N. S. 762; 14 W. R. 993.

Annotations:—*Refd.* Chasemore v. Turner (1875), L. R. 10 Q. B. 500; Green v. Humphreys (1884), 26 Ch. D. 474; Firth v. Slingsby (1888), 58 L. T. 481; Whitcombe v. Steere (1903), 19 T. L. R. 697; Cooper v. Kendall, [1909] 1 K. B. 405; Fettes v. Robertson (1921), 37 T. L. R. 581; Spencer v. Hemmerde, [1922] 2 A. C. 507.

See, also, Nos. 446–463, ante, No. 567, post; & compare No. 595, post.

G. Promise to Pay out of Particular Fund.

515. General rule.—(1) The legal effect of an acknowledgment of a debt barred by Statute of Limitations is that of a promise to pay the old debt, which promise the law implies from the acknowledgment, & for which the old debt is a consideration in law.

(2) But, if the promise is limited to payment of the old debt in a certain time, or in a particular manner, or out of a specific fund, the creditor can claim nothing more than the promise gives him, for the old debt is revived no further than as a consideration for the new promise.—*PHILIPS v. PHILIPS* (1844), 3 Hare, 281; 13 L. J. Ch. 445; 67 E. R. 388.

Annotations:—*As to* (1) *Apprvd.* Buckmaster v. Russell (1861), 10 C. B. N. S. 745. *Consd.* Chasemore v. Turner (1875), L. R. 10 Q. B. 500. *Apprvd.* Lusher v. Hassard (1903), 20 T. L. R. 31. *Consd.* Spencer v. Hemmerde, [1922] 2 A. C. 507. *Refd.* Crawford v. Crawford (1868), 16 W. R. 414. *As to* (2) *Apprvd.* Buckmaster v. Russell (1861), 10 C. B. N. S. 745. *Consd.* Chasemore v. Turner (1875), L. R. 10 Q. B. 500. *Apprvd.* Lusher v. Hassard (1903), 20 T. L. R. 31. *Consd.* Spencer v. Hemmerde, [1922] 2 A. C. 507. *Refd.* Smith v. Thorne (1852), 18 Q. B. 134. *Generally, Mentd.* Can v. O'Connor (1851), 18 L. T. O. S. 11; Stevens v. King, [1904] 2 Ch. 30.

516. —.]—If he acknowledges a debt & says nothing more the ct. implies a promise to pay the debt; but if his promise is to pay out of a particular fund, or if he only points out where payment is to be had, that is not an acknowledgment whereby he charges himself; & therefore, it does not take the case out of the statute, except as regards the particular fund referred to (*WIGRAM, V.-C.*).—*COURTENAY v. WILLIAMS* (1844), 3 Hare, 539, 639; 13 L. J. Ch. 461; 8 Jur. 844; 67 E. R. 494, 536; *affd. sub nom.* *COURTNAY v. WILLIAMS* (1846), 15 L. J. Ch. 204, L. C.

Annotations:—*Mentd.* Harvey v. Palmer (1851), 4 De G. & Sm. 425; Coates v. Coates (1864), 33 Beav. 249; *Re* Morley, Morley v. Saunders (1869), L. R. 8 Eq. 594; Poole v. Poole (1871), 7 Ch. App. 17; *Re* Stead's Settlement Trusts (1876), 24 W. R. 698; *Re* Milnes, Milnes v. Sherwin (1885), 53 L. T. 534; *Re* Akerman, Akerman v. Akerman, [1891] 3 Ch. 212; *Re* Taylor, Taylor v. Wade (1894), 8 R. 186; *Re* Langham, Otway v. Langham (1896), 74 L. T. 611; *Re* Watson, Turner v. Watson, [1896] 1 Ch. 925; Dingle v. Coppen, Coppen v. Dingle, [1899] 1 Ch. 726; *Re* Lloyd, Lloyd v. Lloyd, [1903] 1 Ch. 385; *Re* Bruce, Lawford v. Bruce, [1908] 2 Ch. 682; *Re* Sewell, White v. Sewell, [1909] 1 Ch. 806; *Re* Rhodesia Goldfields, Partridge v. Rhodesia Goldfields, [1910] 1 Ch. 239; *Re* National Live Stock Insce., *Re* National General Insce., [1917] 1 Ch. 628; *Re* Savage, Cull v. Howard, [1918] 2 Ch. 146; Woodcock v. Eames (1925), 69 Sol. Jo. 444.

517. Charge on reversionary interest.—“I do hereby charge my reversionary interest, when the same shall fall into possession, & be rendered

available to my use, with the payment of £101 8s. 9d.”—*Held*: not to be such an acknowledgment as to raise an implied promise to pay.—*MARTIN v. KNOWLES* (1833), 1 Nev. & M. K. B. 421; 2 L. J. K. B. 100.

518. Proceeds of transfer of mortgage.—(1) T. owed to P. & co. on their bkpcy. £275 as surviving partner of the firm of T. & Y., & £6,565 as partner in the firm of T. & J. For £5,000 part of this latter sum he had given a mtge. as security. The official assignee of P. & co. wrote to T. demanding payment of the £275 standing in bkpts.' books against the firm of T. & Y. T., in answer, wrote, “You have no occasion to blame yourself respecting any claim on me for the estate of P. & co.; the matter has been arranged at the different interviews & meetings with the assignees here,” etc. “It was arranged that I should pay £450 on May 20, £450 on Aug. 20, £450 on Nov. 20, & £450 on Feb. 20 next, after which I am in hopes that I shall be able to transfer the £5,000 mtge. to enable me to clear off the whole that may be standing against me.” It was admitted that the instalments of £450 were to be paid in respect of the debt of £6,565:—*Held*: the letters did not contain a sufficient acknowledgment or promise to take the case as to the debt of £275 out of Statute of Limitations.

(2) The effect of the document set up as an acknowledgment is entirely a question for the ct. unless extrinsic evidence is necessary to qualify or explain it (*PARKE, B.*).—*SMITH v. THORNE* (1852), 18 Q. B. 134; 21 L. J. Q. B. 199; 16 Jur. 332; 118 E. R. 50.

Annotations:—*As to* (1) *Consd.* Chasemore v. Turner (1875), L. R. 10 Q. B. 500. *Refd.* Rackham v. Marriott (1857), 2 H. & N. 196; Sidwell v. Mason (1857), 2 H. & N. 306. *Everett v. Robertson* (1858), 1 E. & E. 16; *Holmes v. Mackrell* (1858), 3 C. B. N. S. 789; *Hales v. Stevenson* (1862), 1 New Rep. 23; *Lee v. Wilmot* (1866), 4 H. & C. 469; *Quincey v. Sharpe* (1876), 40 J. P. 328; *Firth v. Slingsby* (1888), 58 L. T. 481; *Barrett v. Davies, Barrett v. Withers* (1904), 90 L. T. 460 (*see* 91 L. T. 736); *Cooper v. Kendall*, [1909] 1 K. B. 405; *Fettes v. Robertson* (1921), 37 T. L. R. 581; *Spencer v. Hemmerde*, [1922] 2 A. C. 507. *As to* (2) *Consd.* Spencer v. Hemmerde, [1922] 2 A. C. 507.

519. Proceeds of sale of shares.—*BARRETT (R.) & SON, LTD. v. DAVIES*, No. 461, ante.

H. Where Accounts between Parties.

(a) Admissions of Account Pending.

520. Whether sufficient.—*RICHARDSON v. FEN*, No. 374, ante.

521. —.]—To prevent the right to have an account from being barred by the Statute of Limitations, it is not necessary to have an acknowledgment that a debt is actually due; but it is sufficient that there should be an acknowledgment that the account is pending, & a promise to pay the balance, if it should be found to be against the accounting party.

A. having a claim for an account against B. & C. in respect of a former partnership between them, wrote to B.: “C., before he goes, ought to settle the Bridgewater & Minehead account; because, if he is under any idea that there is a balance due to him, he is grossly mistaken, as such balance is due to yours ever, A.” B. answered: “My dear A.—Bridgewater & Minehead: I have had a long talk with my partner about this matter; he says & insists that there is a large balance coming to him, but I have put the matter right with him, & you & I must go into it & settle the account. It is necessary that we should sit down to this matter, & put it on the square.”—*Held*: this was a sufficient acknowledgment of the right to

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an account, & promise to pay anything that might be due, to save the right to sue for an account in equity from being barred by the statute.—*PRANCE v. SYMPSON* (1854), Kay, 678; 18 Jur. 929; 69 E. R. 289.

Annotations:—Consd. Re River Steamer Co., Mitchell's Claim (1871), 6 Ch. App. 822; *Quincey v. Sharpe* (1876), 1 Ex. D. 72; *Banner v. Berridge* (1881), 18 Ch. D. 254; *Firth v. Slingsby* (1888), 58 L. T. 481; *Langrish v. Watts*, [1903] 1 K. B. 636. *Refd. Crawford v. Crawford* (1868), 16 W. R. 414; *Kessisoglu v. Balli* (1903), 47 Sol. Jo. 738. *Mentd. Noyes v. Crawley* (1878), 48 L. J. Ch. 112.

522. —.]—The second mtgee. of a ship claimed an account against the first mtgee., who had sold the vessel upon the mtgor. becoming bkpt. Deft. offered to pay a specific amount. The action having been commenced more than six years after the sale, deft. pleaded the Statute of Limitations. Pltf. set up an express trust as a bar to the statute:—*Held*: (1) there was no express trust, in case of an ascertained surplus the first mtgee. might be constructively a trustee of the surplus, but after six years, evidence could not be adduced to prove a surplus; (2) although the statute was not avoided on the ground of express trust, it was in this case avoided by an acknowledgment within six years of an unsettled account pending which by itself would have sufficed, & also by a promise to pay what should be found due. Pltf. was therefore entitled to an account.—*BANNER v. BERRIDGE* (1881), 18 Ch. D. 254; 50 L. J. Ch. 630; 44 L. T. 680; 29 W. R. 844; 4 Asp. M. L. C. 420.

Annotations:—As to (1) Refd. Soar v. Ashwell, [1893] 2 Q. B. 390; *Price v. Phillips* (1894), 13 R. 191; *The Benwell Tower* (1895), 72 L. T. 664; *Rochevoucauld v. Boustead*, [1897] 1 Ch. 196. *As to (2) Consd. Firth v. Slingsby* (1888), 58 L. T. 481. *Distd. Kessisoglu v. Balli* (1903), 47 Sol. Jo. 738. *Refd. Dooby v. Watson* (1888), 39 Ch. D. 178; *Friend v. Young*, [1897] 2 Ch. 421.

523. What amounts to.]—*KESSISOGLU v. BALLI* (1903), 47 Sol. Jo. 738.

(b) Admission of Open Account.

524. Whether sufficient.]—If there be a mutual account of any sort between pltf. & deft., for any item of which credit has been given within six years, that is evidence of an acknowledgment of there being such an open account between the parties, & of a promise to pay the balance, so as to take the case out of the Statute of Limitations, 1623 (c. 16).—*CATLING v. SKOULDING* (1795), 6 Term Rep. 189; 101 E. R. 504.

Annotations:—Expld. Moore v. Strong (1835), 1 Scott, 367; *Cottam v. Partridge* (1842), 4 Man. & G. 271. *Refd. Foster v. Hodgson* (1812), 19 Ves. 180; *Gregory v. Hurrill* (1826), 5 B. & C. 341; *Inglis v. Haigh* (1841), 8 M. & W. 769. *Mentd. Williams v. Griffiths* (1835), 5 Tyr. 748.

525. —.]—Within the period of limitation in respect of a debt debtor filed a written statement, in an application for probate of his creditor's will, that he had for the past few years open & current accounts with deceased:—*Held*: this was an acknowledgment by debtor that there was a

right to have the accounts settled, from which a promise to pay the amount found due upon the accounts would be inferred so as to take the case out of the Statute of Limitations.—*MANIRAM v. SETH RUPCHAND* (1906), 22 T. L. R. 619, P. C.

(c) Request for Account.

526. Whether sufficient—Request accompanied by promise of payment.]—A promise to pay a debt upon which Statute of Limitations has attached if the creditor will come to an account, is no answer to Statute of Limitations.—*SPARLING v. SMITH* (1701), 1 Ld. Raym. 741; 91 E. R. 1396.

527. —.]—A. having employed B. as his solr. & agent for some years, on Apr. 23, 1813, wrote to him a letter in these words: "I have for a length of time been in expectation of receiving the account of whatever I may stand indebted to you, let me again request you will oblige me with it, that everything may be settled." A. died on Aug. 27, 1814, having made his will, by which he devised his real & personal estates in trust for sale, & directed his trustees to stand possessed of the moneys to arise by the sale thereof, after paying his debts, & the charges & expenses attending his will, upon the trusts therein mentioned. B. shortly after A.'s death, delivered his bill, the last item of which, was on Aug. 19, 1808, & on Nov. 18, 1820, he filed his bill on behalf of himself & the other creditors of testator:—The ct. held that the debt was taken out of Statute of Limitations by testator's letter of Apr. 23, 1813, & was continued to be kept out of that Statute by the devise in testator's will; & decreed for pltf. accordingly; but, in consequence of his laches & some misconduct, without costs.—*RENDELL v. CARPENTER* (1828), 2 Y. & J. 484; 148 E. R. 1009.

Annotation:—Distd. Jones v. Meares (1848), 10 L. T. O. S. 391.

528. —.]—Debt for goods sold & work done. Plea, Statute of Limitations. Pltf., within six years, had sent in his bill to deft. Deft. wrote in answer as follows: "I have received your bill. It does not specify sufficiently to which cottages the work is done, for instance, as to some of the items, I do not know where all this is done, I shall feel obliged if you will more particularly explain. It is my wish to settle your account immediately, but being at a distance I wish everything very explicit & correct. I have asked H. to mark the agreements & send them to me, & I will return them by the first post with instructions to pay if correct":—*Held*: the letter was a sufficient acknowledgment to take the debt out of Statute of Limitations.—*SIDWELL v. MASON* (1857), 2 H. & N. 306; 26 L. J. Ex. 407; 29 L. T. O. S. 213; 3 Jur. N. S. 649; 5 W. R. 729; 157 E. R. 127.

Annotations:—Refd. Cornforth v. Smithard (1859), 5 H. & N. 13; *Godwin v. Culley*, *Edwards & Godwin v. Culley* (1859), 4 H. & N. 373; *Chasemore v. Turner* (1875), L. R. 10 Q. B. 500; *Firth v. Slingsby* (1888), 58 L. T. 481; *Langrish v. Watts*, [1903] 1 K. B. 636; *Whitcombe*

Co. v. GAMON (1903), 6 O. L. R. 481; 2 O. W. R. 966.—CAN.

524 v. —.]—*GANESH v. GYANU* (1898), I. L. R. 22 Bom. 606.—IND.

524 vi. —.]—*FINE v. BULDEO DASS* (1899), I. L. R. 26 Calc. 715; 3 C. W. N. 524.—IND.

PART II. SECT. 8, SUB-SECT. 6.—H. (c).

k. Whether sufficient.]—*BURROWS v. BAKER* (1869), 3 I. R. Eq. 596.—IR.

PART II. SECT. 8, SUB-SECT. 6.—H. (b).

524 i. Whether sufficient.]—*HAMILTON v. MATTHEWS* (1847), 5 U. C. R. 148.—CAN.

524 ii. —.]—The principle that the later items of an account draw the others after them, & thus save all from the Statute of Limitations, does not apply where quarterly payments are made & received, as for a late specific independent quarter due at the time of payment, unmixed with items for

any earlier quarter; the presumption in such a case is, unless the contrary is shown, that the earlier quarters have been all paid & satisfied.—*KING'S COLLEGE v. McDUGALL* (1849), 5 U. C. R. 315.—CAN.

524 iii. —.]—*JONES v. BROWN* (1858), 9 C. P. 201.—CAN.

524 iv. —.]—Where an account was a running account, with frequent entries in each month from its beginning to its end:—*Held*: the Statute of Limitations could not apply to any of the items.—*Re JELLY, UNION TRUST*

v. Steere (1903), 19 T. L. R. 697; *Cooper v. Kendall*, [1909] 1 K. B. 405; *Fettes v. Robertson* (1921), 37 T. L. R. 581; *Spencer v. Hemmerde*, [1922] 2 A. C. 507. **Mentd.** *Holmes v. Mackrell* (1858), 3 C. B. N. S. 789; *Skeet v. Lindsay* (1877), 2 Ex. D. 314.

529. ———.]—In 1847, pltf., who were solrs., lent to deft. £100 on a mtge., £40 on a promissory note, & they had also a claim against him for costs. In 1857, deft. wrote to pltf. as follows: "Sept. 26. I wish to inform you that I received yours this morning. I am going to leave my situation on Nov. 1, & when the policy is paid on Oct. 29, I hope that you will have the whole of your account ready for me, as I hope to be with you on that day." "Oct. 25. Mr. V., when here on Saturday, stated that the amount due against me was about £280. Of course this includes the £100 & interest that I had some years since, & the £40 promissory note that I jointly signed with the late Mr. B. Of course you are aware that you have £25 to my credit that Mr. Y. paid over when he could not complete the purchase of the property in the High Street":—**Held**: a sufficient acknowledgment of the debt to take the case out of Statute of Limitations.—*GODWIN v. CULLEY, EDWARDS & GODWIN v. CULLEY* (1859), 4 H. & N. 373; 157 E. R. 886.

Annotations:—**Refd.** *Cornforth v. Smithard* (1859), 5 H. & N. 13; *Stamford, Spalding & Boston Banking Co. v. Smith*, [1892] 1 Q. B. 765.

530. ———. "If just."]—Debt on a bill of exchange by payee against acceptor for £20. Pleas, first, except as to £10 11s. parcel, etc., a set-off for board & lodging; & as to the sum of £10 11s., payment of that sum into ct. Replication, that the alleged debts & causes of set-off did not accrue within six years before the commencement of the suit, concluding to the contrary: to which deft., by his rejoinder, added the *similiter*. At the trial, pltf. having proved his case, & deft. his set-off, the latter put in a letter from pltf. to deft., in which the following passages were relied upon, to take the case out of the Statute: "Before closing this, I have to request you will be pleased to send me in any bill or what demand you have to make on me, & if just, I shall not give you the trouble of going to law. If you refer to your books, you will find the last payment I made you was in May, 1839; the day I have forgot. I shall leave town to-morrow, but shall be back in a few days, for a month, & if you will bring my bill in here to me by eleven, I shall be at your service":—**Held**: this was not a sufficient admission to take the case out of Statute of Limitations.—*SPONG v. WRIGHT* (1842), 9 M. & W. 629; 2 Dowl. N. S. 545; 12 L. J. Ex. 144; 152 E. R. 265.

531. ———. **When affairs arranged.**]—In an action by the payees, commenced in 1873 against one of the makers of a joint promissory note, dated Oct. 1, 1858, deft. pleaded Statute of Limitations. At the trial the following letter from deft. to pltf. dated May 29, 1867, at which time the Statute had run, was put in: "The old account between us which has been standing over so long has not escaped our memory, & as soon as we can get our affairs arranged we will see you are paid; perhaps, in the meantime, you will let your clerk send me an account of how it stands":—**Held**: the promise in the letter was sufficient.—*CHASEMORE v. TURNER* (1875), L. R. 10 Q. B. 500; 45 L. J. Q. B. 66; 33 L. T. 323; 24 W. R. 70, Ex. Ch.

Annotations:—**Expld.** *Quincey v. Sharpe* (1876), 1 Ex. D. 72. **Consd.** *Skeet v. Lindsay* (1877), 2 Ex. D. 314; *Green v. Humphreys* (1883), 23 Ch. D. 207; *Cooper v.*

Kendall, [1909] 1 K. B. 405. **Expld.** *Fettes v. Robertson* (1921), 37 T. L. R. 581. **Refd.** *Meyerhoff v. Froehlich* (1878), 39 L. T. 620; *Mowbray v. Appleby* (1899), 80 L. T. 805; *Lusher v. Hassard* (1903), 20 T. L. R. 31; *Spencer v. Hemmerde*, [1922] 2 A. C. 507.

532. ———. **When able.**]—**Re** *BETHELL, BETHELL v. BETHELL*, No. 169, *ante*.

533. ———. **By advertisement—To creditors to send in accounts.**]—*ANDREWS v. BROWN* (1714), Prec. Ch. 385; 1 Eq. Cas. Abr. 305; Gilb. Ch. 41; 24 E. R. 173.

Annotations:—**Consd.** *Jones v. Scott* (1831), 1 Russ. & M. 255 (see 4 Cl. & Fin. 382). **Mentd.** *Cowslade v. Cornish* (1751), 2 Ves. Sen. 270; *Burke v. Jones* (1813), 2 Ves. & B. 275; *Hanover (King) v. Wheatley* (1841), 10 L. J. Ch. 253.

534. ———. ———.]—An exor.'s advertisement to creditors to send in an account of their claims for examination, does not amount to a promise sufficient to revive a debt already barred by Statute of Limitations.—*SCOTT v. JONES* (1838), 4 Cl. & Fin. 382; 7 E. R. 147; *sub nom. JONES v. SCOTT*, 7 L. J. Ch. 242, H. L.

Annotations:—**Mentd.** *Evans v. Tweedy* (1838), 1 Beav. 55; *Freaker v. Cranefeldt* (1838), 3 My. & Cr. 499; *Re Lyon, Ex p. Robinson* (1844), 2 L. T. O. S. 440; *Re Emmings* (1849), 14 L. T. O. S. 208; *Briggs v. Wilson* (1853), 17 Beav. 330; *O'Connor v. Haslam* (1855), 5 H. L. Cas. 170; *Cadbury v. Smith* (1869), L. R. 9 Eq. 37; *Re Hepburn, Ex p. Smith* (1884), 14 Q. B. D. 394; *Re Stephens, Warburton v. Stephens* (1889), 43 Ch. D. 39; *Re Balls, Trewby v. Balls*, [1909] 1 Ch. 791.

535. ———. **Request accompanied by promise of "attention."**]—The following letter was written by deft., sued as exor. of his father, to pltf.'s testator: "If you have any account against my late father that remains unsettled, forward the same to G. As soon as matters are put a little in order, it shall have my first attention":—**Held**: not a sufficient acknowledgment to satisfy Statute of Limitations.—*JONES v. MEARES* (1848), 10 L. T. O. S. 391.

536. ———. **Request accompanied by promise of future orders.**]—In action for work done pltf., in answer to plea of Statute of Limitations, put in evidence the following two letters, written within six years of commencement of the action by deft.'s testator, the person for whom the work was done to the pltf.: "I shall be obliged to you to send in your account made up to Christmas last. I shall have much work to be done this spring, but cannot give further orders till this be done." "You have not answered my note. I again beg of you to send in your account, as I particularly require it in the course of this week":—**Held**: they amounted to a promise to pay the balance due on the account, & took the case out of the Statute.—*QUINCEY v. SHARPE* (1876), 1 Ex. D. 72; 45 L. J. Q. B. 347; 34 L. T. 495; 40 J. P. 328; 24 W. R. 373.

Annotations:—**Refd.** *Skeet v. Lindsay* (1877), 2 Ex. D. 314; *Green v. Humphreys* (1884), 26 Ch. D. 474; *Firth v. Slingsby* (1888), 58 L. T. 481; *Bartley v. Lees* (1895), 11 T. L. R. 243; *Kessiosoglou v. Balli* (1903), 47 Sol. Jo. 738; *Fettes v. Robertson* (1921), 37 T. L. R. 581; *Spencer v. Hemmerde*, [1922] 2 A. C. 507.

537. ———. **Request accompanied by complaint as to amount.**]—*SKEET v. LINDSAY*, No. 566, *post*.

(d) *Agreement to take Item into Account.*

538. Whether sufficient—No statement of position of account.]—One or two persons who had dealings together & were mutually indebted to one another, had supplied some bricks on the credit of the other in 1834, but no account had been delivered or made out on either side. In 1845

PART II. SECT. 8, SUB-SECT. 6.—H. (d).

1. *Whether sufficient.*]—*VENKATARAMIAH PANTULU v. RAMAKRISHNA PANTULU* (1906), I. L. R. 29 Mad. 295.—**IND.**
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B B

Sect. 8.—Acknowledgments in writing: Sub-sect. 6, H. (d), (e), (f) & (g), & I. (a).]

they signed in duplicate a memorandum thus expressed: "It is agreed that Mr. R., in his general account shall give credit to Dr. H. for £174, being for bricks delivered in 1834":—*Held*: this was insufficient to exclude the mutual debts from the operation of the Statute of Limitations.—*HUGHES v. PARAMORE* (1855), 7 De G. M. & G. 229; 3 Eq. Rep. 677; 24 L. J. Ch. 681; 25 L. T. O. S. 75; 1 Jur. N. S. 1101; 3 W. R. 388; 44 E. R. 90, L. JJ.

(e) Willingness to go into Account.

539. Whether sufficient.]—Pltf. co. through their solr., by letter dated Oct. 8, 1870, sent by them to deft. co. submitted to pay whatever under the Act of Parliament was payable, upon the amount thereof being made to satisfactorily appear upon account:—*Held*: after that letter pltf. co. must pay to deft. the sum of the deficiencies for the years extending from 1858 to 1870.—*SOUTHAMPTON DOCK CO. v. SOUTHAMPTON HARBOUR & PIER BOARD* (1872), L. R. 14 Eq. 595; 41 L. J. Ch. 832; 26 L. T. 828; 20 W. R. 940.

540. —.]—By a memorandum, dated Apr. 28, 1874, it was witnessed that deft. deposited with pltf. certain title deeds by way of equitable mortgage for £6,000 & interest. Deft. also agreed to pay to pltf. on demand £6,000 & interest, & to execute a proper mortgage with all the usual powers & authorities usually given to a mtgee. This memorandum was not under seal. No interest was paid under this agreement, & nothing was done until about eleven years after the date of it, when this action was brought for the specific performance of the agreement. At the trial it was declared that pltf. was entitled to a lien on the property comprised in the deeds for the money advanced, & to have the agreement specifically performed, but that was without prejudice to deft.'s right to insist on the Statute of Limitations as a defence against any principal sum or interest. The question was, whether pltf. was entitled to have in the mtge. a covenant for principal & interest. The statute was relied on as a bar to any such right. A correspondence had in 1885 passed between the parties in which pltf. had demanded an account of how matters stood between them. Deft. answered that he was unable to make out the account, but that he should be glad to leave the whole thing entirely in pltf.'s hands, & adopt whatever he suggested. He also wrote: "There is only one thing which gives me uneasiness, which is, that should I survive you, your exors. might sell the land at a forced sale for little or nothing, & make a claim against me, which I have no funds to meet":—*Held*: deft.'s letters amounted to an admission of his liability to account, & also of his present liability to pltf.; there was nothing in those letters to prevent the admission from carrying with it a promise to pay; & the case was taken out of the Statute of Limitations, & pltf. was entitled to have a covenant for the payment of principal & interest.

The agreement is not under seal, therefore the debt thereby referred to is not grounded on any contract, according to the words in the statute of James. Therefore if at the end of six years an

action had been brought . . . the statute of James would have been a complete bar (*STIRLING, J.*).—*FIRTH v. SLINGSBY* (1888), 58 L. T. 481.

Annotations:—Reid. Re Buskin, Ex p. Farlow (1894), 15 R. 117; *Barnes v. Glenton*, [1899] 1 Q. B. 885.

541. —.]—Where in an action commenced in 1902 upon a promissory note given by deft. to pltf. in 1881, for £100 with interest, payable on demand, it was proved that deft. had in 1901 written a letter in which, after asserting that there had been certain payments by him on account of the note, he used expressions importing that he was willing that an account should be taken between himself & pltf., & he would pay what was thereupon found to be due, & it was found on the trial that no payments had been made on account of the note:—*Held*: the letter afforded sufficient evidence of a new promise to take the case out of the Statute of Limitations.—*LANGRISH v. WATTS*, [1903] 1 K. B. 636; 72 L. J. K. B. 435; 88 L. T. 443; 51 W. R. 503; 19 T. L. R. 359, C. A.

(f) Reference to Past Application for Account.

542. Whether sufficient.]—To an action by the exor. of an attorney, for his bill of costs, deft. pleaded the Statute of Limitations & a set-off; to which latter plea pltf. replied the Statute of Limitations. Testator had transacted the law business of deft., & received his tithes & rents. A letter written to testator by the steward of deft., by his desire, stated that deft. wished to have testator's account, for the purpose of settling it. Another letter, written in Welsh, stated that deft. intended to borrow money on his estates, & that the writer would come to testator's house for the deeds, & if any account required looking over, the testator might do that at the same time. With reference to the last-mentioned letter, testator wrote to deft. as follows: "I have received a (Welsh) letter from your agent, & as far as I am able to understand it, he requests to have the abstract of title, & my bill against you & account, as you are about to receive a sum of money to pay off the mtge. on your estates. I should be glad to hear from you, as I am no Welsh scholar myself, precisely what is wanted." In answer, deft. wrote: "Being one of those people who think short accounts make long friends, I directed my agent last year to apply to you for your bill, in order that we might settle the tithe accounts. What he applied to you, in Welsh, the other day, was for my title deeds." Deft., for the purpose of taking his set-off out of the statute, put in evidence an account furnished by testator to deft. in obedience to a rule of ct.; & he also put in evidence an affidavit, made & signed by testator, on the occasion of his furnishing such account. The account contained items to the credit of deft. for tithes & rents received by testator for deft.; & it also contained items to the credit of testator, for cash paid to deft. & for work done; & the account claimed a balance as due to testator. The affidavit, in like manner, claimed a balance as due to testator on the same account:—*Held*: the letters were not sufficient to take pltf.'s claim, nor the account & affidavit sufficient to take deft.'s set-off, out of the Statute of Limitations.—*WILLIAMS v. GRIFFITHS* (1849), 3 Exch. 335; 18 L. J. Ex. 210; 154 E. R. 872.

Annotation:—Reid. Quincey v. Sharpe (1876), 40 J. P. 328.

PART II. SECT. 8, SUB-SECT. 6.—H. (e).

539 i. Whether sufficient.]—*HORI NARAIN GHOSE v. ADMINISTRATOR-GENERAL OF BENGAL* (1877), 3 C. L. R. 446.—**IND.**

539 ii. —.]—*CRAWFORD v. CRAWFORD* (1867), 2 I. R. Eq. 166.—**IR.**

(g) *Statement of Account.*

543. Whether sufficient.]—An administratrix sued for a debt due to the intestate. It appeared that the debt accrued more than six years before the commencement of the action; but that, within six years, deft. & the agent of the administratrix went through the account together, & struck a balance, which deft. promised to pay as soon as he could:—*Held*: the administratrix was entitled to recover on a count upon an account stated with her, & Statute of Limitations was no bar.—**SMITH v. FORTY** (1829), 4 C. & P. 126.

Annotations:—**Distd.** Jones v. Ryder (1838), 4 M. & W. 32. **Overd.** Whitehead v. Buckley (1843), 1 L. T. O. S. 147. **Refd.** Bird v. Gammon (1837), 3 Bing. N. C. 883; Ashby v. James (1843), 11 M. & W. 542; Brennan v. Crawley, Mexican Ry. Garnishees (1868), 16 W. R. 754.

544. —.]—**WHITEHEAD v. BUCKLEY** (1843), 1 L. T. O. S. 147.

545. — Statement with items all on one side.]—**ASHBY v. ASHBY**, No. 442, *ante*.

546. —.]—**CLARK v. ALEXANDER**, No. 408, *ante*.

547. — Acknowledgment forming part of general settlement of accounts.]—L. being the holder for value of certain promissory notes made by deft., & being indebted to deft. & D., as exors., in a greater amount, it was agreed between them that the amount of the notes should be set off against & satisfied by the same amount of L.'s debt. On that occasion deft. gave to L. a paper, in which the amounts of the several notes, & the interest thereon, were enumerated, at the foot of which deft. wrote as follows: "June 8, 1842. Approved due to L.—W. Davis." L. retained possession of the notes, & afterwards indorsed them to pltf. for value. In an action by pltf., as indorsees, against deft., as the maker of these notes:—*Held*: the paper so signed by deft. was not such an acknowledgment in writing as to defeat a plea of Statute of Limitations, inasmuch as, coupling it with the evidence, no promise to pay the debt could be inferred from it.

Qu.: whether a promise in writing, given by the maker of a promissory note to the payee, can be made available to defeat Statute of Limitations, in an action by a subsequent party to the note.—**CRIPPS v. DAVIS** (1843), 12 M. & W. 159; 13 L. J. Ex. 217; 2 L. T. O. S. 125; 152 E. R. 1152.

Annotation:—**Refd.** Stamford, Spalding & Boston Banking Co. v. Smith (1892), 66 L. T. 306.

548. —.]—In an action on the common counts, deft., in order to take a promissory note for £80, relied upon in his set-off out of Statute of Limitations, gave in evidence a letter written by pltf. to a third person, who was authorised to communicate it to him, in which pltf. stated an account, making the promissory note an item against himself, but showing a balance in his favour, & proposed that the account should be arranged upon payment by deft. of £50. The proposed arrangement was not acceded to:—*Held*: the

acknowledgment being on a proposal which was not accepted, was not sufficient, within Statute of Frauds Amendment Act, 1828 (c. 14), s. 1, to take the case out of Statute of Limitations.—**FRANCIS v. HAWKESLEY** (1859), 1 E. & E. 1052; 28 L. J. Q. B. 370; 33 L. T. O. S. 182; 5 Jur. N. S. 1391; 7 W. R. 509; 120 E. R. 1204.

Annotation:—**Refd.** Chasemore v. Turner (1875), 24 W. R. 70.

549. —.]—Deft. pleaded a plea of Statute of Limitations to an action on two promissory notes. It was proved that he had, at the request of pltf., made a statement in writing of his affairs, beginning with the words "J. Mackrill," in his own handwriting, & in which he debited himself with the notes given to pltf.:—*Held*: the statement was signed within the meaning of the Statute, & involved a promise.—**HOLMES v. MACKRELL** (1858), 3 C. B. N. S. 789; 30 L. T. O. S. 243; 140 E. R. 953.

550. —.]—An account stated between deft., being part owner & ship's husband, & his co-owners, in which the items of pltf.'s account for work done & money advanced are included, is not such an acknowledgment as will take the case out of operation of Statute of Limitations. The circumstance of there being no ascertained or adjusted debt till within six years, will not delay the operation of the Statute.—**NASH v. HILL** (1858), 1 F. & F. 198.

I. *When Amount Disputed or Uncertain.*(a) *In General.*

551. Whether amount need be specified.]—(1) The whole of the acknowledgment of a debt, to take the case out of the Statute of Limitations, 1623 (c. 16), must, under Lord Tenterden's late Act [Statute of Frauds Amendment Act, 1828 (c. 14)], be in writing; & a written acknowledgment of a debt without specifying the amount, cannot be rectified by the admission of counsel.

(2) Where such a written acknowledgment is qualified by a condition, no action can be maintained upon it, if the condition is broken.—**KENNETT v. MILBANK** (1831), 8 Bing. 38; 1 Moo. & S. 102; 1 L. J. C. P. 8; 131 E. R. 314.

Annotations:—*As to* (1) **Consd.** Lechmere v. Fletcher (1833), 3 Tyr. 450; Cheslyn v. Dalby (1840), 4 Y. & C. Ex. 238; Hartley v. Wharton (1840), 11 Ad. & El. 934; Courtenay v. Williams (1844), 3 Hare, 539. **Refd.** Edmunds v. Downes (1834), 4 Tyr. 173; Cheslyn v. Dalby (1838), 2 Y. & C. Ex. 170; Bird v. Gammon (1837), 3 Bing. N. C. 883; Smith v. Thorne (1852), 18 Q. B. 134. *As to* (2) **Refd.** Brigstocke v. Smith (1833), 1 Cr. & M. 483; Eicke v. Nokes (1834), 1 Mood. & R. 359.

552. —.]—**DICKENSON v. HATFIELD**, No. 398, *ante*.

553. —.]—In *assumpsit* on a bill of exchange, a letter was produced, to take the case out of Statute of Limitations, from deft. to pltf., stating that pltf. should be informed immediately it was settled how deft.'s affairs should be arranged; & adding, "Your account is quite correct & O! that I were now going to enclose the amount."

PART II. SECT. 8, SUB-SECT. 6.—H. (g).

543 i. Whether sufficient.]—**RUSSELL v. CRYSLER** (1849), 5 U. C. R. 484.—**CAN.**

543 ii. —.]—Even if a debt is of a commercial nature, the sending of an account current accompanied by a letter referring to it signed by applt. will take the case out of the Statute of Limitations.—**DARLING v. BROWN** (1858), 1 S. C. R. 360.—**CAN.**

543 iii. —.]—**HOUSE v. HOUSE** (1875), 24 C. P. 526.—**CAN.**

543 iv. —.]—Balancing of accounts,

before assignments, upon the general account, & also the payments on account are sufficient to prevent the operation of the Statute of Limitations.—**STEWART v. GAGE** (1887), 13 O. R. 458.—**CAN.**

543 v. —.]—A verbal statement of an account made within six years before action brought where there are items on both sides, & a balance has been struck in favour of pltf., will take the case out of the operation of the Statute of Limitations.—**SMITH v. CORMIER** (1889), 28 N. B. R. 432.—**CAN.**

543 vi. —.]—**WATSON v. AGA**

MEHEDEE SHERAZEE (1874), L. R. 1 Ind. App. 346.—**IND.**

543 vii. —.]—**NAND RAM v. RAM PRASAD** (1880), I. L. R. 2 All. 641.—**IND.**

543 viii. —.]—**NAHANIBAI v. NATHU BHAI** (1883), I. L. R. 7 Bom. 414.—**IND.**

545 i. — Statement with items all on one side.]—**JAMUN v. NAND LAL** (1892), I. L. R. 15 All. 1.—**IND.**

m. Mere expression of willingness to account—Not sufficient acknowledgment.]—**CRAWFORD v. CRAWFORD** (1867), 16 W. R. 411.—**IR.**

Sect. 8.—Acknowledgments in writing: Sub-sect. 6, I. (a),

No amount of debt was stated; & no proof was given, from the letter or otherwise, to what account the letter referred, nor whether the letter applied to the bill. It being left to the jury whether this was an unconditional acknowledgment of the debt, & they having found that it was:—*Held*: such promise, accompanied by this expression, "It is impossible to state to you what will be done in my affairs at present; it is difficult to know what will be best, but immediately it is settled you shall be informed"; is an absolute unconditional promise, & not a qualified or conditional promise.—*DODSON v. MACKEY* (1835), 8 Ad. & El. 225; 4 Nev. & M. K. B. 327; 112 E. R. 823.

Annotation:—*Reid. Routledge v. Ramsey* (1838), 8 Ad. & El. 221.

554. —.]—*WALLER v. LACY*, No. 444, *ante*.

555. —.]—*WHITCOMBE v. STEERE* (1903), 19 T. L. R. 697.

Annotation:—*Reid. Fettes v. Robertson* (1921), 37 T. L. R. 581.

556. — **Admissibility of evidence to prove amount.**—A promise in writing, signed by the party chargeable thereby, to pay his proportion of a joint debt more than six years old, is a sufficient compliance with Statute of Frauds Amendment Act, 1828 (c. 14), s. 1, to take the case out of Statute of Limitations, though no amount is specified in the promise, & pltf. suing on such promise is not confined to nominal damages, but may recover the whole of such proportion upon proving the amount by extrinsic evidence.

A. & B. were jointly indebted to C. after more than six years had elapsed since the debt accrued, A. promised in writing signed by him to pay his proportion when applied to. Afterwards, C. sued A. & B. jointly, in *indebitatus assumpsit*, on the original joint cause of action. B. pleaded the general issue, & A. pleaded the general issue & the Statute of Limitations. A verdict passed against B. on the general issue, & for A. upon the general issue & upon the issue on the Statute of Limitations, & judgment was entered for C. against B. & for A. against C. C. afterwards brought a fresh action against A. & declared specially on the new promise to pay his proportion:—*Held*: neither the recovery against B. nor the verdict & judgment for A. were any answer to the action against A. on the new promise.—*LECHMERE v. FLETCHER* (1833), 1 Cr. & M. 623; 3 Tyr. 450; 2 L. J. Ex. 219; 149 E. R. 549.

Annotations:—*Dbtd. Hooper v. Stephens* (1835), 7 C. & P. 260. *Folld. Bird v. Gammon* (1837), 3 Bing. N. C. 883. *Apld. Cheslyn v. Dalby* (1840), 4 Y. & C. Ex. 238; *Williams v. Griffiths* (1849), 3 Exch. 335. *Reid. Edmunds v. Johnson v. Dodgson* (1837), 2 M. & W. 653; *Routledge v. Ramsey* (1838), 3 Nev. & P. K. B. 319; *Hartley v. Wharton* (1840), 3 Per. & Dav. 529; *Waller v. Lacy* (1840), 1 Man. & G. 54; *Courtenay v. Williams* (1844), 3 Hare, 539; *King v. Hoare* (1844), 2 Dow. & L. 382; *Deacon v. Gridley* (1854), 24 L. J. C. P. 17; *Walker v. Butler* (1856), 6 E. & B. 508; *Curlewis v. Mornington* (1857), 5 W. R. 491. *Mentd. Baker v. Walker* (1845), 14 M. & W. 465; *Blyth v. Fladgate, Morgan v. Blyth, Smith v. Blyth*, [1891] 1 Ch. 337; *Isaacs v. Salbstein*, [1916] 2 K. B. 139.

557. —.]—L., being embarrassed, made a bill of sale absolutely & unconditionally of his effects, stock, etc., to deft. & another, deceased,

the consideration for which was expressed to be the paying & securing of L.'s debts; an account of which was at the time submitted to deft. When the bill of sale was made, L. was indebted to pltf., who had, as security, a judgment upon which he had sued out execution, which he refrained from carrying into effect, upon the promise of deft. that he should be paid. The statement which contained pltf.'s debt, was perused & approved of by deft., & pltf. also furnished him with his account, to which no objection was made. Much correspondence took place upon the subject, in the course of which, deft. wrote the following letter: "I am in receipt of yours of the 2nd. I do wish I could comply with your request, for really I am & have been very wretched on account of your account not being paid. I hear there is a prospect of an abundant harvest, which surely must turn into a goodly sum, & very considerably reduce your account; at all events, if it does not, the concern must be broken up to meet it at last." The letter concluded thus: "My hope is, that out of the present harvest you will be paid":—*Held*: (1) such letter, coupled with the other circumstances above referred to, was sufficient to take the case out of Statute of Frauds Amendment Act, 1828 (c. 14), it being an unconditional, unqualified admission of liability not depending upon or referring to the contingency of a good harvest for the creation of a fund to meet the demand; (2) also the sufficiency of the letter for that purpose was not affected by the omission of the amount claimed, as that may be proved by extrinsic evidence, when the existence of a debt is clearly established; (3) it was for the jury to put a construction upon the letter, & determine whether it referred to pltf.'s demand.—*BIRD v. GAMMON* (1837), 3 Bing. N. C. 883; 3 Hodg. 224; 5 Scott, 213; 6 L. J. C. P. 258; 132 E. R. 650.

Annotations:—*As to (2) Apld. Cheslyn v. Dalby* (1840), 4 Y. & C. Ex. 238; *Williams v. Griffiths* (1849), 3 Exch. 335. *Reid. Morrell v. Frith* (1838), 3 M. & W. 402; *Hartley v. Wharton* (1840), 11 Ad. & El. 934; *Waller v. Lacy* (1840), 8 Dowl. 563; *Smith v. Thorne* (1852), 18 Q. B. 134; *Deacon v. Gridley* (1854), 3 C. L. R. 129.

558. —.]—*CHESLYN v. DALBY, DALBY v. CHESLYN*, No. 424, *ante*.

559. **Correctness of amount disputed.**—Deft. saying to pltf. "what an extravagant bill you have delivered me!" is a sufficient acknowledgment to avoid the Statute of Limitations.—*LAWRENCE v. WORRALL* (1791), Peake, 127.

Annotation:—*Reid. Poynder v. Bluck* (1837), 5 Dowl. 570.

560. —.]—*GODWIN v. CULLEY, EDWARDS & GODWIN v. CULLEY*, No. 529, *ante*.

561. — **Accompanying promise to have account examined into.**—A letter, the fair effect of which is, that the writer is not certain whether the debt is owing, & will have the matter examined into, is not a sufficient acknowledgment in writing to take the case out of the Statute of Limitations, notwithstanding that it contains expressions of regret that the debt should have been left so long unpaid. But a letter not in itself sufficient to bar the statute may be left, with other evidence, to the jury, upon the question, whether there have been payments or deliveries of goods, in part satisfaction of the debt, within the six years. It will be a question for the jury whether the payments or deliveries of goods were made & received on

PART II. SECT. 8, SUB-SECT. 6.— I. (a).

559 i. **Correctness of amount disputed.**—*KEYS v. POLLOK* (1839), 1 Thom., 1st ed. 81; 2nd ed. 109.—CAN.

559 ii. —.]—*LALJEE SAHOO v.*

ROGHOUNDUN LALL SAHOO (1880), 1 L. R. 6 Calc. 447.—IND.

559 iii. —.]—*JOGESHWAR ROY v. RAJ NARAIN MITTER* (1904), 1 L. R. 31 Calc. 195; 8 C. W. N. 168.—IND.

559 iv. —.]—Letters expressing

doubts as to the existence of a debt, but expressing a wish that if deft. had any claim, the matter should be arranged, are not a sufficient acknowledgment to take the case out of the Statute of Limitations.—*CASSIDY v. FIRMAN* (1897), 15 W. R. 482.—IR.

account of the particular debt sued for. Where the action is by an exor., who has also claims due to himself in his own right, it will be for the jury whether the payments were upon account of the debt due to the testator, or to the exor. in his own right.

The evidence showed that goods were delivered as payment, & the fact that the amount of the balance of the debt to testator had been claimed, with the other circumstances, showed that the deliveries were in payment of the debt due to testator. If so they would have the same effect as payments of money on account of that debt & would take it out of the statute (MARTIN, B.).—*COLLINSON v. MARGESSON* (1858), 27 L. J. Ex. 305.

(b) *Promise to Pay Ascertained Sum.*

562. Whether sufficient.—*GARDNER v. M'MAHON*, No. 572, *post*.

—**Sum to be ascertained by submission to arbitration.**—*See* No. 424, *ante*, Nos. 570, 571, *post*.

(c) *Promise to Pay Smaller Amount than Claimed.*

563. Whether sufficient.—*BASS v. SMITH* (1668), 12 Vin. Abr. 229.

Annotation:—*Consd.* *Scales v. Jacob* (1826), 3 Bing. 638.

564. —.]—The following letter from deft. to pltf.'s attorney, was given in evidence by a pltf. in answer to a plea of Statute of Limitations. "I have received yours respecting pltf.'s demand; it is not a just one; I am ready to settle the account whenever pltf. thinks proper to meet on the business; I am not in his debt £90, nor any thing like that sum; shall be happy to settle the difference by his meeting me"—*Held*: the judge was justified in directing the jury, "that after this letter Statute of Limitations was out of the question."—*COLLEDGE v. HORN* (1825), 3 Bing. 119; 10 Moore, C. P. 431; 3 L. J. O. S. C. P. 184; 130 E. R. 459.

Annotations:—*Refd.* *Brigstock v. Smith* (1833), 2 L. J. Ex. 187; *Gardner v. M'Mahon* (1842), 3 Q. B. 561; *Re River Steamer Co., Mitchell's Claim* (1871), 6 Ch. App. 822; *Chasemore v. Turner* (1875), L. R. 10 Q. B. 500. *Mentd.* *R. v. Coyle* (1855), 26 L. T. O. S. 136.

565. —.]—Deft. had written a letter to T., to make a proposition to pltf. respecting a debt he owed him; & in this letter he desired T. to arrange with the whole of his creditors. T. wrote a letter to pltf., offering an acceptance for 7s. 6d. in the pound on the debt:—*Held*: not sufficient to take the case out of Statute of Limitations.—*GIBSON v. BAGHOTT* (1832), 5 C. & P. 211.

566. —.]—Deft., whose debt to pltf. was barred by Statute of Limitations, wrote to pltf. within six years before action the following letter: "I return to Shepperton about Easter. If you send me there the particulars of your account with vouchers, I shall have it examined & cheque sent to you for the amount due; but you must be under some great mistake in supposing that the amount due to you is anything like the sum you now claim"—*Held*: the debt was revived, as the request to be furnished with an account with vouchers at a particular time & place did not negative the implied promise to pay arising from the admission of a balance due.—*SKEET v. LINDSAY* (1877), 2 Ex. D. 314; 36 L. T. 98; 41 J. P. 456; 25 W. R. 322; *sub nom.* *SKEAT v. LINDSAY*, 46 L. J. Q. B. 249.

Annotations:—*Appld.* *Langrish v. Watts*, [1903] 1 K. B. 636. *Refd.* *Whitcombe v. Steere* (1903), 19 T. L. R. 697; *Barrett v. Davies*, *Barrett v. Withers* (1904), 90 L. T. 460.

567. — **Offer of "reasonable amount."**—In Oct. 1898, a debt then being statute-barred, A. wrote to M.: "You may be quite sure I shall do all I can, & as soon as I can, but it is not much use making promises without some pretty good prospect of keeping them." On Nov. 17 following he wrote to pltf.: "I had a letter from you four or five weeks ago, & wrote you in reply that I would do all in my power, but that it was useless for me to make promises I could not be fairly sure of keeping, & I really cannot say anything more definite." Later, in answer to a demand from M.'s solrs., he wrote asking for particulars, & concluded: "Legal proceedings . . . would only result in my losing my present employment & the small salary I am able to earn, which would still further delay the possibility of payment. I trust your client will agree to accept some comparatively reasonable amount, & if you can give me the option of repayment by instalments I shall be glad." The required particulars were supplied by M.'s solrs., & he was asked to state with what sum & in what manner he would settle the claim:—*Held*: these letters did not constitute a promise to pay absolutely & unconditionally, & therefore did not amount to sufficient acknowledgment to take the debt out of Statute of Limitations.—*MOWBRAY v. APPLEBY* (1899), 80 L. T. 805; 15 T. L. R. 425.

(d) *Promise to Pay Taxed and Certified Costs.*

568. Whether sufficient.—Where a client has obtained the common order for taxation of the bill of costs of a solr. which contains a submission to pay what should appear to be due on the taxation, the taxing master is right in taxing statute-barred items, & the client is bound under his submission to pay such items when taxed. A client desiring to raise the question of the Statute of Limitations in respect of any items in a bill of costs should obtain a special order.—*Re MARGETTS*, [1896] 2 Ch. 263; 65 L. J. Ch. 479; 74 L. T. 309; 44 W. R. 462; 40 Sol. Jo. 404.

Annotations:—*Refd.* *Re Brockman*, [1909] 2 Ch. 170. *Mentd.* *Re Thomas*, *Evans v. Griffiths* (1900), 48 W. R. 299.

(e) *Submission to Arbitration.*

569. Whether sufficient—Reference proving abortive.—*CHESLYN v. DALBY*, *DALBY v. CHESLYN*, No. 424, *ante*.

570. —.]—After the Statute of Limitations had begun to run, an agreement of reference between H. & the trustees of a turnpike road was entered into, which recited that H. was employed to construct certain roads, & that disputes existed as to the amount due to H., & by which, after the usual stipulations of reference, it was agreed that the arbitrators should find what was due, & that they should, in their award, order the treasurer of the trustees to pay such sum "at such times & in such proportions as they should think fit." The reference proved abortive:—*Held*: this was not such an unconditional promise to pay as would take the case out of the Statute of Limitations.—*HALES v. STEVENSON* (1863), 8 L. T. 798; 11 W. R. 952, Ex. Ch.

Annotations:—*Consd.* *Re River Steamer Co., Mitchell's Claim* (1871), 6 Ch. App. 825, n. *Refd.* *Skeet v. Lindsay* (1877), 2 Ex. D. 314.

571. —.]—*FENNER v. LORD* (1898), 14 T. L. R. 450.

Sect. 8.—Acknowledgments in writing: Sub-sect. 6, J., K., L. & M.]

J. Promise not to Plead Statute.

572. Mere promise not to plead statute—Accompanying qualifying expressions—Indicating intention to dispute liability.]—Deft. having pleaded the Statute of Limitations, pltf. proved, in answer, that, before six years had elapsed from the contracting of the debt, & within six years before action brought, deft. wrote to him as follows: "I do not desire that you or any one of my creditors should lose what I owe them; on the contrary, it is very much my wish not only to pay my debts but interest upon them if I can. As you have mentioned the Limitation Act, I answer at once, that I am ready to put it out of my power to take advantage of that Act, & will immediately give you my note for whatever amount is due to you. To pay you now or within the year I am utterly unable. I really have not, as you imagine, received £600." "It is of course indispensable that the exact sum I owe you should be fixed, whether you accept my note or not. I have clearly shown you in a former letter, that your account is not in accordance with the estimate upon which you agreed." "If you really cannot produce the original estimate, or the rough draft of it, it certainly is reasonable that some, & considerable, deduction should be made from your charges." (Details as to this were then stated.) "You will perhaps say, what deduction you are prepared to make, & I shall be glad if it be such as will allow me, with justice to my other creditors, to give you my note for the amount, or, if it be possible, to borrow it from a friend, which I have a hope of doing, & wipe the account entirely out of your books." "I am fully sensible of, & thankful for, the forbearance you have shown; but I cannot move a step in the way to give you satisfaction, & do justice to my other creditors, until the sum actually due to you be ascertained":—*Held*: the letter contained an unconditional promise to pay, & prevented the Statute of Limitations from operating.—*GARDNER v. M'MAHON* (1842), 3 Q. B. 561; 2 Gal. & Dav. 593; 11 L. J. Q. B. 297; 6 Jur. 712; 114 E. R. 622.

*Annotations:—*Reid. *Bateman v. Pinder* (1842), 11 L. J. Q. B. 281; *Hart v. Prendergast* (1845), 14 M. & W. 741; *Williams v. Griffith* (1849), 3 Exch. 335; *Rackham v. Marriott* (1857), 29 L. T. O. S. 145; *Sidwell v. Mason* (1857), 5 W. R. 729; *Skeet v. Lindsay* (1877), 2 Ex. D. 314; *Barrett v. Davies*, *Barrett v. Withers* (1904), 90 L. T. 460.

573. — Inability to pay—No distinct promise to pay.]—Deft., who owed money for goods supplied to him by pltf.'s testator, wrote the following letter to pltf.: "I am sorry I cannot pay off anything of my account at present. . . . You have always treated me very well, & as soon as I have the money I shall forward you a cheque for the late account. . . . I hope you will express my regret to the exors., & explain that it is my intention to pay when I am in a position to do so, & I shall not try to get out of the debt by its becoming outdated":—*Held*: this was a conditional promise to pay the debt; & the condition not being fulfilled, the letter did not take the case out of Statute of Limitations.—*LUSHER v. HASSARD* (1904), 20 T. L. R. 563, C. A.

*Annotation:—*Reid. *Barrett v. Davies*, *Barrett v. Withers* (1904), 21 T. L. R. 21.

See, also, Nos. 452, 571, ante.

PART II. SECT. 8, SUB-SECT. 6.—J. n. Mere promise not to plead statute.]—The maker of a promissory note, nearly six years after it was due,

wrote a letter acknowledging that pltf. had a bill or note of his, "which might by possibility be upwards of six years from its date. I, of course, will not plead the Statute of Limitations":—

Held: the debt was thereby sufficiently acknowledged to take it out of the statute.—*BEWLEY v. POWER* (1833), *Hayes & Jo. 368.—IR.*

574. Promise based on new consideration—Settlement of mutual accounts.]—A parol agreement was entered into between the respective exors. of L. & T., that various old accounts of their testators should be settled on a certain fixed day, without reference to the time that they had been running. The accounts were settled accordingly, & the exors. of L. received the value of a promissory note that would have been barred by the statute. The exors. of T. afterwards discovered a note from L. to T. on which nothing had been done for more than six years before the death of T.:—*Held*: the exors. of T. were entitled to have the benefit of this note.—*LADE v. TRILL*, *TRILL v. LADE* (1842), 11 L. J. Ch. 102; 6 Jur. 272.

575. Promise subject to condition—Condition unfulfilled.]—*BUENOS AYRES MUNICIPALITY v. BARING BROTHERS* (1924), 59 L. Jo. 167.

K. Refusal to Pay Admitted Debt.

576. Whether sufficient—Recommendation to plaintiff to bring action.]—Plea of Statute of Limitations to a bill of discovery over-ruled upon letters, assigning reasons for declining to pay; & recommending pltf. to bring an action; as amounting to an acknowledgment of the debt, sufficient to take it out of the statute upon the authorities, though against principle.—*BAILLIE v. SIBBALD* (1808), 15 Ves. 185; 33 E. R. 724.

577. — Refusal to pay "unless obliged."]—Where upon demand made of payment of seaman's wages, accrued during the Russian embargo, deft. answered, "that he would not pay; there were none paid, & he did not mean to pay unless obliged":—*Held*: sufficient to take the case out of Statute of Limitations.—*DOWTHWAITE v. TIBBUT* (1816), 5 M. & S. 75; 105 E. R. 979.

*Annotations:—*Reid. *Clark v. Hougham* (1823), 2 B. & C. 149; *A'Court v. Cross* (1825), 11 Moore, C. P. 198; *Scales v. Jacob* (1826), 3 Bing. 638; *Tanner v. Smart* (1827), 6 B. & C. 603; *Linley v. Bonsor* (1835), 1 Hodg. 308.

578. — Stamp objection.]—(1) Deft. being arrested on a debt more than six years old, said, "I know that I owe the money, but the bill I gave is on a threepenny receipt stamp, & I will never pay it":—*Held*: not such an acknowledgment as would revive the debt against a plea of Statute of Limitations, 1623 (c. 16).

(2) It [Statute of Limitations, 1623 (c. 16)] is, as I have heard it often called by great judges, an Act of peace (*BEST, C.J.*).—*A'COURT v. CROSS* (1825), 3 Bing. 329; 11 Moore, C. P. 198; 4 L. J. O. S. C. P. 79; 130 E. R. 540.

*Annotations:—*As to (1) *Appld. Ayton v. Bolt* (1827), 4 Bing. 105. *Consd. Upton v. Else* (1827), 5 L. J. O. S. C. P. 108. *Reid. Scales v. Jacob* (1826), 3 Bing. 638; *Pierce v. Brewster* (1827), 12 Moore, C. P. 515; *Tanner v. Smart* (1827), 6 B. & C. 603; *Gould v. Shirley* (1829), 2 Moo. & P. 581; *Linley v. Bonsor* (1835), 2 Scott, 399.

579. — Mere refusal.]—*PIERCE v. BREWSTER*, No. 508, *ante*.

580. — "Sooner go to gaol than prefer creditor."]—(1) To take a case out of Statute of Limitations, pltf. gave in evidence letters wherein deft. stated that he would have nothing to do with pltf.'s claim, that he wished he would make him a bkpt., & that he would rather go to gaol than pay pltf. in preference to others of his creditors who had executed a composition deed. The judge left it to the jury to say whether the letters contained an acknowledgment of the debt, telling them, that, to entitle pltf. to recover, it must be

such an acknowledgment whence a promise to pay could be inferred. The jury having returned a verdict for debt., the ct. declined to disturb it, holding the direction to be proper.

(2) To show a part payment within six years so as to bring the case within the exception in the statute, pltf. proved a payment of a portion of his demand by one F., the trustee under a deed of composition, who was expressly instructed to make the payment as a full satisfaction, instead of which he handed the money over as a part payment, & took a receipt accordingly. This payment so made was expressly repudiated by debt.:—*Held*: this was not a payment within the exception.—*LINSELL v. BONSOR* (1835), 2 Bing. N. C. 241; 132 E. R. 95; *sub nom.* *LINLEY v. BONSOR*, 2 Scott, 399; 1 Hodg. 305; 5 L. J. C. P. 40.

Annotations:—*As to* (1) *Reid*. *Fettes v. Robertson* (1921), 37 T. L. R. 581; *Spencer v. Hemmerde*, [1922] 2 A. C. 507.

581. — Refusal to pay without order of court.]

—(1) Where Statute of Limitations had run against a debt, due from a testator before his death, & the exor. wrote thus to the creditor: "The legatees object to my paying the claim though I think it just," & "I not only do not dispute the claim but admit it, thinking it just, but am compelled to refuse payment without an order of the ct.":—*Held*: the debt was not revived.

(2) Where an indorsement admitting the receipt of interest was made on a promissory note prior to the passing of Lord Tenterden's Act (Statute of Frauds Amendment Act, 1828 (c. 14)), it was held not to be evidence to take such promissory note out of Statute of Limitations, as it appeared to have been made after the time when the presumption of the debt having been barred by the statute had arisen, & it was consequently not against, but in accordance with, the interest of the party to make such admission.—*BRIGGS v. WILSON* (1854), 5 De G. M. & G. 12; 23 L. T. O. S. 136; 43 E. R. 772, L.JJ.

Annotations:—*As to* (2) *Apld.* *Newbould v. Smith* (1885), 29 Ch. D. 882. *Reid.* *Coope v. Cresswell* (1866), L. R. 2 Eq. 106. *Generally*, *Mentd.* *Saunders v. Druce* (1855), 3 Drew. 139; *Fuller v. Redman* (No. 2) (1859), 26 Beav. 614; *Taylor v. Witham*, *Witham v. Taylor* (1876), 24 W. R. 877; *Re Lacy*, *Howard v. Lightfoot* (1906), 51 Sol. Jo. 67.

L. Proposals without Prejudice.

Admissibility as evidence.—*See* EVIDENCE, Vol. XXII., p. 377, Nos. 3853, 3854.

582. — **Acceptance of proposal.**—*Re* RIVER STEAMER CO., MITCHELL'S CLAIM, No. 412, *ante*.

M. Denial of Liability.

583. **Denial of existence of debt—Admission of receipt of money but as gift.**—*OWEN v. WOLLEY* (1751), Bull. N. P. 148, N. P.

Annotation:—*Apprvd.* *Partington v. Butcher* (1806), 6 Esp. 66.

584. — **Accompanying statement of inability to pay.**—(1) Where it was proved that a debt. had, after having denied the existence of a debt demanded of him, replied, to an assertion by pltf., that he had documents in his possession which would prove it, that "It is of no use for me to look at them, for I have no money to pay it now":—*Held*: a nonsuit, which had been directed on such a case made & relied on by pltf., was right.

(2) The legal effect of such conversations, as to how far they are to be considered as admitting debts to be due, or amounting to promises to pay them, is a question rather for the determination of the ct. than the jury.—*SNOOK v. MEARS* (1818), 5 Price, 636; 146 E. R. 718.

Annotation:—*As to* (1) *Consd.* *A'Court v. Cross* (1825), 11 Moore, C. P. 198.

585. — **Accompanying promise to communicate personally with plaintiff.**—The operation of the Statutes of Limitations will not be barred by a written acknowledgment of a pre-existing debt, unless a fresh promise to pay it can be inferred from the terms used:—*Held*: a letter from a debt. denying his liability to pay pltf.'s claim, & containing no acknowledgment of its validity, though pointing out a time for communicating personally with pltf. about it, did not take a case out of the Statute, & a nonsuit was right.

Semble: part payment will not bar the interest, where the debt to which it is applied consists of several items.—*BRIGSTOCKE v. SMITH* (1833), 1 Cr. & M. 483; 3 Tyr. 445; 2 L. J. Ex. 187; 149 E. R. 489.

Annotation:—*Reid.* *Elcke v. Nokes* (1834), 1 Mood. & R. 359.

586. **Claim to benefit of statute.**—An acknowledgment of the debt, though accompanied with a declaration by debt. "that he did not consider himself as owing pltf. a farthing, it being more than six years since he contracted," is sufficient to take the case out of Statute of Limitations.—*BRYAN v. HORSEMAN* (1804), 4 East, 599; 1 Smith, K. B. 125; 102 E. R. 960.

Annotations:—*Distd.* *Rowcroft v. Lomas* (1816), 4 M. & S. 457. *Consd.* *Frost v. Bengough* (1823), 1 Bing. 266; *A'Court v. Cross* (1825), 11 Moore, C. P. 198. *Reid.* *Snook v. Mears* (1818), 5 Price, 636; *Tanner v. Smart* (1827), 6 B. & C. 603.

587. —.]—"I owe you not a farthing, for it is more than six years since," is not to be left to the jury as evidence of an admission, to take a debt out of Statute of Limitations.—*COLTMAN v. MARSH* (1811), 3 Taunt. 380; 128 E. R. 151.

Annotations:—*Reid.* *Frost v. Bengough* (1823), 8 Moore, C. P. 180; *Knott v. Farren* (1824), 2 L. J. O. S. K. B. 122; *A'Court v. Cross* (1825), 11 Moore, C. P. 198; *Poynder v. Bluck* (1837), 5 Dowl. 570.

588. —.]—In *assumpsit* against debt. as acceptor of a bill of exchange, & upon an account stated, evidence that debt. acknowledged his acceptance & that he had been liable, but said that he was not liable then, because it was out of date, & that he could not pay it, it was not in his power to pay it, was held sufficient to take the case out of the statute, upon a plea of *actio non accrevit infra sex annos*. Pltf. may declare on the original promise, although he relies on the subsequent promise to take the case out of Statute of Limitations.—*LEAPER v. TATTON* (1812), 16 East, 420; 104 E. R. 1147.

Annotations:—*Reid.* *Hurst v. Parker* (1817), 1 B. & Ald. 92; *Clark v. Hougham* (1823), 2 B. & C. 149; *A'Court v. Cross* (1825), 11 Moore, C. P. 198; *Tanner v. Smart* (1827), 6 B. & C. 603; *Irving v. Voitch* (1837), 3 M. & W. 90.

589. —.]—In *assumpsit* for money due on an accountable receipt, pltf., in order to take the case out of Statute of Limitations, called a witness, who proved that he called on debt., & showed him the receipt, & asked him if he knew anything of it, to which debt. answered that he knew all about it; witness then asked him for the amount; to which he answered it was not worth a penny; he should never pay it; that it was his signature, but that he never had & never would pay it, "& besides" he added, "it is out of date, & no law shall make me pay it":—*Held*: this evidence was insufficient to charge debt. with it, for there was no acknowledgment, but the contrary, that the debt ever existed.—*ROWCROFT v. LOMAS* (1816), 4 M. & S. 457; 105 E. R. 903.

Annotations:—*Apld.* *Snook v. Mears* (1818), 5 Price, 636. *Consd.* *A'Court v. Cross* (1825), 11 Moore, C. P. 198; *Spencer v. Hemmerde*, [1922] 2 A. C. 507. *Reid.* *Tanner v. Smart* (1827), 6 B. & C. 603.

590. **Expression of belief that debt already paid.**—To a demand for the charges of preparing an

Sect. 8.—Acknowledgments in writing: Sub-sect. 6, M. & N.; sub-sect. 7.]

annuity deed, deft. said, "I thought I had paid it at the time, but I have been in so much trouble since, that I really do not recollect it." Pltf. answered, "You know the price of the annuity was paid you in a £1,000 banknote, which you changed at Badcock's." Deft. made no answer:—*Held*: that this was not a sufficient acknowledgment of the debt to deprive deft. of the benefit of his plea of Statute of Limitations.—*HELLINGS v. SHAW* (1817), 7 Taunt. 608; 1 Moore, C. P. 340; 129 E. R. 243.

Annotations:—*Refd.* Beale v. Nind (1821), 4 B. & Ald. 568; Frost v. Bengough (1823), 8 Moore, C. P. 180; Scales v. Jacob (1826), 3 Bing. 638; Cottam v. Partridge (1842), 4 Man. & G. 271; Spencer v. Hemmerde, [1922] 2 A. C. 507.

591. — Promise to produce receipt.]—When a debt of a bill six years standing is demanded, & deft. says he has paid it, & will show the receipt, but does not, it is not such an acknowledgment as takes the debt out of Statute of Limitations.—*BIRK v. GUY* (1802), 4 Esp. 184, N. P.

592. — —.]—Where, after the lapse of six years, a deft., being asked for the payment of a debt, said, "I owed the money, but I have a receipt in full of all demands, I shall search for it, & let you know in the event of my not being able to find it":—*Held*: this was not sufficient to take the case out of Statute of Limitations.—*BRYDGES v. PLUMPTRE* (1827), 9 Dow. & Ry. K. B. 746.

593. — By third person—"If not paid it ought to be."]—"I will see D. or write to him; I have no doubt he has paid it; if by chance he has not paid it, it is very fit it should be" in a letter is not a sufficient acknowledgment of a debt under Statute of Frauds Amendment Act, 1828 (c. 14), s. 1, to take the case out of Statute of Limitations.—*POYNDER v. BLUCK* (1837), 5 Dowl. 570; Will. Woll. & Dav. 191.

594. — —.]—*BROWN v. BROWN* (1838), 2 Jur. 255.

595. — Proposal to pay by instalments.]—In answer to an application for a debt barred by the Statute of Limitations, deft. wrote, "I have received a letter from Messrs. P. & L., solrs., requesting me to pay you an account of £40 9s. 6d. I have no wish to have anything to do with the lawyers: much less do I wish to deny a just debt. I cannot, however, get rid of the notion that my account with you was settled in 1851: but as you declare it was not settled, I am willing to pay you £10 *per annum* until it is liquidated. Should this proposal meet with your approbation, we can make arrangements accordingly":—*Held*: this was not such an absolute unqualified acknowledgment & unconditional promise to pay as to take the case out of the Statute of Limitations.

The question is whether the letter contains an acknowledgment from which a promise can be implied to pay the debt which was barred by statute. It is obvious that the promise is of a nature not to bind deft. unless it was accepted by the persons to whom it was proffered; for it would be unjust to hold the one party bound by the offer unless it were assented to by the other party (*WILLIAMS, J.*).

The simple question is whether, independently of the special promise there is an absolute & unqualified acknowledgment of the existence of the debt from which a promise to pay can fairly be implied. I am of opinion that there is not. There clearly is no acknowledgment at all. The writer states his impression to be that the alleged debt has no existence (*WILLIAMS, J.*).—*BUCK-*

MASTER v. RUSSELL (1861), 10 C. B. N. S. 745; 4 L. T. 552; 8 Jur. N. S. 155; 9 W. R. 749; 142 E. R. 646.

Annotations:—*Apprvd.* Langrish v. Watts, [1903] 1 K. B. 636. *Refd.* Chasemore v. Turner (1875), L. R. 10 Q. B. 500; Lusher v. Hassard (1903), 20 T. L. R. 31; Spencer v. Hemmerde, [1922] 2 A. C. 507.

596. Claim that debt discharged by written instrument—Instrument inoperative as discharge.]

—If deft. to a debt otherwise bound by Statute of Limitations, admits the debt, but claims to be discharged by a written instrument, but which being referred to does not amount to a legal discharge, he shall be bound by the admission & the case be thereby taken out of the Statute.—*PARTINGTON v. BUTCHER* (1806), 6 Esp. 66, N. P. *Annotation*:—*Refd.* Hellings v. Shaw (1817), 1 Moore, C. P. 340.

597. Admission qualified by reliance on valid objection.]—A qualified admission by a party who relies on an objection which would at any time have been a good defence to the action does not take a case out of Statute of Limitations.—*DE LA TORRE v. BARCLAY & SALKELD* (1814), 1 Stark. 7, N. P.

598. Claim to set-off more than amount of debt.]—*Assumpsit* on a promissory note. Plea, first, general issue; secondly, Statute of Limitations; but there was no plea or notice of set-off. It was proved that on pltf.'s showing deft. the note within six years, the latter said, "You owe me more money: I have a set-off against it."—*Held*: that was not a sufficient acknowledgment within six years to take the case out of Statute of Limitations.—*SWANN v. SOWELL* (1819), 2 B. & Ald. 759; 106 E. R. 543.

Annotations:—*Refd.* A'Court v. Cross (1825), 11 Moore, C. P. 198; Scales v. Jacob (1826), 11 Moore, C. P. 553; Pierce v. Brewster (1827), 12 Moore, C. P. 515; Tanner v. Smart (1827), 6 B. & C. 603.

599. —.]—*Re RIVER STEAMER CO., MITCHELL'S CLAIM*, No. 412, *ante*.

N. Other Cases.

600. Promise to pay on proof of debt.]—(1) A promise to an exor. in these words, "Prove the debt & I will pay you," will avoid Statute of Limitations.

(2) Acknowledgment of debt after commencement of the action takes it out of Statute of Limitations.—*HEYLIN v. HASTINGS* (1698), Carth. 470; 1 Com. 54; Holt, K. B. 427; 5 Mod. Rep. 425; 12 Mod. Rep. 223; 1 Salk. 29; 1 Ld. Raym. 421; 88 E. R. 1277.

Annotations:—*As to* (1) *Consd.* Stafford v. Forcer (1714), 10 Mod. Rep. 311; Perham v. Raynal (1824), 2 B. & C. 306; Tanner v. Smart (1827), 6 B. & C. 603. *Re* Hurst v. Parker (1817), 1 B. & Ald. 92; Scales v. Jacob (1826), 3 Bing. 638; Spencer v. Hemmerde, [1922] 2 A. C. 507. *Generally, Mentd.* Anon. (1704), 2 Salk. 655; Loyd v. Lee (1718), 1 Stra. 94; Hooper v. Summersett (1810), Wight, 16; Williams v. Moor (1843), 12 L. J. Ex. 253.

601. Promise to do what is right.]—The words, he will do what is right, & just, take it out of the Statute (*LORD HARDWICKE, C.*).—*GALWAY v. BARRYMORE (EARL)* (1752), 1 Dick. 163; 21 E. R. 231.

602. — Through solicitors.]—In *assumpsit* for seaman's wages, to which Statute of Limitations was pleaded, it was proved that deft. being applied to for payment, after the lapse of six years, said "I will see my attorney, & tell him to do what is right":—*Semle*: this was not a sufficient acknowledgment to take the case out of the Statute.—*MILLER v. CALDWELL* (1823), 3 Dow. & Ry. K. B. 267.

603. Reference of creditor to debtor's solicitors—Promise by solicitors to pay if debtor bound.]—

Under a plea of Statute of Limitations, pltf. gave in evidence a letter of debt's in answer to an application for payment of his debt, in which the latter referred pltf. to his solrs., by whose opinion he should be governed, adding, "they are in possession of my determination & ability," & also a conversation with debt's solrs., in which they stated, that if pltf. had any letter which would bind debt., the debt would be paid, if it amounted to £100; this being left to the jury, a verdict was found for pltf.; but the ct. inclining to think it did not take the case out of the Statute, granted a new trial.—*BICKNELL v. KEPPEL* (1804), 1 Bos. & P. N. R. 20; 127 E. R. 364.

Annotations:—*Refd.* *Coltman v. Marsh* (1811), 3 Taunt. 380; *Tanner v. Smart* (1827), 6 B. & C. 603.

604. Promise to pay if others paid—Wages.—A demand being made by a seaman on the owner of a ship for wages, which had accrued during an embargo, he said, if others paid, he should do the same:—*Held*: this was a sufficient acknowledgment to take the case out of Statute of Limitations.—*LOWETH v. FOTHERGILL* (1815), 4 Camp. 185, N. P.

Annotation:—*Consd.* *Scales v. Jacob* (1826), 11 Moore, C. P. 553.

605. Promise "to satisfy creditor as to misunderstanding concerning debt."—A. is applied to by the attorney of B. for the payment of a debt. He writes in answer "that he will wait on debt., when he shall be able to satisfy him respecting the misunderstanding which had occurred between them":—*Held*: this was no such acknowledgment of a debt, as would bar a plea of Statute of Limitations; & such evidence ought not to be left to a jury, as grounds to infer a new promise to pay.—*CRAIG v. COX* (1816), Holt, N. P. 380, N. P. *Annotation*:—*Refd.* *Frost v. Bengough* (1823), 8 Moore, C. P. 180.

606. Qualified acknowledgment—Admission to some creditors only.—An acknowledgment by the acceptor of a bill of exchange within six years of his liability on the bill to the payee of the bill, but accompanied with a declaration that he was not liable to the drawers of the bill, there being no consideration for the acceptance, is not sufficient in an action by the drawers against the acceptor to take the case out of Statute of Limitations.—*EASTERLY v. PULLEN* (1822), 3 Stark. 186, N. P. *Annotation*:—*Refd.* *Brownell v. Bouney* (1841), 1 Q. B. 39.

607. Acknowledgment in manner signifying intention that debt not to be paid.—An admission of a debt made to a person who at the same time signed a paper purporting to be a discharge of the debt, is not a sufficient acknowledgment of the debt to prevent the operation of Statute of Limitations, though the discharge was inoperative in itself, & was given upon a condition which debt. failed to observe.

The two documents taken together show that though there was an admission of the debt, it was with the intention, on both sides, that the debt should never be paid (*POLLOCK, C.B.*).—*GOATE v. GOATE* (1856), 1 H. & N. 29; 156 E. R. 1105.

Annotation:—*Refd.* *Francis v. Hawkesley* (1859), 1 E. & E. 1052.

SUB-SECT. 7.—PLEADING AND PROOF.

See R. S. C., Ord. 19, r. 5.

608. Acknowledgment applicable to debt other than debt claimed—Onus of proof.—(1) A general

acknowledgment shall be sufficient to take a demand out of the Statute of Limitations.

(2) If the acknowledgment applied to a different debt from that for which the action is brought, proof of that shall lie on debt.—*BAILLIE v. INCHQUIN* (LORD) (1796), 1 Esp. 435, N. P.

Annotations:—*As to* (1) *Refd.* *Baillie v. Sibbald* (1808), 15 Ves. 185; *Fearn v. Lewis* (1830), 8 L. J. O. S. C. P. 95; *Routledge v. Ramsay* (1838), 8 Ad. & El. 221. *As to* (2) *Refd.* *Read v. Price*, [1909] 2 K. B. 724.

609. Admissibility of parol evidence—To prove lost written acknowledgment.—(1) Where a written promise to pay a debt barred by the Statute of Limitations, has been lost, oral evidence of the contents of the writing may be given.

(2) Such a promise, if conditional, must be declared on as conditional notwithstanding Statute of Frauds Amendment Act, 1825 (c. 14), & notwithstanding it was given within six years from the time of contracting of the debt.—*HAYDON v. WILLIAMS* (1830), 7 Bing. 163; 4 Moo. & P. 811; 9 L. J. O. S. C. P. 16; 131 E. R. 63.

Annotations:—*As to* (1) *Consd.* *Read v. Price*, [1909] 2 K. B. 724. *Refd.* *Baildon v. Walton* (1847), 17 L. J. Ex. 357. *As to* (2) *Consd.* *Irving v. Velch* (1837), 3 M. & W. 90. *Generally, Refd.* *Brigstocke v. Smith* (1833), 1 Cr. & M. 483; *Courtenay v. Williams* (1844), 3 Hare, 539.

610. ———.—Parol evidence is admissible to prove the contents of a written acknowledgment which has been lost.—*READ v. PRICE*, [1909] 2 K. B. 724; 78 L. J. K. B. 1137; 101 L. T. 60; 25 T. L. R. 701, C. A.

611. ———.—To prove date of undated acknowledgment.—(1) Where a letter acknowledging the existence of a debt, which was produced for the purpose of taking the case out of Statute of Limitations, did not contain any date:—*Held*: the time when the letter was written might be supplied by parol evidence.

(2) In an action on a promissory note payable with interest, the words in the letter acknowledging the debt were as follows: "I shall be most happy to pay you both interest & principal as soon as convenient":—*Held*: this was a conditional promise, & pltf. was bound to give some evidence to show that debt. was able to pay, or that it was convenient for him to do so.—*EDMUNDS v. DOWNES* (1834), 2 Cr. & M. 459; 4 Tyr. 173; 3 L. J. Ex. 98; 149 E. R. 840.

Annotations:—*As to* (1) *Appld.* *McGuffie v. Burleigh* (1898), 78 L. T. 264. *Refd.* *Hartley v. Wharton* (1840), 11 Ad. & El. 934. *As to* (2) *Consd.* *Mowbray v. Appleby* (1899), 80 L. T. 805. *Refd.* *Evans v. Nicholson* (1875), 32 L. T. 778.

612. ———.—To prove identity of debt.—*HARTLEY v. WHARTON*, No. 613, *post*.

613. ———.—To prove identity of acknowledgment—Letter of acknowledgment undated & without address.—Pltf. produced the following paper, signed by debt. "I am sorry to give you so much trouble in calling; but I am not prepared for you; but will without neglect remit you in a short time." The paper had no address or date, & specified no sum: but it was proved orally that debt. delivered it to pltf.'s agent, on being pressed for the debt, the amount of which was also proved by oral evidence:—*Held*: sufficient to satisfy Statute of Frauds Amendment Act, 1828 (c. 14), s. 5.—*HARTLEY v. WHARTON* (1840), 11 Ad. & El. 934; 3 Per. & Dav. 529; 9 L. J. Q. B. 209; 4 Jur. 576; 113 E. R. 669.

Annotations:—*Appld.* *McGuffie v. Burleigh* (1898), 78 L. T. 264. *Refd.* *Rowe v. Hopwood* (1868), 9 B. & S. 881. *Mentd.* *Williams v. Moor* (1843), 11 M. & W. 256; *Harris v. Wall* (1847), 1 Exch. 122.

See, also, No. 479, *ante*.

PART II. SECT. 8, SUB-SECT. 7.
o. Necessity for special plea.]—*IVES v. IVES* (1840), 2 Ont. Dig. 4047.—*CAN.*

6121. Admissibility of parol evidence
—To prove identity of debt.]—*REYNOLDS v. O'BRIEN* (1847), 4 U. C. R. 221.—*CAN.*

p. ——— To connect second account
—As acknowledgment of first.]—*KALINDAS PANDUDAS v. LOTU* (1901), 1 L. R. 25 Bom. 330.—*IND.*

Sect. 8.—Acknowledgments in writing: Sub-sects. 7 & 8. Sect. 9: Sub-sect. 1, A. & B. (a).]

614. — To connect two letters as one acknowledgment.]—Parol evidence is admissible to show that a letter was written in answer to a former one, in order to read the two letters together that they may constitute an acknowledgment to take a debt out of the Statute of Limitations.—*McGUFFIE v. BURLEIGH* (1898), 78 L. T. 264; 14 T. L. R. 319.

SUB-SECT. 8.—STAMPS.

See, generally, REVENUE.

615. Necessity for stamp—Agreement stamp—Debt proved by other evidence.]—Under Lord Tenterden's Act [Statute of Frauds Amendment Act, 1828 (c. 14), s. 8], the following memorandum, "I acknowledge to owe M. £36, which I agree to pay him as soon as my circumstances will permit," is exempt from stamp duty, as a writing made necessary by that statute, provided it be put in for the mere purpose of barring the Statute of Limitations, the debt itself being proved by other evidence.—*MORRIS v. DIXON* (1836), 4 Ad. & El. 845; 2 Har. & W. 57; 6 Nev. & M. K. B. 438; 5 L. J. K. B. 155; 111 E. R. 1002.

Annotation:—Distd. Jones v. Ryder (1838), 4 M. & W. 32.

616. — — —.]—*TAYLOR v. STEELE*, No. 443, ante.

617. — Promissory note.] —(1) A promissory note, improperly stamped, is not admissible as a memorandum to take the case out of the Statute of Limitations, under Statute of Frauds Amendment Act, 1828 (c. 14), s. 8. That sect. applies only to instruments which might be stamped with an agreement stamp.

(2) A mere parol statement of an antecedent debt, without any new contract or consideration made within six years before action brought, does not constitute a sufficient cause of action to prevent the operation of the Statute of Limitations.—*JONES v. RYDER* (1838), 4 M. & W. 32; 1 Horn & H. 256; 7 L. J. Ex. 216; 150 E. R. 1331.

Annotations:—As to (1) Consd. Ex p. Wilson, Ex p. Wyman (1841), 1 Mont. D. & De. G. 586. *As to (2) Refd. Clark v. Alexander* (1844), 8 Scott, N. R. 147.

618. — — —.]—Debtor sent to one of the persons beneficially interested under the will of his creditor a promissory note stamped for the amount of the debt, with a letter referring to the note as being for the money due:—*Held*: the letter was not of itself a sufficient promise or acknowledgment to exclude the operation of the Statute of Limitations, & the note could not be received in evidence to show what the promise was, that being a direct & not a collateral purpose.—*PARMITER v. PARMITER* (1861), 3 De G. F. & J. 461; 30 L. J. Ch. 508; 3 L. T. 799; 45 E. R. 957, L. C.

619. — — —.]—In *assumpsit* the first count of the declaration was on a promissory note dated Dec. 7, 1845, made by deft. for payment of £500 & interest, on demand, to J. pltf.'s testator. The second count was on a similar note for £500, dated Jan. 20, 1846. The third count was for money lent by J. to deft., & for interest & money due from deft. to J. on an account stated. Pleas to the first & second counts: first, payment; secondly, that, after the making of the notes,

& before demand of the sums therein mentioned, or of any interest thereon, J. exonerated & discharged deft. from payment of the notes; thirdly, that, after the making of the notes, it was agreed between J. & deft., that the latter should purchase, with his own money, a piece of paper marked with a 10s. receipt stamp, & should write on it as follows: "Hull, Feb. 16, 1846. Received of R., deft., the sum of £1,080, being the interest & principal on two notes, dated Dec. 1845, & Jan. 1846, & in full of all demands," & that deft. should suffer J. to sign the same; & that such agreement & purchase of the piece of paper so stamped, & such writing on by deft., & permitting J. to sign the same, should be accepted by J. in full satisfaction & discharge of the causes of action. To the residue of the declaration; fourthly, *non assumpsit*; fifthly, payment; sixthly, the Statute of Limitations, 1623 (c. 16), & seventhly, a plea similar to the third. Replications, to the first & fifth pleas, denial of payment; to the second plea, *de injuria*; to the third & seventh pleas, that it was not agreed *modo et forma*; to the sixth plea, that the causes of action did accrue within six years. At the trial, it appeared from deft.'s answer to a bill of discovery, that, in the years 1835 & 1842, J. lent to deft. two sums of £500, upon the security of his promissory notes payable on demand, with interest. The interest was duly paid, & memoranda thereof indorsed by J. on the backs of the notes. At length, the backs of the notes being covered with these memoranda, it was arranged between J. & deft., that new promissory notes should be substituted, & accordingly deft. gave J., the notes on which this action was brought. In Feb. 1846, J. told deft. that he intended to give him the £1,000 secured by the promissory notes, & he wished to give deft. a release & discharge for the same & interest due thereon, & he directed deft. to write out a receipt for such £1,000 & interest, for him, J., to sign as a release & discharge; & thereupon deft. purchased a 10s. receipt stamp, & wrote thereon the receipt mentioned in the third plea; which J. signed, & delivered to deft., with the express object of releasing him from payment of the £1,000 & interest. No interest was afterwards applied for or paid. J. subsequently died, having bequeathed the notes in question to pltf. This action was commenced in Oct. 1850:—*Held*: (1) the transaction relating to the giving of the receipt did not amount to payment; (2) the transaction relating to the receipt was not evidence of part payment of the original debt for money lent, so as to take the case out of the Statute of Limitations, 1623 (c. 16), neither did the renewal of the notes render deft. liable as upon a new promise.

But even upon the supposition of its being a part payment, it was not such within the statute, for it must be a payment of a portion of the debt, accompanied by an acknowledgment, from which a promise may be inferred to pay the remainder. Deft. clearly intended to pay the whole debt. (*PARKE, B.*)—*FOSTER v. DAWBER* (1851), 6 Exch. 839; 20 L. J. Ex. 385; 17 L. T. O. S. 310; 155 E. R. 785.

Annotations:—As to (2) Consd. Turney v. Dodwell (1854), 3 E. & B. 136. *Refd. Morgan v. Rowlands* (1872), L. R. 7 Q. B. 493; *Re Somerset, Somerset v. Poulett*, [1894] 1 Ch. 231; *Fettes v. Robertson* (1921), 37 T. L. R. 581. *Generally, Mentd. Peace v. Hains* (1853), 11 Hare, 151; *Clay v. Turley* (1857), 27 L. J. Ex. 2; *Owens v. Pizey* (1862), 11 W. R. 21; *Cook v. Lister* (1863), 32 L. J. C. P.

PART II. SECT. 8, SUB-SECT. 8.

617i. Necessity for stamp—Promissory note.]—A note not properly

stamped cannot be used as an acknowledgment to take a case out of the Statute of Limitations.—*McKAY v. GRINLEY* (1871), 30 U. C. R. 54.—*CAN.*

617ii. —.]—*FATECHAND HARCHAND v. KISAN* (1894), 1 L. R. 18 Bom. 614.—*IND.*

121; *Abrey v. Crux* (1869), L. R. 5 C. P. 37; *Edwards v. Walters*, [1896] 2 Ch. 157; *Morris v. Baron*, [1918] A. C. 1.

See, also, No. 549, ante.

SECT. 9.—PART PAYMENT AND PAYMENT OF INTEREST.

SUB-SECT. 1.—PART PAYMENT OF PRINCIPAL.

A. In General.

620. Evidence of unqualified promise to pay.]—Payment on account of a debt is evidence of a general unqualified promise to pay so as to take the case out of the statute.—*BURLEIGH v. STOTT* (1828), 8 B. & C. 36; 2 Man. & Ry. K. B. 93; 6 L. J. O. S. K. B. 232; 108 E. R. 956; *sub nom.* *BURLEIGH v. PLATT*, Dan. & Ll. 53.

*Annotations:—**Reid. Manderston v. Robertson* (1829), 4 Man. & Ry. K. B. 440; *Pease v. Hirst* (1829), 5 Man. & Ry. K. B. 88; *Slater v. Lawson* (1830), 1 B. & Ad. 396; *Wyatt v. Hodson* (1832), 8 Bing. 309; *Channell v. Ditchburn* (1839), 5 M. & W. 494.

621. Payment of smaller on account of larger sum.]—(1) The meaning of part payment, to take a case out of Statute of Limitations, 1623 (c. 16), is payment of a smaller on account of a greater sum of money, due from the party making the payment to the party to whom it is made.

(2) The appropriation of such part payment of principal, or of payment of interest, to a particular debt, may be shown by any medium of proof, & does not require an express declaration by debtor, at the time of payment, to establish it; it may therefore be proved by previous or subsequent declarations of debtor; although the fact of the payment must be proved by independent evidence.—*WATERS v. TOMPKINS* (1835), 2 Cr. M. & R. 723; 1 Gale, 323; Tyr. & Gr. 137; 5 L. J. Ex. 61; 150 E. R. 306.

*Annotations:—**As to (1) Consd. Nash v. Hodgson* (1855), 6 De G. M. & G. 474. *Reid. Hodger v. Arch* (1854), 10 Exch. 333; *Turney v. Dodwell* (1854), 18 Jur. 187; *Goodwin v. Parton & Page* (1879), 41 L. T. 91. *As to (2) Consd. Bayley v. Ashton* (1840), 12 Ad. & El. 493; *Maghee v. O'Neil* (1841), 7 M. & W. 531. *Apld. Bevan v. Gething* (1842), 3 Q. B. 740. *Reid. Eastwood v. Saville* (1842), 9 M. & W. 615; *Baldon v. Walton* (1847), 1 Exch. 617; *Nash v. Hodgson* (1855), 6 De G. M. & G. 474. *Generally, Mentd. Edan v. Dudfield* (1841), 1 Q. B. 302.

B. Implied Promise to Pay Residue.

(a) Necessity for.

622. General rule.]—In order to take a case out of Statute of Limitations, 1623 (c. 16), by a part payment, it must appear that the payment was made on account of the debt for which the action is brought, & that it was made as part payment of a greater debt.

In order to take a case out of the Statute of Limitations, 1623 (c. 16), by part payment, it must appear, in the first place, that the payment

was made on account of a debt. Secondly it must appear that the payment was made on account of the debt for which the action is brought. But the case must go further; for it is necessary, in the third place, to show that the payment was made as part payment of a greater debt, because the principle upon which a part payment takes a case out of the statute is, that it admits a greater debt to be due at the time of part payment. Unless it amounts to an admission that more is due, it cannot operate as an admission of any still existing debt (*PARKE, B.*).—*TIPPETS v. HEANE* (1834), 1 Cr. M. & R. 252; 4 Tyr. 772; 3 L. J. Ex. 281; 149 E. R. 1074.

*Annotations:—**Distd. Evans v. Davies* (1836), 4 Ad. & El. 840. *Apld. Mills v. Fowkes* (1839), 5 Bing. N. C. 455. *Distd. Burn v. Boulton* (1846), 2 C. B. 476. *Apld. Davies v. Edwards* (1851), 7 Exch. 22. *Consd. Nash v. Hodgson* (1855), 6 De G. M. & G. 474. *Reid. Morgan v. Rowlands* (1872), 26 L. T. 855; *Goodwin v. Parton & Page* (1879), 41 L. T. 91; *Friend v. Young*, [1897] 2 Ch. 421.

623. —.]—Where a debtor owes his creditor some debts from a period longer than six years, & others from a period within six years, & pays a sum without appropriating it to any particular debt, such payment is not a payment on account, to take out of Statute of Limitations, 1623 (c. 16), the debts due longer than six years: but the creditor may at any time apply such payment to the debts due longer than six years.

The law has been correctly laid down that the payment must expressly be made in discharge of part of a larger debt, which accrued six years or more before payment (*TINDAL, C.J.*).—*MILLS v. FOWKES* (1839), 5 Bing. N. C. 455; 2 Arn. 62; 7 Scott, 444; 8 L. J. C. P. 276; 3 Jur. 406; 132 E. R. 1174.

*Annotations:—**Consd. Waller v. Lacy* (1840), 1 Man. & G. 54; *Nash v. Hodgson* (1855), 6 De G. M. & G. 474. *Distd. Friend v. Young*, [1897] 2 Ch. 421. *Reid. Waugh v. Cope* (1840), 6 M. & W. 824; *Courtenay v. Williams* (1844), 3 Hare, 539; *Re Rainforth, Gwynn v. Gwynn* (1879), 48 L. J. Ch. 725; *Dingle v. Coppen, Coppen v. Dingle*, 1 Ch. 726; *Smith v. Betty*, [1903] 2 K. B. 317. *Mentd. City Discount Co. v. McLean* (1874), L. R. 9 C. P. 692; *Seymour v. Pickett*, [1905] 1 K. B. 715.

624. —.]—If a payment may have been made by a party paying to the credit of an account due to himself, or with the intention of satisfying the whole of the demand, against him, it is not sufficient to bar Statute of Limitations; there must be a distinct admission of an existing debt, of which the payment was a payment in part.

Pltf., an attorney, had transacted professional business for *deft.*, in 1827, & several subsequent years. In July, 1832, *pltf.*, as the solr. concerned on a lunacy inquiry, wrote to *deft.*, who had attended the inquiry as a witness, to know what his expenses were on that occasion. *Deft.*, in answer, told *pltf.* to allow him what was usual, & place the same to his, *deft.*'s, account. In Mar. 1833, *pltf.* wrote to *deft.*, informing him, that

PART II. SECT. 9, SUB-SECT. 1.—A.

621 i. Payment of smaller on account of larger sum.]—*STARK v. SOMERVILLE* (1918), 41 O. L. R. 591; 13 O. W. N. 353; 41 D. L. R. 496.—CAN.

g. Payment on account of promissory note.]—*SLATER v. MOSGROVE* (1881), 29 Gr. 392.—CAN.

r. —.]—*ASHDOWN v. MONTGOMERY* (1892), 8 Man. L. R. 520.—CAN.

t. —.]—*YUILL v. HOLLINGSWORTH* (Sask.), [1923] 4 D. L. R. 591; 3 W. W. R. 1003.—CAN.

a. After action commenced.]—Part payment of a note after the commencement of an action upon it will not support the action in answer to a plea that the cause of action did

not accrue within six years.—*WALSH v. HERMAN* (1908), 13 B. C. R. 314.—CAN.

b. After debt barred—Debt revived.]—*GOODACRE & SONS v. SIMPSON* (1910), 15 B. C. R. 492.—CAN.

c. —.]—A part payment, made even after the expiration of the six years, is sufficient in general to revive the cause of action.—*SAWYER-MASSEY CO. v. WEDDER* (1912), 22 W. L. R. 150; 6 D. L. R. 305; 5 Alta. L. R. 362; 2 W. W. R. 965.—CAN.

d. Payment must be voluntary.]—*VIENNE v. FRASLIN*, [1921] 3 W. W. R. 600.—CAN.

PART II. SECT. 9, SUB-SECT. 1.—B. (a).

622 i. General rule.]—*McKEEN v.*

McDOUGALL (1858), 2 Thom. 403.—CAN.

622 ii. —.]—*BOULTBEE v. BURKE* (1885), 9 O. R. 80.—CAN.

622 iii. —.]—*QUAKER OATS CO. v. DENIS & RACICOT* (1915), 19 D. L. R. 327; 31 W. L. R. 579; 7 W. W. R. 1008; *affd.*, 8 W. W. R. 877.—CAN.

622 iv. —.]—*LINDSAY v. MAGUIRE*, [1899] 2 I. R. 554.—IR.

622 v. —.]—A part payment to take a debt out of the Statute of Limitations must amount to an acknowledgment of that debt, from which a promise to pay the residue must be implied in fact & not merely in law.—*GILKISON v. TOTHILL* (1913), 32 N. Z. L. R. 1064.—N.Z.

622 vi. —.]—*Re WEBSTER'S ESTATE* (1891), 12 N. L. R. 129.—S. AF.

take the debts out of the operation of the Statutes of Limitation, & appct.'s right to prove in the administration for the balance due to him was therefore barred.—*Re LEE, Ex p. GRUNWALDT*, [1920] 2 K. B. 200; 89 L. J. K. B. 364; 123 L. T. 31; [1918-19] B. & C. R. 287.

Annotations:—Mentd. Re A Bankruptcy Notice, [1924] 2 Ch. 76; *Huddersfield Fine Worsteds v. Todd* (1925), 134 L. T. 82.

(b) *Circumstances Supporting Implication.*

i. *Non-Existence of Other Debts.*

629. Evidence of part payment.]—TIPPETS v. HEANE, No. 622, *ante*.

630. —.—In *assumpsit* on a promissory note bearing interest, proof that debt., being sent to by pltf. for money, paid £1, & said, "This puts us straight for last year's interest, all but 18s.; some day next week I will bring that up," is sufficient answer to a plea of Statute of Limitations, 1623 (c. 16), no evidence being given of any other debt due from debt. to pltf.—*EVANS v. DAVIES* (1836), 4 Ad. & El. 840; 2 Har. & W. 15; 6 L. J. K. B. 268; 111 E. R. 1000.

631. —.—A. is indebted to B. in a sum of £1656. A.'s creditors, among whom is B., entered into a composition with him & agreed to take 5s. in the pound upon their debt. A. paid B. 2s. 6d. in the pound. B. then became bkpt. Six years elapsed since the last acknowledgment of debt by A. Upon the assignees of B. applying to A. for a settlement of the original debt, A. inclosed them a cheque for £100 in the following note: "Inclosed I send a cheque for £100 for which have the goodness to return receipt as at foot. The balance shall be arranged the earliest possible, & which I expect will be very shortly." The words & figures of the receipt were: "Received from A. £100 being a payment on account of a composition of 5s. in the pound, upon the balance of account owing by A. to the estate of B." Upon the question, whether the payment of the £100 was to be considered a part payment in respect of the original debt, & so take it out of Statute of Limitations, 1623 (c. 16), or merely as expressed in the letter, a part payment of the balance due under the composition:—*Held*: the part payment must have reference to the only debt then subsisting, namely, the original debt, subject to the composition, which on account of the bkpcy. having supervened, was thereby at an end.

Qu.: without the circumstance of part payment, would the acknowledgment & promise in the letter of Feb. 18, have been sufficient to have taken the original debt out of the statute.—*Re WOTHER-SPON, Ex p. BATESON* (1840), 1 Mont. D. & De G. 289; 4 Jur. 994, Ct. of R.

ii. *Ascertained Debt.*

632. Payment must be on account of debt sued on—Onus of proof on payee.]—*HOLME v. GREEN*, No. 364, *ante*.

633. —.—In an action of *assumpsit*, which contained several demands, debt. pleaded, except as to one, a set-off & Statute of Limitations, 1623 (c. 16). Pltf., in order to take the case out of the statute, put in evidence the particulars of set-off, containing an item, "Paid to pltf. £15":—*Held*: the particulars were no evidence in support

of debt.'s plea of set-off.—*BURKITT v. BLANSHARD* (1848), 3 Exch. 89; 18 L. J. Ex. 34; 12 L. T. O. S. 221; 154 E. R. 768.

634. —.—TIPPETS v. HEANE, No. 622, *ante*.

635. —.—WAUGH v. COPE, No. 624, *ante*.

(c) *Rebuttal of Implication.*

636. Refusal to pay remainder.]—WAINMAN v. KYNMAN, No. 625, *ante*.

637. Words qualifying payment—Used at time of payment.]—In an action for money lent debt. pleaded Statute of Limitations, 1623 (c. 16), & at the trial pltf. proved the transmission of the money to debt., & the payment by him of a half-yearly sum for interest up to a certain time, & produced an answer to a bill in Chancery, in which debt. admitted having paid the same half-yearly sum within six years, but asserted that it was paid by way of annuity & not of interest. Assuming that an acknowledgment of a payment must be in writing, & signed, under Statute of Frauds Amendment Act, 1828 (c. 14), s. 1, in order to bar the operation of Statute of Limitations, 1623 (c. 16):—*Held*: the evidence for pltf. was insufficient to go to the jury; the construction of the admission in the answer was for the ct., & the whole of it should have been left to the jury; but they might believe the fact of the payments having been made half-yearly, but reject the residue, & infer from the other evidence that the payments were really made in respect of interest.

Words used at the time of making a payment qualify it; but it is for the jury to judge of the truth of a statement accompanying the admission of a previous payment.—*BAILDON v. WALTON* (1847), 1 Exch. 617; 17 L. J. Ex. 357; 154 E. R. 262, Ex. Ch.

638. Payment by trustee in bankruptcy.]—*DAVIES v. EDWARDS*, No. 626, *ante*.

639. —.—The insertion of a debt in the schedule to a deed of inspectorship executed for the purpose of distributing the estate of a debtor is not, although the schedule be verified by the affidavit of debtor, a sufficient acknowledgment to take the debt out of the operation of Statute of Limitations, 1623 (c. 16), so as to entitle the creditor to prove for the debt under a subsequent distribution of the debtor's estate in bkpcy. Nor is the payment by the inspectors of a dividend upon the debt a sufficient part-payment for that purpose.—*Re LEVEY, Ex p. TOPPING* (1865), 4 De G. J. & Sm. 551; 34 L. J. Bcy. 44; 12 L. T. 787; 11 Jur. N. S. 210; 13 W. R. 1025; 46 E. R. 1033, L. C.

Annotations:—Apld. Taylor v. Hollard, [1902] 1 K. B. 676. *Mentd. Lacey v. Hill, Leney v. Hill* (1872), 8 Ch. App. 441; *Nanson v. Gordon* (1876), 1 App. Cas. 195; *Re Wright, Ex p. Sheen* (1877), 6 Ch. D. 235; *Re Hind, Ex p. Hind* (1890), 62 L. T. 327; *Re Head, Ex p. Head*, [1894] 1 Q. B. 638.

640. Intention to pay whole debt.]—*LINSELL v. BONSOR*, No. 580, *ante*.

641. —.—WAUGH v. COPE, No. 624, *ante*.

642. —.—*FOSTER v. DAWBER*, No. 619, *ante*.

C. *Effect of Payment of Principal on Claim for Interest.*

643. Payment of principal coupled with refusal to pay interest—Claim to interest not revived.]—Where a party revives a debt barred by Statute

debt.—*NEWMAN v. BLACKBURN* (1868), 5 Nfld. L. R. 249.—*NFLD.*

PART II. SECT. 9, SUB-SECT. 1.—
B. (b) ii.

634i. Payment must be on account of debt sued on.]—*DEANE v. CITY BANK OF SYDNEY* (1918), 25 C. L. R. 215; 35 N. S. W. W. N. 118.—*AUS.*

634ii. —.—In order to take a case out of the operation of the Statute of Limitations by a part payment, it must appear that the payment was made on account of the debt for which the action is brought, & that it was made as part payment of a greater

PART II. SECT. 9, SUB-SECT. 1.—C.

643i. Payment of principal coupled with refusal to pay interest—Claim to

Sect. 9.—Part payment and payment of interest:
Sub-sect. 1, C., D., E. & F. (a), (b) & (c) i. & ii.]

of Limitations, 1623 (c. 16), by paying it into ct., but at the same time refuses to pay interest, such payment of the principal does not revive the claim for interest.—*COLLYER v. WILLOCK* (1827), 4 Bing. 313; 12 Moore, C. P. 557; 5 L. J. O. S. C. P. 181; 130 E. R. 788.

Annotation:—*Refd.* Bealy v. Greenslade (1831), 1 L. J. Ex. 1.

D. Payment in Court.

644. Rest of debt not taken out of statute.]—

Assumpsit for goods sold & delivered, & on the money counts. Pleas, general issue, & Statute of Limitations, 1623 (c. 16). Deft. paid money into ct. generally:—*Held*: such payment did not take the case out of the statute.—*LONG v. GREVILLE* (1824), 3 B. & C. 10; 4 Dow. & Ry. K. B. 632; 2 L. J. O. S. K. B. 205; 107 E. R. 638.

Annotation:—*Mentd.* Ravenscroft v. Wise (1834), 1 Cr. M. & R. 203.

645. —.]—Payment of money into ct. on a count on a promissory note payable by instalments, is only an admission by deft. that money to the amount paid in was due on the promissory note: it does not bar Statute of Limitations, 1623 (c. 16), as to a further sum claimed to be due on the same note.—*REID v. DICKONS* (1833), 5 B. & Ad. 499; 2 Nev. & M. K. B. 369; 110 E. R. 875.

Annotations:—*Mentd.* Shearwood v. Hay, Wills v. Lang- (1836), 5 Ad. & El. 383; *Fischer v. Aldi* (1838), 7 L. J. Ex. 229; *Dolby v. Iles* (1840), 3 Per. & Dav. 287.

646. Payment coupled with denial of interest due.]—*COLLYER v. WILLOCK*, No. 643, *ante*.

E. Payments under or on Eve of Bankruptcy.

647. Payments under bankruptcy—Payment by order of bankruptcy court.]—*DAVIES v. EDWARDS*, No. 626, *ante*.

648. —.]—*Re LEVEY, Ex p. TOPPING*, No. 639, *ante*.

649. Payment on eve of bankruptcy—Account treated as subsisting debt.]—A debtor unable to pay his debts as they became due from his own money paid within three months of his being adjudged bkpt. part of a debt barred by Statute of Limitations, with the object of renewing the debt & enabling the creditor to prove in the bkpcy. for the balance due. The debt up to the date of such payment on account had always been treated by debtor & creditor as a subsisting debt, & one which it was intended should be ultimately paid:—*Held*: there was a sufficient part-payment to take the debt out of the operation of the Statute of Limitations.—*Re LANE, Ex p. GAZE* (1889), 23 Q. B. D. 74; 58 L. J. Q. B. 373; 61 L. T. 54; 37 W. R. 671; 6 Morr. 143.

F. Mode of Payment.

(a) In General.

650. Money payment unnecessary.]—To constitute a payment of interest sufficient to take a debt out of the operation of Statute of Limitations, 1623 (c. 16), it is not essential that money should

actually pass between debtor & creditor. After a debt due to pltf. from his son had been barred by the statute, pltf., his son, & his son's wife, had an interview at which the interest due was calculated. Pltf.'s son then put his hand into his pocket, as if to get out the money to pay it. Pltf. stopped him, & writing a receipt for the interest, gave it to his son's wife, saying that he would make her a present of the money. No money actually passed between the parties:—*Held*: this transaction was a sufficient payment to take the debt out of Statute of Limitations, 1623 (c. 16).—*MABER v. MABER* (1867), L. R. 2 Exch. 153; 36 L. J. Ex. 70; 16 L. T. 26.

651. Maintenance of child.]—In 1833, pltf. married, at which time his wife was the holder of a promissory note made by deft., & which had been given to her whilst sole. In 1834, pltf.'s wife died, after giving birth to a child. It was then agreed between pltf., who claimed the note as the representative of his late wife, & deft., that the latter should maintain the child, & that in consideration thereof deft. should receive the rents of certain cottages which had been the property of pltf.'s wife, & that he should also retain the interest to become payable on the note. In 1839, deft. signed an indorsement on the note, to the effect that all interest on the note was then paid. Deft. continued to maintain the child to

its death in 1848. In 1853, letters of tion were granted to pltf.; & subsequently, in the same year, pltf. brought the action on the note:—*Held*: agreement between pltf. & deft., that the future maintenance of the child should be taken in part payment of the interest upon the note, & which had been acted upon within six years before action brought was a sufficient payment of interest within the proviso of Statute of Frauds Amendment Act, 1828 (c. 14), s. 2.—*BODGER v. ARCH* (1854), 10 Exch. 333; 2 C. L. R. 1491; 24 L. J. Ex. 19; 24 L. T. O. S. 96; 156 E. R. 472.

Annotations:—*Apld.* Amos v. Smith (1862), 1 H. & C. 238. *Refd.* Maber v. Maber (1867), L. R. 2 Exch. 153. *Mentd.* Baker v. Blaker (1886), 55 L. T. 723; *Kregor v. Hollins* (1913), 109 L. T. 225.

(b) Delivery of Goods.

652. Delivery to creditor—Agreement to accept as part payment.]—If the parties to a bill of exchange agree that goods shall be supplied in part payment, & they are supplied & taken accordingly, that is part payment, so as to prevent the operation of Statute of Limitations.—*HART v. NASH* (1835), 2 Cr. M. & R. 337; 1 Gale, 171; 5 Tyr. 955; 4 L. J. Ex. 130, n.; 150 E. R. 146.

Annotations:—*Foll.* Hooper v. Stephens (1835), 4 Ad. & El. 71. *Dist.* Walker v. Nussey (1847), 16 L. J. Ex. 120. *Refd.* Blair v. Ormond (1851), 17 Q. B. 423. *Mentd.* R. v. St. Michael's, Southampton (1856), 6 E. & B. 807; *M'Kune v. Joynson* (1858), 5 C. B. N. S. 218.

653. —.]—Where it has been agreed between debtor & creditor that the latter shall receive goods in reduction of his demand, the delivery of such goods operates as a payment within Statute of Frauds Amendment Act, 1828 (c. 14), s. 1, to bar Statute of Limitations, 1623 (c. 16).—*HOOPER v. STEPHENS* (1835), 4 Ad. & El. 71; 1

interest not revived.]—*MAKUNDI KUAR v. BALKISHEN DAS* (1880), 1 L. R. 3 All. 328.—IND.

PART II. SECT. 9, SUB-SECT. 1.—E.

e. Dividends paid by assignee under assignment for benefit of creditors.]—A dividend paid by an assignee, under the usual voluntary assignment by a debtor for the benefit of his creditors, is not such a part payment as will take a debt, otherwise barred,

out of the Statute of Limitations.—*BIRKETT v. BISONETTE* (1907), 15 O. L. R. 93; 10 O. W. R. 171.—CAN.

f. —.]—*SPRIGGS v. SINCLAIR* (1923), 16 Sask. L. R. 297; [1923] 1 W. W. R. 1168.—CAN.

PART II. SECT. 9, SUB-SECT. 1.—F. (a).

650 i. Money payment unnecessary.]—A payment may be made not only

in the current coin of the realm, but in any other medium that the creditor may choose to accept.—*RAGHO SHITARAM v. HARI* (1900), 1 L. R. 24 Bom. 619.—IND.

PART II. SECT. 9, SUB-SECT. 1.—F. (b).

652 i. Delivery to creditor—Agreement to accept as part payment.]—*FERMIN v. PUBLIC TRUSTEE* (1889), 7 N. Z. L. R. 277.—N.Z.

Har. & W. 480; 111 E. R. 714; *sub nom.* COOPER v. STEVENS, 5 Nev. & M. K. B. 635; 5 L. J. K. B. 4.

Annotations:—*Reid.* Blair v. Ormond (1851), 17 Q. B. 423. *Mentd.* R. v. St. Michael's, Southampton (1856), 6 E. & B. 807.

654. ———.]—An open account between two tradesmen for goods sold by each to the other, without any agreement that the goods delivered on the one side shall be considered as payment for those delivered on the other, does not constitute such an "account as concerns the trade of merchandise between merchant & merchant" within the exception of Statute of Limitations, 1623 (c. 16), s. 3. Since Lord Tenterden's Act (Statute of Frauds Amendment Act, 1828 (c. 14), s. 1), the existence of items, within six years, in an open account, will not operate to take the previous portion of the account out of the Statute of Limitations, 1623 (c. 16).—COTTAM v. PART-
RIDGE (1842), 4 Man. & G. 271; 4 Scott, N. R. 819; 11 L. J. C. P. 161; 134 E. R. 111.

Annotations:—*Consd.* Friend v. Young, [1897] 2 Ch. 421. *Reid.* Tatam v. Williams (1844), 3 Hare, 347.

655. ———.]—COLLINSON v. MARGESSON, No. 561, *ante*.

656. Delivery to agent of creditor.—A., having authority to collect the debts of a firm, agreed with B., who was indebted to the firm, to purchase goods from him, & to allow him the amount of the purchase money in his account with the firm, & drew a cheque including that amount, & delivered the same to the bankers of the firm. The greater part of B.'s debt to the firm was incurred beyond the period of the Statute of Limitations:—*Held*: there was a sufficient evidence of a part payment to prevent the operation of the statute.—PEARCE v. SELBY (1842), 6 Jur. 896.

(c) Negotiable Instruments.

i. In General.

See Statute of Frauds Amendment Act, 1828 (c. 14), s. 3.

657. Bill of exchange.—Where a bill of exchange has once been so delivered in payment on account of a debt as to raise an implication of a promise to pay the balance, Statute of Limitations is answered, as from the time of such delivery, whatever afterwards becomes of the bill: the promise implied from such delivery not being, within the meaning of Statute of Frauds Amendment Act, 1828 (c. 14), s. 1, "an acknowledgment or promise by words only," & the word "payment" in the proviso in that section being used in the popular sense, so as to include a giving & taking of a negotiable instrument on account of a debt, as well as a giving & taking of it in satisfaction of the debt.—TURNER v. DODWELL (1854), 3 E. & B. 136; 2 C. L. R. 666; 23 L. J. Q. B. 137; 23 L. T. O. S. 38; 18 Jur. 187; 118 E. R. 1091.

Annotations:—*Apprvd.* Marreco v. Richardson, [1908] K. B. 584. *Reid.* Garden v. Bruce (1868), L. R. 3 C. P. 300. *Mentd.* R. v. St. Michael's, Southampton (1856), 6 E. & B. 807.

658. ———.]—An account of £1,000 was sent in for goods delivered, other goods were afterwards supplied, a bill of exchange for £375 was then given generally on account, & more goods were

subsequently supplied:—*Held*: the bill of exchange took the whole account out of Statute of Limitations.—CURLEWIS v. MORNINGTON (EARL) (1857), 5 W. R. 491.

659. Cheque.—Deft., being indebted to his solr. in respect of a bill of costs, handed him on May 10, 1900, a cheque in part payment of the bill; at the same interview it was verbally agreed between the parties that the cheque should not be presented for payment before June 20. On June 20 the cheque was presented for payment at deft.'s bankers, & was duly paid. On June 18, 1906, the exors. of the solr., who had meanwhile died, issued the writ in the present action to recover the balance of the debt upon the bill of costs:—*Held*: the date of part payment of the debt was the date when the cheque was handed by deft. to his creditor, & not the date when the cheque was in fact paid by virtue of the special arrangement; therefore, the only time at which a promise to pay the balance of the debt could be implied from the circumstances under which part payment was made was May 10, 1900, & that being more than six years before the issue of the writ, a plea of Statute of Limitations, 1623 (c. 16), afforded a good defence to the action.—MARRECO v. RICHARDSON, [1908] 2 K. B. 584; 77 L. J. K. B. 859; 99 L. T. 486; 24 T. L. R. 624; 52 Sol. Jo. 516, C. A.

660. Renewal of promissory note.—In exchange for cancelled notes.—FOSTER v. DAWBER, No. 619, *ante*.

See, also, Sub-sect. 1, F. (b), *ante*.

ii. From What Time Operative.

661. From time of delivery.—A. & B. being joint owners of a ship, & indebted to C. for repairs, B. gave two bills to C., which were dishonoured, & afterwards sold his interest, & became bkpt. A. proved under B.'s commission for £3,000, & in 1822 drew on his assignee a bill of exchange payable to C., which the assignee accepted, & which A. then delivered to C. on account of the sum due to him for the repairs & on the bills. It was agreed that payment of this latter bill should not be demanded of the acceptor until he should have funds on account of dividends of B.'s estate. The bill was paid in Mar. 1827. In 1830, C. brought an action against A. for the sum remaining due on account of repairs, & A. pleaded Statute of Limitations:—*Held*: the drawing of the bill, supposing it to be evidence of a fresh promise on the original demand, was only evidence of a promise at the time when it was drawn, & not when it was paid, & therefore did not take the case out of the statute.—GOWAN v. FORSTER (1832), 3 B. & Ad. 507; 110 E. R. 184.

Annotations:—*Apprvd.* Marreco v. Richardson, [1908] 2 K. B. 584. *Reid.* *Re* Harries (1844), 13 M. & W. 3; Turner v. Dodwell (1854), 3 E. & B. 136; Francis v. Hawkesley (1859), 1 E. & E. 1052; Garden v. Bruce (1868), L. R. 3 C. P. 300.

662. ———.]—Where debtor draws a bill of exchange, to be applied in part payment of the debt, & the bill is paid when due by the drawee to creditor, it operates as part payment, to defeat Statute of Limitations, only from the time of the

PART II. SECT. 9, SUB-SECT. 1.— F. (c) i.

659 i. Cheque.—KEDAR NATH MITRA v. DINABANDHU SAHA (1915), 1 L. R. 42 Calo. 1043.—IND.

g. Order on third party not accepted by him.—Acceptance & payments by son.]—Where, in a settlement of accounts between pltf. & deft., the

former took as part payment an order drawn by the latter upon a third party, which was not accepted by him, but by his son, who made payments under it:—*Held*: not sufficient payment by deft. to take the case out of the Statute of Limitations.—SMYTH v. McDONALD (1859), 4 N. S. R. (Coch.) 86.—CAN.

h. ——— *Not taken as payment.*—To take a case out of the Statute of

Limitations pltf. relied on a written order given by deft. to pltf.'s agent on a third party, to be applied to payment of deft., but which order was never accepted or paid by the party upon whom it was drawn:—*Held*: the order did not operate as an acknowledgment, the evidence showing that it was not taken as payment.—FAULKNER v. ARCHIBALD (1889), 21 N. S. R. 294.—CAN.

Sect. 9.—Part
Sub-sect. 1, F. (c) ii., d
sect. 2, A., B., C. & D.]

delivery of the bill by debtor, not from the time of its payment.

Qu.: whether a part payment by an agent operates as an acknowledgment so as to take a case out of the Statute of Limitations.—**IRVING v. VEITCH** (1837), 3 M. & W. 90; Murp. & H. 313; 7 L. J. Ex. 25; 150 E. R. 1069.

Annotations:—**Consd.** Hartland v. Jukes (1862), 7 L. T. 792. **Apld.** *Re* Stock, *Ex p.* Amos (1896), 66 L. J. Q. B. 146. **Folld.** Marreco v. Richardson (1908), 77 L. J. K. B. 859. **Refd.** Bateman v. Pinder (1842), 2 Gal. & Dav. 790; *Re* Harries (1844), 13 M. & W. 3; Turney v. Dodwell (1854), 3 E. & B. 136; Garden v. Bruce (1868), L. R. 3 C. P. 300. **Mentd.** Burgh v. Legge (1839), 5 M. & W. 418; Baker v. Heard (1850), 5 Exch. 959; Evans v. Nicholson (1875), 32 L. T. 778; Camillo Tank S.S. Co. v. Alexandria Engineering Works (1921), 38 T. L. R. 134.

663. —.—.]—**TURNEY v. DODWELL**, No. 657, *ante*.

664. —.—.]—**Agreement to delay presentation.**—**MARRECO v. RICHARDSON**, No. 659, *ante*.

(d) Striking a Balance.

665. Balance must be struck.—A. occupied a house & land under B., at the rent of £16 a year, & A., at B.'s request, entered into his employment as a farming bailiff, & to perform other services, in the place of another person who had been employed by A., & had been paid 12s. a week. A. continued in B.'s service for more than twelve years, but there was no payment of rent on the one hand or of wages on the other. In an action brought by A., to recover wages for twelve years, deducting the rent:—*Held*: this was not such an open account as would take the case out of the Statute of Limitations since Statute of Frauds Amendment Act, 1828 (c. 14); but that there must be a part payment in cash, or what is equivalent to it, to have that effect.—**WILLIAMS v. GRIFFITHS** (1835), 2 Cr. M. & R. 45; 1 Gale, 65; 5 Tyr. 748; 4 L. J. Ex. 129; 150 E. R. 19.

Annotations:—**Apld.** Mills v. Fowkes (1839), 5 Bing. N. C. 455. **Consd.** Waller v. Lacy (1840), 1 Man. & G. 54. **Refd.** Cottam v. Partridge (1842), 4 Scott, N. R. 819.

666. —.—.]—**COTTAM v. PARTRIDGE**, No. 654, *ante*.

667. —.—.]—Where A. has an account against B. some of the items of which are more than six years old, & B. has a cross account against A. & they meet & go through both accounts & a balance is struck in A.'s favour, this amounts to an agreement to set off B.'s claim against the earlier items of A.'s, out of which arises a new consideration for the payment of the balance; & takes the case out of the operation of the Statute of Limitations.—**ASHBY v. JAMES** (1843), 11 M. & W. 542; 12 L. J. Ex. 295; 152 E. R. 920; *sub nom.* **ASHLEY v. JAMES**, 1 L. T. O. S. 170.

Annotations:—**Distd.** Clark v. Alexander (1844), 8 Scott, N. R. 147. **Consd.** Pott v. Clegg (1847), 16 M. & W. 321. **Refd.** Worthington v. Grimsditch (1845), 7 Q. B. 479; Callander v. Howard (1850), 10 C. B. 290; Cawley v. Furnell (1851), 15 Jur. 908; Amos v. Smith (1862), 1 H. & C. 238; Brenan v. Crawley (1868), 16 W. R. 754.

668. —.—.]—**HINSON v. BOYSON** (1843), 1 L. T. O. S. 107.

669. —.—.]—**CLARK v. ALEXANDER**, No. 408, *ante*.

PART II. SECT. 9, SUB-SECT. 1.—
F. (d).

k. Whether sufficient.—Mere striking of a balance as between the parties does not constitute an account stated to take the case out of the Statute of Limitations.—**MCFATRIDGE v. HUNTER** (1878), 12 N. S. R. (3 R. & C.) 289.—**CAN.**

l. —.—.]—**STEWART v. GAGE** (1887),

13 O. R. 458.—**CAN.**

PART II. SECT. 9, SUB-SECT. 2.—A.

673 i. Amounts to acknowledgment of debt.—**VANWART v. ROBERTS** (1847), 3 Kerr, 572.—**CAN.**

673 ii. —.—.]—**NICKLE v. KINGSTON & PEMBROKE RY. CO.** (1906), 12 O. L. R. 349; 8 O. W. R. 158.—**CAN.**

670. —.—.]—Where it appeared that the course of dealing between master & steward had been to allow the steward to retain his salary from time to time out of money in his hands, the steward was allowed after the master's death to claim in account his salary for twenty years, Statute of Limitations being held not to apply to such a claim.—*Re* **HAWKINS, HAWKINS v. HAWKINS** (1879), 28 W. R. 240.

671. Running account.—A running account between a solr. & another person is within the exception of Statute of Limitations, & the debt on the balance is proveable.—*Re* **SEABER, Ex p. SEABER** (1836), 1 Deac. 543; 2 Mont. & A. 588; 5 L. J. Bcy. 42.

672. —.—.]—Bkpt. had been in the habit for a long course of years of making payments & receiving moneys for petitioner, no account of which had been rendered by bkpt.; but the account was extracted from his books after his bkpcy. It did not appear, however, that for the last six years he had made any payment to the petitioner, or had received any money for him, but that the only transaction, during that period, was an actual payment made by him for petitioner of the drainage tax:—*Held*: such payment was evidence of a running account between the parties so as to take the case out of Statute of Limitations.—*Re* **SEABER, Ex p. PEACHY** (1836), 1 Deac. 551.

G. By and To Whom Made.

See Sub-sect. 3, *post*.

H. Proof of Payment.

See Sub-sect. 4, *post*.

I. Appropriation.

See Sub-sect. 5, *post*.

SUB-SECT. 2.—PAYMENT OF INTEREST.

A. In General.

673. Amounts to acknowledgment of debt.—The payment, within six years, of interest due upon a note beyond six years, where the note remains in the hands of the payee, is sufficient to take the case out of Statute of Limitations.—**BEALY v. GREENSLADE** (1831), 2 Cr. & J. 61; 2 Tyr. 121; 1 L. J. Ex. 1; 149 E. R. 26.

Annotation:—**Refd.** Hollis v. Palmer (1836), 5 L. J. C. P. 264.

674. —.—.]—Payment of interest upon a promissory note payable on demand, is sufficient to take the case out of Statute of Limitations, although there be no independent evidence that any demand of payment of the note has been made.—**BAMFIELD v. TUPPER** (1851), 7 Exch. 27; 155 E. R. 841; *sub nom.* **BRADFIELD v. TUPPER**, 21 L. J. Ex. 6; 18 L. T. O. S. 78.

Annotations:—**Consd.** *Re* Rutherford, Brown v. Rutherford (1880), 14 Ch. D. 687. **Refd.** Nash v. Hodgson (1855), 6 De G. M. & G. 474.

675. —.—.]—Testator devised certain estates to trustees for the payment of his debts, & appointed the same trustees his exors., & devised other estates

673 iii. —.—.]—**SUKHAMONI CHOWDHURI v. ISHAN CHUNDER ROY** (1898), 1 L. R. 25 Calc. 844; L. R. 25 Ind. App. 95; 2 C. W. N. 402.—**IND.**

673 iv. —.—.]—**MUHAMMAD ABDULLA KHAN v. BANK INSTALMENT CO., LTD.** (1909), 1 L. R. 81 All. 495.—**IND.**

673 v. —.—.]—*Re* **KINGSTON'S (EARL) ESTATE** (1869), 3 I. R. Eq. 485.—**IR.**

in various portions, some to the same trustees for the separate use of married women for life with remainders over, others to devisees in fee, & others to devisees for life with remainders over in tail, & of some of which estates testator created terms for raising specific sums of money, & others he charged with legacies & annuities. Testator died in Jan. 1843. On a bill filed in Aug. 1849, by the payee of a promissory note made by testator, on which it was proved that interest had been paid by the exors. up to 1847, for payment of the note out of the real as well as the personal estate, against the exors. & trustees, some of whom were insolvent, against the residuary legatees who had received payments on account of their residuary shares, & against the parties beneficially interested in the real estate, of whom some set up Statute of Limitations in bar of the demand, some omitted to do so, & others were out of the jurisdiction:—*Held*: (1) payment of interest is an acknowledgment of a debt; & upon a general acknowledgment of a debt where nothing is said to prevent it, a general promise to pay is to be implied: & such an acknowledgment made by a party filling the two characters of beneficial devisee & exor., will be attributed to both characters & not to one only, for the moral obligation does not attach more to one character than to the other. But it is otherwise where the characters held by the party are entirely distinct, as where he is personally liable as debtor, & is answerable also in the character of exor. or trustee of another; for he then represents two persons, & the question in such a case is by whom the promise is made, & not what is its extent or effect.

(2) The payment of interest of a debt of testator by his exors., they being also trustees of his real estate not subjected by the will to debts, did not necessarily keep the debt alive as against such real estate, for, although the exors. & trustees were the same persons, they filled different characters; & where the payment was made by them in the character of exors. only, the real estate was not affected by it.

(3) The creditor was entitled to a decree as against the parties beneficially interested in the real estate who had omitted to claim the benefit of the Statute of Limitations.—*FORDHAM v. WALLIS* (1853), 10 Hare, 217; 22 L. J. Ch. 548; 21 L. T. O. S. 190; 17 Jur. 228; 1 W. R. 118; 68 E. R. 905.

Annotations:—As to (1) *Consd.* *Re Hollingshead*, *Hollingshead v. Webster* (1888), 37 Ch. D. 651. *Refd.* *Roddam v. Morley* (1857), 1 De G. & J. 1; *Pears v. Laing* (1871), L. R. 12 Eq. 41; *Re Macdonald*, *Dick v. Fraser*, [1897] 2 Ch. 181. As to (2) *Refd.* *Coope v. Cresswell* (1866), L. R. 2 Eq. 106; *Astbury v. Astbury*, [1898] 2 Ch. 111. As to (3) *Refd.* *Re Marsden*, *Bowden v. Layland*, *Gibbs v. Layland* (1884), 26 Ch. D. 783. *Generally*, *Mentd.* *Briggs v. Wilson* (1854), 5 De G. M. & G. 12; *Ridgway v. Newstead* (1860), 2 Giff. 492; *Hunter v. Young* (1879), 4 Ex. D. 256.

676. —.] — *Re RUTHERFORD*, *BROWN v. RUTHERFORD*, No. 152, *ante*.

677. —.] — *Re COUCHMAN*, *COLLYER v. COUCHMAN* (1915), 139 L. T. Jo. 158.

678. Payment must be on account of debt sued for.]—*MORRELL v. PARKER* (1843), 1 L. T. O. S. 337.

679. Similar payments made previously.]—A., an attorney, being indebted to B. in several sums on bond, & simple contract, bearing interest, from time to time stated accounts with B. in which he debited himself with the interest, & took credit for payments which he made from time to time, on account of B., for the rent & tithes of a farm occupied by B., & other disbursements. The latest of these accounts was stated in 1823; & a balance was struck therein in favour of B.; up to that time the rents & tithes had nearly balanced

the interest; but the rents were then considerably reduced. Afterwards A., who took considerable part in the management of B.'s affairs, continued to pay the rents & tithes on B.'s account, & stated a further account with B. in writing, in which he took credit for the payment of rent & tithes, but inserted no item on the debit side. The latest account stated was in 1842. B., in 1843, sued A. for the sums due on simple contract, & interest thereon:—*Held*: the facts above stated were evidence for the jury, from which they might find the payments of rent & tithes since 1823 were payments made on account of the interest due on the simple contract debts, so as to take the case out of Statute of Limitations.—*WORTHINGTON v. GRIMSDITCH* (1845), 7 Q. B. 479; 15 L. J. Q. B. 52; 5 L. T. O. S. 214; 10 Jur. 26; 115 E. R. 569.

680. Payment under compulsion of law—No acknowledgment.]—*MORGAN v. ROWLANDS*, No. 627, *ante*.

681. Security given for debt—Effect of payment of interest on debt to keep security alive.]—One of two joint drawers of a bill of exchange becomes bkpt., & under his commission the indorsees prove a debt, beyond the amount of the bill, for goods sold, etc., & they exhibit the bill as a security they then held for their debt, & afterwards receive a dividend. In an action by the indorsees of the bill against the solvent partner:—*Held*: Statute of Limitations was a good defence, although the dividend had been paid by the assignees of bkpt. partner within six years.—*BRANDRAM v. WHARTON* (1818), 1 B. & Ald. 463; 106 E. R. 170.

Annotations:—*Refd.* *Goss v. Watlington* (1821), 6 Moore, C. P. 355; *Atkins v. Tredgold* (1823), 2 B. & C. 23; *Perham v. Raynal* (1824), 2 Bing. 306; *Manderston v. Robertson* (1829), 4 Man. & Ry. K. B. 440; *Davies v. Edwards* (1851), 7 Exch. 22.

682. —.] — N. having applied to D. for a loan of £300 on mtge., D., doubting the sufficiency of the security, refused to advance it without having, in addition, a joint & several promissory note for £50 from N. & one from F., payable on demand. The note & mtge. were accordingly given, the latter containing a covenant by N. to pay the sum of £300 & interest at 5 per cent. Several half-yearly payments of £7 10s. each for interest having been made by N.:—*Held*: in an action against F. upon the note, such payments by N. kept all the securities alive, & prevented the operation of Statute of Limitations as to the note.—*DOWLING v. FORD* (1843), 11 M. & W. 329; 12 L. J. Ex. 342; 152 E. R. 829.

Annotation:—*Refd.* *Nash v. Hodgson* (1855), 6 De G. M. & G. 474.

683. Payment by promissory note.]—A promissory note, "Five months after date I promise to pay to L.'s order the sum of £23 2s. 6d., being the amount of interest due on a promissory note, from the undersigned to the late W. for £117, dated July 6, 1838, up to July 6, 1844," is evidence of the debt of £117, being still due, & will support a count on an account stated with L. as exor. of W.—*PERRY v. SLADE* (1845), 8 Q. B. 115; 1 New Pract. Cas. 322; 15 L. J. Q. B. 10; 6 L. T. O. S. 168; 10 Jur. 31; 115 E. R. 817.

B. By and To Whom Made.

See Sub-sect. 3, *post*.

C. Proof of Payment.

See Sub-sect. 4, *post*.

D. Appropriation.

See Sub-sect. 5, *post*.

*Sect. 9.—Part payment and payment of interest:
Sub-sect. 3, A., B. & C. (a).]*

**SUB-SECT. 3.—BY AND TO WHOM EFFECTIVE
PAYMENT MAY BE MADE.**

A. Agents.

684. Payment of interest by agent—Agency question for jury.]—A parish vestry having resolved to borrow money for the purpose of building almshouses, the money was in 1830 advanced by pltf. upon the security of a promissory note payable to him, or bearer, on demand, with interest, & signed by defts. thus:—"J. H., churchwarden, J. E., overseer, or others for the time being." The interest had been regularly paid by the overseers for the time being up to 1847, but defts. had never paid the interest, or in express terms authorised the parish officers to pay it for them. Defts. having pleaded the Statute of Limitations to an action on the note:—*Held*: it was a question for the jury, whether, by the form of the note, defts. had not constituted the parish officers for the time being their agents for the payment of interest, so as to take the case out of the statute.—*JONES v. HUGHES* (1850), 5 Exch. 104; 155 E. R. 45; *sub nom.* *JONES v. EVANS*, 19 L. J. Ex. 200; 14 L. T. O. S. 156, 446; 14 J. P. 98.

685. —.]—A parish vestry resolved to borrow money from H. N., who advanced it, & took promissory notes for the amount, made by P., W., & F., who were churchwardens & overseer, & who added to their signatures the titles of their respective offices. Interest was paid on the notes, from the parochial funds, & the accounts containing the item were allowed by the vestry; & W., with other parishioners, signed the allowance in one instance. P., W., & F. resided constantly in the parish. To an action brought on the notes, against P., W., & F., within six years from W.'s signature of the allowance, but not from the making of the note, Statute of Limitations was pleaded; the jury having found for pltf., the ct. sustained the verdict.—*REW v. PETTER* (1834), 1 Ad. & El. 196; 110 E. R. 1181; *sub nom.* *CREW v. PETIT*, 2 Nev. & M. M. C. 309; 3 Nev. & M. K. B. 456.

Annotations:—Reid. Dowling v. Ford (1843), 12 L. J. Ex. 342; *Jones v. Hughes* (1850), 5 Exch. 104. *Mentd.* *Furnivall v. Coombes* (1843), 6 Scott, N. R. 522; *Elliott v. Bax-Ironside*, [1925] 2 K. B. 301.

686. —.]—*HALL v. THORNTON* (1852), 10 L. T. O. S. 184.

687. — Not agent for that purpose.]—Deft. in order to obtain an advance of money, gave a promissory note to H., a customer of pltf's, who were bankers. H. indorsed the note to pltf's. on obtaining the money, with which he was debited by them. Deft. was debited by H. with the amount, & H. had paid interest on the note to pltf's. within six years:—*Held*: these payments did not take the note out of the statute as against deft., H. not being his agent for that purpose.—*HARDING v. EDGE CUMBE* (1859), 28 L. J. Ex. 313.

688. — —.]—In 1878 resps., as first mtgees., sold the property under their power of sale, employing S., who was also the mtgor.'s

solr., to conduct the sale. S. received the sale moneys, & after satisfying resps.' mtge., kept the balance for himself instead of paying off the second mtgee. S. did not inform the second mtgee. of the sale but, acting as the mtgor.'s solr., continued to pay him interest on the second mtge. as if it were still subsisting. Until 1892 resps. either did not know that there was a second mtge. or believed a false representation made to them by S. that he had the authority of the second mtgee. to receive the balance. In 1892 the second mtgee. discovered the fraud & brought an action against resps. for an account & payment of the amount due to him:—*Held*: the action was barred by Statute of Limitations & Trustee Act, 1888 (c. 59), s. 8; the case did not fall within either of the exceptions mentioned in sect. 8; the resps. were not "party or privy" to the fraud of S., & the trust moneys were not "still retained" by them, the moneys not being in their hands or under their control when the action was brought; in committing & concealing the fraud S. was not acting as resps.' agent, & there was nothing to prevent the Statute of Limitations from beginning to run in 1878.—*THORNE v. HEARD & MARSH*, [1895] A. C. 495; 64 L. J. Ch. 652; 73 L. T. 291; 44 W. R. 155; 11 T. L. R. 464; 11 R. 254, H. L.; *affg.*, [1894] 1 Ch. 599, C. A.

Annotations:—Consd. Re McCallum, McCallum v. McCallum, [1901] 1 Ch. 143. *Reid. Mara v. Browne*, [1895] 2 Ch. 69; *How v. Winterton*, [1896] 2 Ch. 626; *Whitwan v. Watkin* (1898), 78 L. T. 188; *Hambro v. Burnand*, [1903] 2 K. B. 399; *Ruben v. Great Fingall Consolidated*, [1904] 2 K. B. 712; *Re Fountaine, Fountaine v. Amherst* (1909), 78 L. J. Ch. 648; *Re Allsop, Whittaker v. Bamford*, [1914] 1 Ch. 1. *Mentd. Lloyd v. Grace, Smith* (1912), 81 L. J. K. B. 1140.

689. Part payment by agent.]—*IRVING v. VEITCH*, No. 662, *ante*.

690. —.]—H., the owner of a business, mortgaged it to S. to secure an annuity, the mtge. deed providing that S. might exercise the power of appointing a receiver under Conveyancing Act, 1881 (c. 41), s. 24, & further, that the receiver might, if so directed in writing by S., "manage & carry on the business as he might think fit." H. continued to carry on the business from the date of the mtge., & in doing so became indebted to pltf. for work done in connection with the business. The debt was unsecured, but it was arranged between H. & pltf. that H. should pay it off by fixed instalments. In June, 1891, after having paid some of the instalments, H. died leaving an extrix., & then, S.'s annuity being in arrear, S. by writing under the power conferred by the mtge. deed appointed a receiver of the business "with full power to manage & carry on the same as he might think fit." In Aug. 1891, the receiver paid pltf. a further instalment in reduction of his debt.

In a creditor's administration action commenced in July, 1897, by pltf. against H.'s extrix.:—*Held*: the balance of pltf.'s debt was not statute-barred, inasmuch as the receiver had, under the combined powers of Conveyancing Act, 1881 (c. 41), s. 24, & of the mtge. deed, & also as agent for H.'s extrix., as he had been for H. himself, authority to continue paying the debt

PART II. SECT. 9, SUB-SECT. 3.—A.
m. General rule.]—COWING v. VINCENT (1870), 29 U. C. R. 427.—CAN.

n. —.]—MASSEY-HARRIS v. SMITH (1904), 6 Terr. L. R. 50.—CAN.

may be impliedly authorised within Limitation Act, s. 20, to make a payment of interest or principal before the expiration of the period prescribed.—

BIRJMOHUN LALL v. RUDRA PERKASH MISSEER (1899), 1 L. R. 17 Calc. 944.—IND.

p. Payment after revocation of authority.]—Held: a payment made by deft.'s wife was insufficient to take the case out of Statute of Limitations, the evidence showing that deft. had forbidden his wife to make further payments, & any implied authority

which the wife had previously having been terminated by this prohibition.—*ROBERTSON v. MCKEIGAN* (1897), 29 N. S. R. 315.—CAN.

q. Payment by husband — Must be as agent.]—HARRIS v. GREENWOOD (1904), 9 O. L. R. 25; 4 O. W. R. 140; 25 C. L. T. 72.—CAN.

r. Payment by curator of insolvent — Payments made by the curator

by instalments, & there was, as incident to his authority, an implied promise that the balance should be paid out of H.'s assets.—*Re HALE, LILLEY v. FOAD*, [1899] 2 Ch. 107; 68 L. J. Ch. 517; 80 L. T. 827; 47 W. R. 579; 15 T. L. R. 389; 43 Sol. Jo. 528, C. A.

691. Payment of interest to agent—Wife.]—A *feme sole*, payee of a promissory note payable with interest, married, & her husband survived her. In an action on the note by her administrator:—*Held*: (1) the note did not become the property of the husband, but passed to her administrator, though the husband had received the interest during her life; for he did not thereby reduce the chose in action into possession; (2) the payment of such interest, in the wife's life, to the husband, within six years before action brought, must be considered as made to him in the character of agent to the wife, & was an answer to a plea of Statute of Limitations.—*HART v. STEPHENS* (1845), 6 Q. B. 937; 14 L. J. Q. B. 148; 4 L. T. O. S. 453; 9 Jur. 225; 115 E. R. 353.

Annotation:—As to (1) *Reid. Scarpellini v. Atcheson* (1845), 7 Q. B. 864.

B. *Cestui que trust*.

692. Payment to cestui que trust—Payment to trustee.]—Testator bequeathed to his two daughters £250 each, to be paid when they arrived at the age of twenty-one; & till that period expenses of board, clothes, & education to be borne & paid by his exors. He appointed exors. & also trustees, & with all necessary powers to fulfil the will. At a meeting of the trustees & exors., for the purpose of settling testator's affairs, the exors. paid over to the trustees (*inter alia*) the sum of £500, to be set apart for the payment of legacies to the daughters when they attained the age of twenty-one. This sum was afterwards lent by the trustees to pltf. on a promissory note which described them as "trustees acting under the will of the late Mr. W. B." (testator):—*Held*: a payment of principal & interest to one of the legatees within six years was sufficient to take the case out of Statute of Limitations, & the trustees had a right to maintain an action on the note.—*MEGGINSON v. HARPER* (1834), 2 Cr. & M. 322; 4 Tyr. 94; 3 L. J. Ex. 50; 149 E. R. 784.

C. Co-Contractor.

(a) Payment by Co-Contractor.

See, now, Mercantile Law Amendment Act, 1856 (c. 97), s. 14.

693. Mercantile Law Amendment Act, 1856 (c. 97), s. 14—Not retrospective.]—To a plea of Statute of Limitations in an action on a promissory note, pltf. replied that the note was made by deft. jointly with one P., & that within six years before suit P. paid pltf. interest on the note:—*Held*: assuming the payment to have been made before the passing of the above Act the replication was bad on general demurrer.—*RIDD v. MOGGRIDGE* (1857), 2 H. & N. 567; 157 E. R. 233.

694. ———.]—Where a payment has been

of an insolvent estate are virtually payments made by the insolvent himself, & they interrupt prescription.—*HOCHELAGA BANK v. RICHARD* (1908), 5 E. L. R. 575.—CAN.

t. Payment to solicitor of creditor—Without creditor's knowledge—Not sufficient.]—*COTTON v. MITCHELL* (1883), 3 O. R. 421.—CAN.

PART II. SECT. 9, SUB-SECT. 3.—B.

a. Appropriation by trustee of trust

money—As part payment of debt of *cestui que trust*.]—The application by a trustee of the income of trust property received by him, to the partial liquidation of a debt due to him by his *cestui que trust* will, if made by the authority of the latter, prevent the residue of the debt from being affected by the Statute of Limitations, in respect of the lapse of time preceding the last such application.—*STEWART v. CONNICK* (1871), 1 R. 5

made, of either interest or principal, on a promissory note by one of the co-contractors, before the passing of the above Act an action may be maintained by the holder of the note against any other of the co-contractors within six years after such payment, notwithstanding above sect., as that sect. has no retrospective effect.—*JACKSON v. WOOLLEY* (1858), 8 E. & B. 778; 27 L. J. Q. B. 448; 31 L. T. O. S. 342; 4 Jur. N. S. 656; 6 W. R. 686; 120 E. R. 289, Ex. Ch.

Annotations:—*Consd. Williams v. Smith* (1859), 4 H. & N. 559. *Flood v. Patterson* (1861), 29 Beav. 295. *Reid. Pardo v. Bingham* (1869), 4 Ch. App. 735; *Watson v. Woodman* (1875), L. R. 20 Eq. 721. *Mentd. Loft v. Dennis* (1859), 5 Jur. N. S. 727; *Re Sanford's Trust*, *Bennett v. Lytton* (1860), 2 John. & H. 155; *R. v. General Council of Medical Education & Registration* (1861), 7 Jur. N. S. 798; *West v. Gwynne* (1911), 80 L. J. Ch. 578.

695. ——— "By reason only of payment"—Letter authorising creditor to receive dividend from debtor's estate.]—A. & B. made a joint & several promissory note, payable on demand, which they gave to C., B. being only surety for A. A., becoming insolvent, assigned his property for the benefit of his creditors, when C. obtained from B. more than six years after the date of the note, the following letter, in order to enable C. to receive the dividend upon his claim on the note, from A.'s estate: "I hereby consent to your receiving the dividend under A.'s assignment, & do agree that your doing so shall not prejudice your claim upon me for the same debt. (Signed) B." :—*Held*: (1) the letter not containing an express promise to pay, was not such an acknowledgment as to take the debt out of the statute; (2) payment of A.'s dividend, in connection with B.'s letter, did not except the case from the operations of Mercantile Law Amendment Act, 1856 (c. 97), s. 14, which declares that one of several co-debtors shall not lose the benefit of Statute of Limitations, so as to be chargeable by reason only of a payment by some other of the co-debtors; & therefore, deft. was entitled to avail himself of the statute.—*COCKRILL v. SPARKES* (1863), 1 H. & C. 699; 1 New Rep. 439; 32 L. J. Ex. 118; 7 L. T. 752; 9 Jur. N. S. 307; 11 W. R. 428; 158 E. R. 1065.

Annotations:—As to (1) *Reid. Lee v. Wilmot* (1866), L. R. 1 Exch. 364. As to (2) *Distd. Re Powers, Lindsell v. Phillips* (1885), 30 Ch. D. 291. *Reid. Re Wolmershausen*, *Wolmershausen v. Wolmershausen* (1889), 62 L. T. 541; *Bradford Old Bank v. Sutcliffe*, [1918] 2 K. B. 833. *Generally, Mentd. Read v. Price*, [1909] 1 K. B. 577.

696. Payment by principal debtor—Effect on liability of surety.]—Five directors of a co. gave, in the years 1871 & 1874 respectively, two joint & several promissory notes to secure an advance to the co. The advance was also secured by a mtge. by assignment by the co. of certain leasehold collieries. The co. was wound up, & at that date a considerable sum was due to the lenders. The collieries could not be profitably worked. One of the five directors afterwards became bkpt., & the lenders proved against his estate for the balance due on the promissory notes. This proof was afterwards withdrawn, in pursuance of certain complicated arrangements which the lenders had entered into for the purpose of relieving themselves from the rents & covenants

C. L. 562.—IR.

PART II. SECT. 9, SUB-SECT. 3.—C. (a).

b. Payment by one joint maker of note.]—Payments made by one of two joint & several makers will not take the case out of the Statute of Limitations as against the other, unless made expressly as his agent & by his authority.—*CREIGHTON v. ALLEN*

Sect. 9.—Part payment and payment of interest:
Sub-sect. 3, C. (a) & (b), D., E. & F.]

under the colliery leases to which they had become liable, & a general receipt had been given to the trustee in bkpcy. The lenders now claimed to prove for the balance due on the promissory notes against the estate of another of the signatories which was being administered by the ct. This claim was first made in 1879:—*Held*: (1) the claim on the first promissory note was barred by Statute of Limitations, 1623 (c. 16). The fact that the principal debtor, the co., had made payments in respect of the debt did not prevent the statute from running in favour of the surety, & an affidavit by testator's representatives as to creditors' claims was not a sufficient acknowledgment to take it out of the statute. The receipt given to the trustee in bkpcy. could not release the other sureties, because, although a release to one of several joint debtors is a release to all, the liability became on the bkpcy. several only, & the release was, in consequence, given to one of a number of persons severally liable. Moreover, the receipt was not in fact intended to be a release of the whole liability, but merely a compromise of the claim against bkpt.'s estate; (2) the withdrawal by the creditors of their proof against bkpt.'s estate was a *pro tanto* discharge to the co-sureties.

(3) An acknowledgment must, in order to take a case out of Statute of Limitations, 1623 (c. 16), contain an express or implied promise to pay.—*Re WOLMERSHAUSEN, WOLMERSHAUSEN v. WOLMERSHAUSEN* (1890), 62 L. T. 541; 38 W. R. 537.

Annotation:—Generally, *Mentd. Re E. W. A.*, [1901] 2 K. B. 642.

—.]—*See GUARANTEE*, Vol. XXVI., pp. 105, 106, Nos. 725–736.

(b) Payment by Contractor Executor of Deceased Co-Contractor.

See Mercantile Law Amendment Act, 1856 (c. 97), s. 14.

697. Liability dependent on capacity in which payment made—Whether as executor or co-contractor.]—A. & B. make a joint & several promissory note, & after the lapse of six years, A. dies, leaving B. one of his exors.; & B. subsequently pays interest on the note, not in his executorial character, but personally as a maker of the note. In an action by the exors. of the payee of the note, against A.'s exors., alleging, a promise by testator in his lifetime, & a promise by the exors. after his death:—*Held*: the payment within six years, of interest by B., who suffered judgment by default, was not sufficient to take the case out of Statute of Limitations as against the exors.—*ATKINS v. TREDGOLD* (1823), 2 B. & C. 23; 3 Dow. & Ry. K. B. 200; 1 L. J. O. S. K. B. 228; 107 E. R. 291.

Annotations:—*Consd. Perham v. Raynal* (1824), 2 Bing. 306. *Apld. Slater v. Lawson* (1830), 1 B. & Ad. 396. *Distd. Braithwaite v. Britain* (1836), 1 Keen, 206. *Apld. Way v. Bassett* (1845), 5 Hare, 55. *Refd. Channell v. Ditchburn* (1839), 5 M. & W. 494; *Crallan v. Oulton* (1840), 3 Beav. 1; *Scholey v. Walton* (1844), 12 M. & W. 510; *Fordham v. Wallis* (1853), 10 Hare, 217; *Nash v. Hodgson* (1855), 6 De G. M. & G. 474; *Re Wolmershausen*,

Wolmershausen v. Wolmershausen (1890), 62 L. T. 541; *Re Macdonald, Dick v. Fraser*, [1897] 2 Ch. 181; *Astbury v. Astbury*, [1898] 2 Ch. 111.

698. ———.]—BRAITHWAITE v. BRITAIN, No. 369, *ante*.

699. ———.]—To an action by the payee of a promissory note for £300, against defts., as surviving exors. of W., the maker, pltf., to take the case out of Statute of Limitations, proved he has been supplied by J., the deceased exor., with malt & other articles, & he put in evidence an account between them, signed as follows:—“Settled, J.”; on one side of which pltf. was charged with various quantities of malt, & on the other side had credit for payments: there being, amongst others, the following item:—“To one year's interest, £15”:—*Held*: this settlement of account was evidence of payment of the £15 by J., but not in his representative character.

Semble: payment by one exor. will not take the case out of Statute of Limitations as against a co-exor.—*SCHOLEY v. WALTON* (1844), 12 M. & W. 510; 13 L. J. Ex. 122; 2 L. T. O. S. 331; 8 Jur. 319; 152 E. R. 1299.

Annotations:—*Consd. Spollan v. Magan* (1851), 18 L. T. O. S. 200; *Re Macdonald, Dick v. Fraser*, [1897] 2 Ch. 181. *Refd. Callander v. Howard* (1850), 10 C. B. 290; *Nash v. Hodgson* (1855), 6 De G. M. & G. 474.

700. ——— Presumption that acts done as co-contractor.]—A. deposited moneys with B., C. & D., who were bankers in partnership, & received from them notes, in which they promised to pay him the amount three months after sight, with interest. B. died in Mar. 1837, having appointed C. & another his exors. C. & D. continued the banking business in the same name until 1842, & interest was regularly paid on the notes by the firm until that time, the payment being indorsed upon the notes, & signed by one of the partners or their clerk. In Dec. 1843, the exors. of A. filed their bill against the exors. of B. & the devisees under his will for payment of the amount of the notes out of the personal or real estate of B.:—*Held*: the acts of the surviving partners of B. had not the effect of taking the debt upon the notes out of the operation of the Statute of Limitations as against the real or personal estate of deceased partner.—*WAY v. BASSETT* (1845), 5 Hare, 55; 15 L. J. Ch. 1; 6 L. T. O. S. 118; 10 Jur. 89; 67 E. R. 825.

Annotations:—*Refd. Brown v. Gordon* (1852), 16 Beav. 302; *Fordham v. Wallis* (1853), 10 Hare, 217; *Re Macdonald, Dick v. Fraser*, [1897] 2 Ch. 181.

701. ———.]—FORDHAM v. WALLIS, No. 675, *ante*.

702. ———.]—As to the equity of a creditor of a partnership to obtain payment out of the separate estate of deceased partner.

A creditor of a banking firm held to have accepted the surviving partners as his debtors, & to have lost by sixteen years' delay & his conduct, the benefit of a trust contained in the will of deceased partner for payment of his debts out of his real estate.

Where a man fills two characters, he may do an act which may affect him in one, but not in the other character.

Payment of interest on a debt by surviving partners, one of whom was the exor. of a deceased

& *FRETZ* (1868), 26 U. C. R. 627.—*CAN.*

c. ———.]—*PRICE v. WHITING* (1880), 19 N. B. R. 620.—*CAN.*

d. ———.]—*LEWIN v. WILSON* (1884), 9 S. C. R. 637.—*CAN.*

e. ———.]—*HARRIS v. GREENWOOD* (1904), 9 O. L. R. 25; 4 O. W. R. 140;

25 C. L. T. 72.—*CAN.*

PART II. SECT. 9, SUB-SECT. 3.—
C. (b).

6971. Liability dependent on capacity in which payment made—Whether as executor or co-contractor.]—After the death of one maker of a joint & several promissory note signed by two, the

deceased being a surety only, a payment upon it out of his own moneys & on his own account was made by the surviving maker who was also the sole exor. of the deceased co-maker:—*Held*: such payment did not take the debt out of the Statute of Limitations as regards the estate of the latter.—*PAXTON v. SMITH* (1889), 18 O. R. 178.—*CAN.*

partner, held to have no reference to the executorial character.—*BROWN v. GORDON* (1852), 16 Beav. 302; 22 L. J. Ch. 65; 20 L. T. O. S. 75; 1 W. R. 2; 51 E. R. 795.

Annotations:—*Mentd.* *Lee v. Flood* (1854), 2 W. R. 348; *Rouse v. Bradford Banking Co.* (1894), 63 L. J. Ch. 337.

703. ———.]—A. & B., partners, gave a promissory note in the name of the firm. A. died, leaving B. his sole exor., & no proceedings were taken against his estate for more than six years; but B. who continued the business made payments of interest & then became bkpt.:—*Held*: the payments were made in his character of surviving partner, & not as exor. of A., & having regard to Mercantile Law Amendment Act, 1856 (c. 96), s. 14, the debt was barred as against the estate of A.—*THOMPSON v. WAITHMAN* (1856), 3 Drew. 628; 26 L. J. Ch. 134; 28 L. T. O. S. 95; 2 Jur. N. S. 1080; 5 W. R. 30; 61 E. R. 1043.

Annotations:—*Appld.* *Re Tucker, Tucker v. Tucker*, [1894] 1 Ch. 724. *Refd.* *Cornill v. Hudson* (1857), 3 Jur. N. S. 1257; *Jackson v. Woolley* (1858), 8 E. & B. 778, 784; *Williams v. Smith* (1859), 4 H. & N. 559; *Pardo v. Bingham* (1869), 4 Ch. App. 735; *Watson v. Woodman* (1875), L. R. 20 Eq. 721.

704. Capacity immaterial.]—A., B., & C. made a joint & several promissory note. A. died, leaving B. his exor. C., being afterwards sued on the note, pleaded Statute of Limitations; & pltf., in order to take the case out of the statute, proved a payment of interest on the note by B. within six years. *Semle*, pltf. was entitled to recover, without reference to the question whether B. had paid such interest as the exor. of A. or as a party to the note.—*GRIFFIN v. ASHBY* (1845), 2 Car. & Kir. 139.

D. Executors and Devisees.

705. Payment by devisee—Revives debt against all interested in realty.]—Payment by a devisee for life of interest on a simple contract debt of his testator's is a sufficient acknowledgment to keep the right of action alive against all parties interested in remainder. The law in regard to the payment of interest by a tenant for life on a simple contract debt stands on the same footing as that in respect of payment of interest on a specialty debt.—*Re HOLLINGSHEAD, HOLLINGSHEAD v. WEBSTER* (1888), 37 Ch. D. 651; 57 L. J. Ch. 400; 58 L. T. 758; 36 W. R. 660; 4 T. L. R. 275.

Annotations:—*Expld.* *Dibb v. Walker*, [1893] 2 Ch. 429. *Consd.* *Re Chant, Bird v. Godfrey*, [1905] 2 Ch. 225. *Refd.* *Edwards v. Walters*, [1896] 2 Ch. 157; *Re Macdonald, Dick v. Fraser*, [1897] 2 Ch. 181; *Astbury v. Astbury*, [1898] 2 Ch. 111. *Mentd.* *Re Lacey, Howard v. Lightfoot*, [1907] 1 Ch. 330.

706. ———.]—Payment on account of a simple contract debt of testator by the devisee for life of a part of his real estate is sufficient to keep a right of action alive, not only as against the person making it, but as against all other persons interested in the real estate, so as to entitle a simple contract creditor to an order for administration of the whole of testator's real estate.—*Re CHANT, BIRD v. GODFREY*, [1905] 2 Ch. 225; 74 L. J. Ch. 542; 93 L. T. 265; 53 W. R. 526; 49 Sol. Jo. 537.

Annotation:—*Mentd.* *Re Lacey, Howard v. Lightfoot*, [1907] 1 Ch. 330.

PART II. SECT. 9, SUB-SECT. 3.—D.

1. Executor de son tort.]—An exor. de son tort cannot, by giving a confession of judgment, or making payments on account of a debt, or by any other act of his, give a new start to the Statute of Limitations as against the rightful administrator, or the

parties beneficially interested in the estate.—*GRANT v. McDONALD* (1860), 8 Gr. 468.—*CAN.*

PART II. SECT. 9, SUB-SECT. 3.—F.

707 i. Effect of payment by one partner—While partnership subsisting.]—A part payment by one partner of a

Payment by contractor executor of deceased co-contractor.]—*See* Sub-sect. 3, C. (b), *ante*.

Payment by executor.]—*See* EXECUTORS, Vol. XXIII., pp. 360–362, Nos. 4283–4293.

E. Married Women.

See HUSBAND & WIFE, Vol. XXVII., p. 187, Nos. 1535–1539.

F. Partners.

See, generally, PARTNERSHIP.

707. Effect of payment by one partner—While partnership subsisting.]—If part-owners of a ship are connected together so as to be considered partners, a payment made by one will revive a joint debt as against the other, & will prevent the operation of Statute of Limitations, though the payment is made for the express purpose of so reviving the debt.—*GRIFFITHS v. HICKS* (1850), 15 L. T. O. S. 349, N. P.; *subsequent proceedings* (1851), 16 L. T. O. S. 341.

708. ———.]—W. & B., partners, were employed by X. as his solrs. & general agents to receive moneys for him from time to time & apply them according to his directions. By a dissolution deed of June 1, 1866, it was agreed that W. should retire from the firm, & that the business should belong exclusively to B.; & B. covenanted to pay out of the partnership assets, or out of his own moneys, all debts due from the partnership, & also to pay W. a moiety of the profits made by B. between June 1 & Dec. 31, 1866. B. thereupon continued to act alone as X.'s solr., & agent from June 1, 1866, to X.'s death in 1870, & W. shortly after the date of the dissolution deed advanced various sums to B. to enable him to pay the partnership debts. At the date of the deed a considerable sum was due to X. from the partnership, & in reduction of the debt. B. on July 20, 1866, gave X. a cheque drawn in his favour by B. for £300, which was paid on the following day out of moneys standing to B.'s credit at his bankers, though B. was at that time in embarrassed circumstances. A bill filed on July 20, 1872, by X.'s residuary legatee, to compel W. to pay the balance of the debt, was dismissed with costs, on the ground that the debt was barred by Statute of Limitations & Mercantile Law Amendment Act, 1856 (c. 60), s. 14, & that there was no evidence that B. was acting as W.'s agent in paying the £300.

Mercantile Law Amendment Act, 1856 (c. 60), s. 14, is inapplicable to a subsisting partnership, payments made by either partner being payments of the firm; but on the dissolution of the partnership, payments by one of the late partners can only be held to be payments of both on proof that such one has been authorised, either expressly or by implication, to make the payments as the payments of the other.—*WATSON v. WOODMAN* (1875), L. R. 20 Eq. 721; 45 L. J. Ch. 57; 24 W. R. 47.

Annotations:—*Refd.* *Friend v. Young*, [1897] 2 Ch. 421. *Mentd.* *Watson v. Rodwell* (1878), 11 Ch. D. 150; *Re Tucker, Tucker v. Tucker*, [1894] 3 Ch. 429; *North American Land & Timber Co. v. Watkins*, [1904] 1 Ch. 242.

709. ———.]—One of two partners must be presumed, in the absence of proof to the contrary, to have authority to make a payment on

going mercantile firm of a debt due by the firm will save the limitation against the other partners, if the partner who made the payment had authority to do so on behalf of the firm.—*VALASUBRAMANIA PILLAI v. RAMANANATHAN CHETTIAR* (1908), 1 L. R. 32 Mad. 421.—*IND.*

Sect. 9.—Part payment and payment of interest:
Sub-sect. 3, F., G., H. & I.; sub-sect. 4, A. & B.

account of a debt due by the firm, so as to take the debt out of Statute of Limitations as against the other.

A., one of the partners in a firm, gave instructions to their solr. to put in force & realise a bill of sale held by the firm, & to place the proceeds when received "to the account of the firm," who were then indebted to the solr. for his bill of costs. The solr. having sued the two partners for the balance of his bill of costs, B. pleaded Statute of Limitations:—*Held*: there was sufficient evidence for the jury of a part payment so as to take the case out of Statute of Limitations as against B.—*GOODWIN v. PARTON & PAGE* (1880), 42 L. T. 568, C. A.

710. — After dissolution of partnership—Payment made fraudulently.]—A payment made by one partner after the dissolution of the partnership on account of a partnership debt, & after six years have elapsed without any acknowledgment of the debt, is sufficient to take the case out of the operation of Statute of Limitations, as against the other partner, though the jury find that the payment was fraudulently made against his consent & in concert with the creditor to revive the debt.—*GODDARD v. INGRAM* (1842), 3 Q. B. 839; 3 Gal. & Dav. 46; 12 L. J. Q. B. 9; 6 Jur. 1060; 114 E. R. 730.

Annotations:—*Expld.* *Goodwin v. Parton & Page* (1879), 41 L. T. 91. *Refd.* *Cockrell v. Sparke* (1863), 9 Jur. N. S. 307.

See, now, Mercantile Law Amendment Act, 1856 (c. 97), s. 14.

711. — —.]—*WATSON v. WOODMAN*, No. 708, *ante*.

712. — — Dissolution kept secret.]—W. a member of a firm, was jointly & severally liable in a sum of money deposited with the firm by the trustees of will. In 1883 W. retired from the firm, & a deed of dissolution was executed by which it was agreed that W.'s retirement should not be made known for a year, & then that it should be optional whether it should be gazetted; that the continuing partners should take & collect all the assets & should pay all the debts & liabilities, & should indemnify W. against them, & should pay him a certain sum by instalments; & that so long as any money remained due to him he should have power on giving notice to collect the debts due to the firm & to re-enter on the premises & carry on the business himself. W.'s retirement was never gazetted, & the business was carried on in the old name of the firm. Down to 1891 interest was regularly paid to testator's estate on the loan by cheques drawn in the name of the firm:—*Held*: in a suit by the beneficiaries under the will, as against W. the debt was not barred by Statute of Limitations, notwithstanding Mercantile Law Amendment Act, 1856 (c. 60), s. 14, for, considering the terms of the deed of dissolution & the fact that the retirement of W. was kept secret, the payment of interest, after his retirement, by the partners, must be taken to have been

made by them on his behalf & as his agents.—*Re TUCKER, TUCKER v. TUCKER*, [1894] 3 Ch. 429; 63 L. J. Ch. 737; 71 L. T. 453; 12 R. 141, C. A.

Annotations:—*Mentd.* *Hambro v. Hambro*, [1894] 2 Ch. 564; *Blackburne v. Hope-Edwards*, [1901] 1 Ch. 419.

See Sub-sect. 3, C., ante.

G. Receiver in Lunacy.

See, generally, LUNATICS.

713. Payments on account of maintenance.]—A lunatic not so found by inquisition was maintained in a pauper lunatic asylum by the guardians of a union from 1876 until her death in 1904, at an annual cost of about £21. The lunatic was entitled to property producing about £8 *per annum*. By an order in lunacy a receiver was appointed of this income of the lunatic, & was directed to apply the same in & for the maintenance & benefit of the lunatic. Pursuant to this order the receiver paid the income to the guardians from 1887 to 1903 for the maintenance of the lunatic, & the guardians in their books appropriated each payment of the receiver as a payment on account of the arrears of maintenance due to them at the date of each payment. At the death of the lunatic considerable arrears of maintenance were due to the guardians & in an action by them against the administratrix of the lunatic for these arrears the administratrix contended that the guardians were only entitled to six years' arrears prior to the date of the writ:—*Held*: under the circumstances, the payment by the receiver took the case out of Statute of Limitations, 1623 (c. 16), & the guardians were entitled to payment of all the arrears due to them.—*WANDSWORTH UNION v. WORTHINGTON*, [1906] 1 K. B. 420; 75 L. J. K. B. 285; 95 L. T. 331; 70 J. P. 191; 54 W. R. 422; 22 T. L. R. 284; 50 Sol. Jo. 273; 4 L. G. R. 320.

H. Receiver of Mortgaged Property.

See, now, Law of Property Act, 1925 (c. 20), s. 109.

714. Receiver appointed under Conveyancing Act, 1881 (c. 41), s. 24—Agent of mortgagor—To make payments within the powers conferred by Act.]—*Re HALE, LILLEY v. FOAD*, No. 690, *ante*.

715. Receipt of rent by mortgagee in possession.]—If an equitable mtgee. enters into the receipt of the rents of the mtged. estate, such receipt is, *prima facie*, a payment within the meaning of the proviso in Statute of Frauds Amendment Act, 1828 (c. 14).—*BROCKLEHURST v. JESSOP* (1835), 7 Sim. 438; 58 E. R. 906.

Annotations:—*Consd.* *Cockburn v. Edwards* (1881), 18 Ch. D. 449. *Refd.* *Barnes v. Glenton*, [1899] 1 Q. B. 885; *London & Midland Bank v. Mitchell*, [1899] 2 Ch. 161. *Mentd.* *Connell v. Hardie* (1839), 3 Y. & C. Ex. 582; *Tipping v. Power* (1842), 1 Hare, 405; *Fordham v. Wallis* (1853), 10 Hare, 217; *Tuckley v. Thompson* (1860), 1 John. & H. 126; *Wrigley v. Gill*, [1906] 1 Ch. 165.

I. Strangers.

716. General rule—Payment must be to creditor or his agent.]—The maker of a promissory note repaid the same by instalments to the original

arrears of interest on the mtge. which are statute-barred; & if he pays over the rents & profits to the mtgees., they cannot legally appropriate them to the payment of such arrears.—*HIBERNIAN BANK v. YOURELL*, [1919] 1 I. R. 310.—IR.

PART II. SECT. 9, SUB-SECT. 3.—I.

716i. General rule—Payment must be to creditor or his agent.]—*MOORE v. ROPER* (1904), 35 S. C. R. 533.—CAN.

711i. — After dissolution of partnership.]—Payments having been made within six years by one partner after the dissolution of the firm, as also an account in writing stated & signed by him, acknowledging a balance, which included what was still due:—*Held*: sufficient to entitle pltf. to a verdict against such debt, & if the respective payments were actually made on the notes, they would be sufficient to take the case out of the Statute of Limitations against both debts.—*SANDS v.*

KEATOR & THORNE (1847), 5 N. B. R. (3 Kerr), 329.—CAN.

PART II. SECT. 9, SUB-SECT. 3.—H.

714i. Receiver appointed under Conveyancing Act, 1881 (c. 41), s. 24—Agent of mortgagor—To make payments within powers conferred by Act.]—A receiver appointed by a mtgee. pursuant to above sect., being for all purposes the agent of the mtgor., commits a breach of duty if he pays

holder, after the latter had indorsed it over to pltf., to whom one payment was communicated:—*Held*: such payments were not acknowledgments of the debt so as to prevent the Statute running, as there was no authority to receive payment on behalf of pltf.

In my opinion there is no question that a payment or acknowledgment must be made to the creditor or his agent (LORD HERSCHELL, C.).—*STAMFORD, SPALDING & BOSTON BANKING CO. v. SMITH*, [1892] 1 Q. B. 765; 61 L. J. Q. B. 405; 66 L. T. 306; 56 J. P. 229; 40 W. R. 355; 8 T. L. R. 336; 36 Sol. Jo. 270, C. A.

Annotations:—*Refd.* *Re Beavan, Davies, Banks v. Beavan*, [1912] 1 Ch. 196; *Lloyd v. Coote & Ball*, [1915] 1 K. B.

717. Payment to person wrongly believed to act as representative—Administrator before grant.—Payment of interest on a promissory note to an administrator, who had omitted to take out administration in the diocese in which the note was a *bonum notabile*, held a sufficient acknowledgment of debt to defeat a plea of Statute of Limitations.—*CLARK v. HOOPER* (1834), 10 Bing. 480; 4 Moo. & S. 353; 3 L. J. C. P. 159; 131 E. R. 981.

Annotations:—*Consd.* *Stamford, Spalding & Boston Banking Co. v. Smith*, [1892] 1 Q. B. 765. *Refd.* *Lloyd v. Coote & Ball*, [1915] 1 K. B. 242. *Mentd.* *Bodger v. Arch* (1854), 10 Exch. 333; *Baker v. Blaker* (1886), 55 L. T. 723.

718. ———.]—*BODGER v. ARCH*, No. 651, *ante*.

SUB-SECT. 4.—PROOF OF PAYMENT.

A. Parol Admission.

See Statute of Frauds Amendment Act, 1828 (c. 14), ss. 3, 9.

719. Whether admissible.—A verbal acknowledgment of the payment of part of a debt within six years, is not sufficient within Statute of Frauds Amendment Act, 1828 (c. 14), to take the case out of Statute of Limitations.—*WILLIS v. NEWHAM* (1830), 3 Y. & J. 518; L. & Welsb. 197; 148 E. R. 1285.

Annotations:—*Expld.* *Meggison v. Harper* (1833), 4 Tyr. 94; *Wilby v. Henman* (1834), 2 Cr. & M. 658. *Consd.* *Waters v. Tompkins* (1835), 1 Gale, 323; *Maghee v. O'Neil* (1841), 7 M. & W. 531; *Balldon v. Walton* (1847), 1 Exch. 617. *Overd.* *Cleave v. Jones* (1851), 6 Exch. 573. *Refd.* *Bealey v. Greenslade* (1831), 2 Tyr. 121; *Bayley v. Ashton* (1840), 12 Ad. & El. 493; *Edan v. Dudfield* (1841), 1 Q. B. 302; *Bevan v. Gething* (1842), 3 Gal. & Dav. 59; *Eastwood v. Saville* (1842), 11 L. J. Ex. 383; *Clark v. Alexander* (1844), 8 Scott, N. R. 147; *Napper v. Napper* (1847), 9 L. T. O. S. 80; *Bradley v. James* (1853), 13 C. B. 822; *Marreco v. Richardson*, [1908] 2 K. B. 584. *Mentd.* *Scholey v. Walton* (1844), 12 M. & W. 510.

720. ———.]—A mere verbal acknowledgment, within six years, of payment of part of a debt, is not sufficient under Statute of Frauds Amendment Act, 1828 (c. 14), s. 1, to take the case out of Statute of Limitations.—*MAGHEE v. O'NEIL* (1841), 7 M. & W. 531; 10 L. J. Ex. 326; 151 E. R. 877.

Annotation:—*Mentd.* *Bevan v. Jenkins* (1842), 6 J. P. 731.

721. ———.]—*BEVAN v. GETHING*, No. 750, *post*.

722. ———.]—An indorsement on a promissory note of the payment of interest within six years, made by an authorised agent of the payee, coupled with a parol admission by the maker of its correct-

ness, is not sufficient to take the case out of Statute of Limitations as against the maker.—*LATHAM v. BELL* (1843), 1 L. T. O. S. 413.

723. ———.]—Part payment of principal or payment of interest on account of a debt is not affected by Statute of Frauds Amendment Act, 1828 (c. 14); & therefore a parol acknowledgment of such payment, within six years before action brought, will take the case out of Statute of Limitations.—*CLEAVE v. JONES* (1851), 6 Exch. 573; 20 L. J. Ex. 238; 17 L. T. O. S. 108; 15 Jur. 515; 155 E. R. 672, Ex. Ch.; *subsequent proceedings* (1852), 7 Exch. 421.

Annotations:—*Refd.* *Bradley v. James* (1853), 13 C. B. 822; *Turney v. Dodwell* (1854), 2 C. L. R. 666; *Edwards v. James* (1855), 1 K. & J. 534; *Nash v. Hodgson* (1855), 6 De G. M. & G. 474; *Marreco v. Richardson*, [1908] 2 K. B. 584.

724. ———.]—Evidence of verbal admissions in 1850 by A., since deceased, that he owed a debt of £2,300 to B.'s estate, the interest of which he had arranged to discharge, & was discharging by paying two annuities bequeathed by B.'s will, together with a statement in an affidavit made by B.'s exor. in 1850, which was inserted in the draft affidavit from the dictation of A., to the effect that B.'s exor. had received in Aug. 1850 from A. a half-year's interest on £2,300, & had paid the annuities the same half-year:—*Held*: sufficient to take the debt of £2,300 out of Statute of Limitations.—*EDWARDS v. JAMES* (1855), 1 K. & J. 534; 3 W. R. 566; 69 E. R. 571.

Annotation:—*Refd.* *Re Emmett, Jenkins v. Emmett* (1906), 95 L. T. 755.

B. Entries in Accounts.

725. By debtor.—In order to take a case out of Statute of Limitations, debt.'s nephew & clerk was called, & an account in the handwriting of debt. was put into his hands, with the following memorandum, which the witness admitted to be in his handwriting, thereunder written:—"Paid £12 10s. interest to May 13, 1830." The witness professed to have no recollection whatever of this payment; but stated that he had a general authority to settle all accounts for his uncle:—*Held*: this was evidence for the jury.—*TRENTHAM v. DEVERILL* (1837), 3 Bing. N. C. 397; 4 Scott, 128; 132 E. R. 463.

Annotation:—*Consd.* *Bayley v. Ashton* (1840), 12 Ad. & El. 493.

726. ———.]—*DIBB v. BURGESS* (1844), 3 L. T. O. S. 50.

727. ———.]—Interest credited to creditor.]—*JACKSON v. OGG*, No. 202, *ante*.

728. By creditor—After statutory period expired.—In an action by the exor. of the payee against the maker, upon a promissory note more than six years overdue, pltf., in order to take the case out of the Statute of Limitations, produced a book in which he had, in the years 1844 & 1847 respectively, at the request of testatrix, entered two payments as for interest due upon the note, which she told him she had received from debt.:—*Held*: admissible evidence, as entries against the interest of the party making them.—*BRADLEY v. JAMES* (1853), 13 C. B. 822; 1 C. L. R. 449; 22 L. J. C. P. 193; 1 W. R. 388; 138 E. R. 1426.

Annotation:—*Refd.* *Edye v. Kingsford* (1854), 2 C. L. R. 832.

PART II. SECT. 9, SUB-SECT. 4.—A.

719i. Whether admissible.—Where part payment is relied on to take a case out of the Statute of Limitations, it is the duty of pltf. to give affirmative evidence of such payment, & if the

evidence is doubtful & the jury find against pltf. the verdict will not be disturbed.—*CHARLOTTE COUNTY BANK (PRESIDENT, ETC.) v. BERRY* (1863), 5 All. 520.—*CAN.*

719ii. ———.]—*GAJPAT RAI v. CHIM-*

MAN RAI (1894), I. L. R. 16 All. 189.—*IND.*

PART II. SECT. 9, SUB-SECT. 4.—B.
725i. By debtor.—*KOLLIPARA PUL-
LAMMA v. MADDULA TATAYYA* (1896)
I. L. R. 10 Mad. 340.—*IND.*

Sect. 9.—Part payment and payment of interest:
Sub-sect. 4, B. & C.; sub-sect. 5, A. & B.]

729. —.] — *MORLEY v. FINNEY* (1870), 18 W. R. 490.

Declarations against interest.]—See EVIDENCE, Vol. XXII., pp. 98 et seq.

C. Indorsements of Negotiable Instruments.

See Statute of Frauds Amendment Act, 1828 (c. 14), ss. 3, 9.

730. By creditor.]—How far an indorsement shall be good evidence.—*BARNES v. RANSOM* (1730), 1 Barn. K. B. 432; 94 E. R. 291.

Annotation:—Refd. Gleadow v. Atkin (1833), 3 Tyr. 289.

731. —.] — *BOSWORTH v. COTCHETT* (1824), 1 Philipps & Arnold on Law of Evidence, 10th ed. p. 300; *sub nom. PARR v. COTCHETT*, 3 Starkie on Evidence, 3rd ed. p. 824, n., H. L.

Annotations:—Consd. Gleadow v. Atkin (1833), 1 Cr. & M. 410; *Briggs v. Wilson* (1854), 5 De G. M. & G. 12. *Refd. Edie v. Kingsford* (1854), 14 C. B. 759.

732. —.] — A plea of set off stated, that pltf. made his promissory note payable to A. which was duly indorsed & delivered to deft. after A.'s death, by A.'s administrator, & was unpaid. Replication that the supposed cause of set off on the said note did not accrue to deft. within six years in manner & form, etc.:—*Held*: this replication admitted not only the making of the note but the indorsement of it to deft. by A.'s administrator; & deft. might, therefore, avail himself of memorandums of the payment of interest written on the note by A., before Statute of Frauds Amendment Act, 1828 (c. 14), to bar Statute of Limitations.—*GALE v. CAPERN* (1834), 1 Ad. & El. 102; 3 Nev. & M. K. B. 863; 3 L. J. K. B. 140; 110 E. R. 1146.

Annotations:—Consd. Scarpellini v. Atcheson (1845), 7 Q. B. 864; *Stamford, Spalding, & Boston Banking Co. v. Smith* (1892), 66 L. T. 306. *Refd. Gwynne v. Burnell* (1840), 6 Bing. N. C. 453; *Cripps v. Davis* (1843), 12 M. & W. 159; *Pott v. Clegg* (1847), 16 M. & W. 321; *De Beauvoir v. Owen* (1850), 5 Exch. 166. *Mentd. Gould v. Lasbury* (1834), 4 Tyr. 863.

733. —.] — *Assumpsit* by the exors. of the payee of a promissory note, against deft. as maker. Pltf. produced the note with the following indorsement upon it, signed by deft. & one of pltf's.: "Hull, 1838. Memorandum, that the sum of £1 7s. 6d., one quarter's interest, was paid on the within note":—*Held*: this was sufficient evidence of an account stated with the exors., without any proof of the time of testator's death.—*PURDON v. PURDON* (1842), 10 M. & W. 562; 12 L. J. Ex. 3; 152 E. R. 595.

734. — *Payment by agent of payee.]—LATHAM v. BELL*, No. 722, *ante*.

735. — *After statutory period expired.]—BRIGGS v. WILSON*, No. 581, *ante*.

736. By debtor.]—In an action on a promissory note by the payee against the maker, the note, when produced in evidence by pltf. at the trial, bore upon it an indorsement as follows:—"Aug. 4, 1837, Received of J. S., £6. B. x E." The whole of this entry except the cross, was in the handwriting of deft., & there was no attestation, nor any proof that the cross was the mark of E., nor any proof of the fact of payment:—*Held*: the indorsement was not evidence of part payment, to take the case out of Statute of Limitations.—*EASTWOOD v. SAVILLE* (1842), 9 M. & W. 615; 11 L. J. Ex. 383; 152 E. R. 259.

Declarations against interest.]—See EVIDENCE, Vol. XXII., pp. 98 et seq.

SUB-SECT. 5.—APPROPRIATION.

A. In General.

Appropriation of payments generally, *see CONTRACT, Vol. XII., pp. 474 et seq.*

737. Necessity for appropriation.] — *Semble*: where there are two clear & undisputed debts, the case is not taken out of Statute of Limitations as to either debt, by evidence of a part payment within six years, not specifically appropriated to the one debt or to the other.—*BURN v. BOULTON* (1846), 2 C. B. 476; 15 L. J. C. P. 97; 6 L. T. O. S. 296; 135 E. R. 1031.

Annotations:—Consd. Nash v. Hodgson (1855), 6 De G. M. & G. 474. *Dhtd. Collinson v. Margesson* (1858), 27 L. J. Ex. 305. *Refd. Abley v. Dale* (1851), 11 C. B. 378; *Walker v. Butler* (1856), 6 E. & B. 506; *Re Friend, Friend v. Young* (1897), 77 L. T. 50.

738. Payment made generally on account.]—Between Midsummer, 1845, & Lady Day, 1854, the guardians of the Wycombe Union made payments by way of relief to certain non-settled paupers of the Eton Union. The only authority for these payments were letters written in the years 1847, 1849, & 1850, in which the guardians of the Eton Union requested the guardians of the Wycombe Union to make weekly payments to certain paupers. One of these letters stated that "the money would be repaid quarterly," & another stated that "if they would furnish an account at the end of each quarter they would be repaid." Art. 80 of the Consolidated General Orders of the Poor Law Board, requires that all account of relief to non-settled paupers shall be sent in within fourteen days from the close of each quarter. In July, 1850, the guardians of the Wycombe Union sent to the guardians of the Eton Union an account in which they claimed a balance, after giving credit for a payment made in Nov. 1849, for relief of non-settled paupers of the Eton Union, from Lady Day, 1845, to Lady Day, 1847, & from Lady Day, 1849 to Lady Day, 1850. No previous account had been sent in or claim made in respect thereof. From Lady Day, 1850, to Lady Day, 1854, the accounts were made out sometimes quarterly & sometimes half-yearly, but in no case were they sent to the Eton Union within fourteen days after the expiration of each quarter of half-year, but at periods varying from one to three months after such time:—*Held*: pltf's. could not recover any part of the claim, for assuming that an action would lie, this was a qualified contract to pay if the accounts were sent in within fourteen days after each quarter, as required by the order of the Poor Law Board. Also, the payment not being generally an account did not take the case out of Statute of Limitations.—*WYCOMBE UNION v. ETON UNION* (1857), 1 H. & N. 687; 26 L. J. M. C. 97; 28 L. T. O. S. 256; 21 J. P. 70; 5 W. R. 260; 156 E. R. 1377.

Annotation:—Mentd. Bury & District Joint Hospital Board v. Chorlton Union Grdns. (1905), 70 J. P. 31.

739. —.] — An action may be maintained against the medical officers of a dispensary, who were also members of the managing committee, for drugs supplied for the dispensary, on the orders

PART II. SECT. 9, SUB-SECT. 4.—C.

730 i. By creditor.]—Indorsements on a promissory note, made in the handwriting of deceased payee showing payments of interest, *prima facie* evidence of the payments to take the

note out of the Statute of Limitations.—*WATSON v. HARRINGTON* (1888), 21 N. S. R. 218.—CAN.

PART II. SECT. 9, SUB-SECT. 5.—A.

737 i. Necessity for appropriation.]—

ROSS v. PERRAULT (1867), 13 Gr. 206.—CAN.

737 ii. —.] — *MUHAMMAD ABDULLA KHAN v. BANK INSTALMENT CO., LTD.* (1909), 1 L. L. R. 31 All. 495.—IND.

of others of its medical officers, on behalf of the committee, & with the knowledge of debts., the jury being directed that debts. would be personally liable unless they made pltfs. understand that they were to look only to the funds of the institution.

As to the Statute of Limitations, the payment by debts. generally on account takes the whole claim out of the statute (COCKBURN, C.J.).—LUCKOMBE v. ASHTON (1862), 2 F. & F. 705.

Annotation:—**Mentd.** Steele v. Gourley & Davis (1887), 3 T. L. R. 772.

740. — Or appropriated to particular debt by debtor.]—In 1877 an action was commenced to administer the estate of A., who owed B. £1,864 for cash advances from time to time made to her by B., from the year 1851 down to the time of her death in 1877. Most of the advances were made before 1871. B. claimed to prove for the entire debt, alleging that small cash payments made by A. in 1872, & in 1873, were payments made on account of the general balance of the debt:—*Held*: on the evidence, the payments in question were specific repayments made in respect of particular advances, & the general balance of the debt was statute-barred.—*Re* RAINFORTH, GWYNN v. GWYNN (1879), 49 L. J. Ch. 5; 41 L. T. 610, C. A.

B. Debts Barred and Unbarred.

741. Presumption of appropriation to unbarred debt.]—MILLS v. FOWKES, No. 623, *ante*.

742. —.]—A. being indebted to B. on three promissory notes was applied to by B. for payment on account of interest but without referring to any debt in particular: in consequence of this application A. paid £5: at the time of this payment two of the notes were barred by Statute of Limitations & one was not barred:—*Held*: the payment must be attributed as made exclusively in respect of the note not barred & the effect was as to it to prevent the operation of the statute.—NASH v. HODGSON (1855), 6 De G. M. & G. 474; 3 Eq. Rep. 1025; 25 L. J. Ch. 186; 1 Jur. N. S. 946; 3 W. R. 590; 43 E. R. 1318, L. C. & L. JJ.

Annotations:—**Distd.** Walker v. Butler (1856), 25 L. J. Q. B. 377; Friend v. Young, [1897] 2 Ch. 421. **Refd.** *Re* Boswell, Merritt v. Boswell, [1906] 2 Ch. 359.

743. —.]—(1) A solr. brought in a claim for costs against a deceased client's estate which was being administered by the ct. Most of the costs were incurred more than six years before the judgment in the administration action. The solr., who had acted for the client in various matters for many years, during the whole of which period the client was heavily indebted to him, on several occasions recovered moneys for the client & made certain payments thereout on the client's behalf &, with the assent of the client, retained the balance on account of the client's indebtedness to him. On another occasion he received from an interested party a contribution to the costs of an action

which formed the principal item of the claim, &, with the assent of the client, placed the sum so received to the credit of the client's account:—*Held*: these transactions did not constitute part payments as to take out of the operation of Statute of Limitations the items which were barred at the date of the judgment.

(2) *Qu.*: whether, when a payment on account is made by the debtor & there has been no appropriation by either the debtor or the creditor, the law will appropriate it to the earliest of the items which at the date of the payment were not statute-barred, or will treat it as attributable *pari passu* to all such items so as to take them out of the operation of the statute.—*Re* BOSWELL, MERRITT v. BOSWELL, [1906] 2 Ch. 359; 75 L. J. Ch. 234; 94 L. T. 243; 54 W. R. 306; 22 T. L. R. 247; 50 Sol. Jo. 241; *subsequent proceedings*, [1907] 2 Ch. 331, C. A.

744. Right of creditor to appropriate to barred debt—To take debt out of statute.]—Where, in an action for the balance of a banking account, the question between the parties was whether a disputed sum, above six years old, had been paid by pltfs. with debt.'s authority or not:—*Held*: the jury having found that the payment was authorised by debt., pltfs. were entitled to apply subsequent unappropriated payments of debt. in discharge of the sum in question, so as to prevent the operation of Statute of Limitations.—WILLIAMS v. GRIFFITH (1839), 5 M. & W. 300; 151 E. R. 127.

745. —.]—MILLS v. FOWKES, No. 623, *ante*.

746. —.]—In 1894 E. & co., had presented an account to F. & co., showing a balance due to E. & co. This account included items which had accrued due within six years & also items under the heading "Consignment Account," nearly all of which were statute-barred. The figures of the account were not agreed by either party; but F. & co., paid to E. & co., £300 "on account" which was credited in E. & co.'s books to the "consignment account":—*Held*: the appropriation of the £300 by E. & co. to the consignment account did not take the case out of Statute of Limitations; but the payment amounted to an acknowledgment by F. & co. that there was an account between them & E. & co. on which a balance of more than £300 would be payable from which a promise to pay that balance when ascertained must be inferred.—FRIEND v. YOUNG, [1897] 2 Ch. 421; *sub nom.* *Re* FRIEND, FRIEND v. FRIEND, 66 L. J. Ch. 737; *sub nom.* *Re* FRIEND, FRIEND v. YOUNG, 77 L. T. 50; 46 W. R. 139; 41 Sol. Jo. 607.

Annotations:—**Refd.** *Re* Boswell, Merritt v. Boswell, [1906] 2 Ch. 359. **Mentd.** Bagel v. Miller, [1903] 2 K. B. 212; North American Land & Timber Co. v. Watkins, [1904] 1 Ch. 242; Seymour v. Pickett, [1905] 1 K. B. 715; Henry v. Hammond, [1913] 2 K. B. 515.

747. —.]—SMITH v. BETTY, No. 97, *ante*.

740i. Payment made generally on account—Or appropriated to particular debt by debtor.]—Debt. was indebted to pltf. & interest was paid up to Aug. 1878. Debt. thereafter paid in 1882, \$50, \$40, & \$100, & in 1883, \$100. The first two payments were specially appropriated by debt. to the interest, & the others were unappropriated:—*Held*: the payments must be applied to the interest due on all the notes, the effect of which was to take them out of the Statute of Limitations.—WILSON v. RYKERT (1886), 14 O. R. 188.—CAN.

PART II. SECT. 9, SUB-SECT. 5.—B.

741i. Presumption of appropriation to unbarred debt.]—Where there are several debts & several payments, some of which are made after the earlier debts were barred by the Statute of Limitations, & some after all the debts were barred, & the creditor appropriates them to the earlier debts, none of the debts are taken out of the Statute.—MAHONEY v. MCSWEENEY (1888), 31 N. B. R. 672.—CAN.

744i. Right of creditor to appropriate

to barred debt—To take debt out of statute.]—In an action by an exor. for services rendered by testator as a labourer, on a monthly hiring, extending over many years, it appeared that payments had been made on account, at irregular intervals both to testator & to pltf. after his death, without any specific appropriation either by debt. or the payee:—*Held*: pltf. was entitled to have such payments applied to the earlier items which had become barred by the Statute of Limitations.—CATHCART v. HAGGART (1876), 37 U. C. R. 47.—CAN.

Sect. 9.—Part payment and payment of interest:
Sub-sect. 5, C. Sect. 10: Sub-sects. 1 & 2.
Part II. Sects. 1 & 2.]

C. Proof of Appropriation.

748. General rule.]—WATERS v. TOMPKINS, No. 621, *ante*.

749. Question for jury.]—COLLINSON v. MAR-GESSION, No. 561, *ante*.

750. Admission after payment—By parol.]—In an action upon a promissory note, to which Statute of Limitations was pleaded, pltf. gave evidence that deft. had paid 5s. on account of the note. He then offered to prove that deft., on a subsequent occasion, admitted orally that he had made such payment on the above account:—**Held:** the latter evidence was not excluded by Statute of Frauds Amendment Act, 1828 (c. 14).—BEVAN v. GETHING (1842), 3 Q. B. 740; 3 Gal. & Dav. 59; 12 L. J. Q. B. 37; 6 Jur. 971; 114 E. R. 689; *sub nom.* BEVAN v. JENKINS, 6 J. P. 731.
Annotation:—**Reid.** Blair v. Ormond (1851), 15 Jur. 1054.

751. Appropriation at time of payment.]—A creditor, who had, more than six years before the action, supplied ships' stores on seven separate occasions to debtor, amounting in the aggregate to more than £300, within six years, asked his debtor for money. Debtor answered that he had not looked into his accounts, but supposed the balance due to be between £90 & £100, but he had not cash. Being pressed, he accepted a draft at four months for £60, which he did, taking an acknowledgment that he had given the acceptance on account. It was proved by other evidence that the amount unpaid for the ship's stores was £95; but the different accounts were never balanced or ascertained between the creditor & debtor:—**Held:** evidence of the giving of the acceptance under these circumstances was evidence to go to the jury of a payment on account of all the debts, so as to be evidence of a fresh promise to pay what was due, sufficient to take the whole out of Statute of Limitations.—WALKER v. BUTLER (1856), 6 E. & B. 506; 25 L. J. Q. B. 377; 2 Jur. N. S. 687; 119 E. R. 953.

Annotations:—**Folld.** Curlewis v. Mornington (1857), 5 W. R. 491. **Apld.** *Re* Rainforth, Gwynn v. Gwynn (1879),

48 L. J. Ch. 725. (See 49 L. J. Ch. 5.) **Consd.** Friend v. Young, [1897] 2 Ch. 421; *Re* Boswell, Merritt v. Boswell, [1906] 2 Ch. 359. **Reid.** *Re* Fountaine, Fountaine v. Amherst (1909), 78 L. J. Ch. 648. **Mentd.** Roberts v. Shaw (1863), 32 L. J. Q. B. 308.

752. —.]—By deed between D. & H., D. sold to H. beds of coal, & H. covenanted to pay to D. a sum named for the purchase money, "in manner & at the times following" that is to say, part in cash on the day of the date of the deed, & the remainder by five promissory notes under H.'s hand, bearing even date with the deed, payable to D. or order on July 1, in every year till the whole purchase-money should be paid, with interest, until the notes should be paid.—D. declared against H., on this deed, alleging that, though H. gave D. two notes, etc., according to the language of the covenant, & afterwards paid a part of the principal & interest mentioned in those notes, yet he did not pay the residue of the principal & interest mentioned in those notes, but, except as to the part so paid, those notes & so much of the purchase-money & interest as was therein mentioned remained wholly unpaid to D.:—**Held:** a good breach, the covenant extending to the payment of the money in the notes, & not being satisfied by the mere delivery of the notes—& it was a bad plea, the causes of action did not accrue within six years before the suit.—DIXON v. HOLDROYD (1857), 7 E. & B. 903; 27 L. J. Q. B. 43; 29 L. T. O. S. 196; 3 Jur. N. S. 1147; 5 W. R. 688; 119 E. R. 1482.

SECT. 10.—ACTIONS OF TORT BY AND AGAINST PERSONAL REPRESENTATIVES.

SUB-SECT. 1.—BY REPRESENTATIVES.

See EXECUTORS, Vol. XXIII., pp. 295 *et seq.*, Vol. XXIV., p. 721.

SUB-SECT. 2.—AGAINST REPRESENTATIVES.

See EXECUTORS, Vol. XXIII., p. 302, Nos. 3668–3673; Vol. XXIV., p. 649, Nos. 6758–6762.

Part III.—Specialties.

SECT. 1.—WHAT ARE SPECIALTIES.

See Real Property Limitation Act, 1833, (c. 42); Mercantile Law Amendment Act, 1856 (c. 97).

753. Claims founded on statute.]—An action against a shareholder of a co. for calls, in which the co. declares in the general form given in Companies Clauses Act, 1845 (c. 16), s. 26, is an action on the statute; & therefore a plea alleging that the action is on contracts without specialty, & that the causes of action accrued within six years, is bad.

A declaration in debt upon a statute is a declaration upon a specialty (MAULE, J.).—CORK & BANDON RY. Co. v. GOODE (1853), 13 C. B. 826; 1 C. L. R. 345; 22 L. J. C. P. 198; 21 L. T. O. S. 141; 17 Jur. 555; 1 W. R. 410; 138 E. R. 1427.

Annotations:—**Folld.** Shepherd v. Hills (1855), 11 Exch. 55. **Consd.** Thomson v. Clanmorris, [1900] 1 Ch. 718. **Reid.** Aylott v. West Ham Corp., Sisson v. West Ham

Corp. (1926), 95 L. J. Ch. 533. **Mentd.** *Re* Royal Bank of Australia, Robinson's Exors.' Case (1856), 6 De G. M. & G. 572; *Re* Manchester & Milford Ry., [1897] 1 Ch. 276; Shepherd v. Bray (1906), 75 L. J. Ch. 633.

754. —.]—The justices of a county, as the local authority for the county, neglected between the years 1869 & 1878 to recoup to pltf., as the local authority for a borough within the county, the proportionate amount contributed by the borough to the expenses incurred by the local authority of the county, in carrying out the provisions of Contagious Diseases (Animals) Act, 1869 (c. 70), which they were bound to repay under sect. 97 of that Act. After the passing of Local Government Act, 1888 (c. 41), pltf. sued defts., as successors of the local authority for the county, to recover the sums which should have been recouped:—**Held:** the only remedy against the justices would have been by *mandamus* to them to pay the amounts claimed out of moneys in their hands, or to

E. Payment of rent—Appropriation to earliest arrears.]—EYRE v. COEN (1898), 33 L. L. T. 59.—**IR.**

CARLYLE v. OXFORD (1914), 30 O. L. R. 413; 18 D. L. R. 759; 5 O. W. N. 728.—**CAN.**

TIES Co. (Sask.), [1922] 3 W. W. R. 1; 68 D. L. R. 660.—**CAN.**

PART III. SECT. 1.

753i. Claims founded on

753ii. —.]—KAMSACK TOWN v. CANADIAN NORTHERN TOWN PROPER-

753iii. —.]—R. v. BAYLY (1841), 1 Dr. & War. 213.—IR.****

levy a rate for the purpose; &, as Local Government Act, 1888 (c. 41), vests in the county council the property of the justices for the county subject to the same conditions & restrictions as if the Act had not been passed, debts were not liable in the action. Also, if any action would lie it would be an action on the case & not an action for debt on a Statute, & therefore Statute of Limitations was a bar to the claim.—**SALFORD CORPN. v. LANCASHIRE COUNTY COUNCIL** (1890), 25 Q. B. D. 384; 59 L. J. Q. B. 576; 63 L. T. 409; 55 J. P. 85; 38 W. R. 661; 6 T. L. R. 362, C. A.

Annotations:—**Consd.** Aylott v. West Ham Corpn., *Sisson v. West Ham Corpn.* (1926), 90 J. P. 99. **Mentd.** Bootle-cum-Linacre Corpn. v. Lancashire C. C. (1890), 60 L. J. Q. B. 323; *Everett v. Griffiths*, [1924] 1 K. B. 941.

755. — Ship duties.—Sect. 8 of a local Act, imposes certain rates & duties "to be paid by the master or owners" for every ship or vessel of a certain burden passing from, to, or by Ramsgate. Sect. 14 declares, that "no coasting vessel or fisherman shall pay the duty charged by that Act oftener than once in any one year." Sect. 15 empowers the collectors to distrain every ship, & all the tackle, etc., for nonpayment of the duties. By sect. 16 if any master or owner of any ship or vessel shall elude or avoid payment of the duties, he shall stand charged & be liable to the payment of the same; & the same shall be levied & recovered from such master or owner by the same method by which fines & penalties imposed by that Act are levied & recovered. By sect. 72, penalties & forfeitures are to be recovered by action or distress. Deft., who was sued for duties under the local Act, was the owner of a vessel which several times in the year sailed in ballast to Jersey, & brought from thence oysters, which deft. purchased of fishermen there, & which he deposited in beds at Milton:—*Held*: the action being on a specialty, the period of limitation was twenty years, under Civil Procedure Act, 1833 (c. 42), s. 3.—**SHEPHERD v. HILLS** (1855), 11 Exch. 55; 25 L. J. Ex. 6; 4 L. T. 742; 156 E. R. 743.

Annotations:—**Refd.** Aylott v. West Ham Corpn., *Sisson v. West Ham Corpn.* (1926), 95 L. J. Ch. 533. **Mentd.** St. Pancras Parish Vestry v. Batterbury (1857), 2 C. B. N. S. 477; *Lamplough v. Norton* (1889), 58 L. J. Q. B. 279; *Lowe v. Dorling*, [1906] 2 K. B. 772; *Cohen v. Hall*, [1922] 2 K. B. 37.

Bonds.—See BONDS, Vol. VII., pp. 191, 192, Nos. 307–313, & Nos. 759–762, *post*.

Company proceedings—Calls on shareholders.—See COMPANIES, Vol. IX., pp. 99, 197, 198, Nos. 415, 1236.

In winding up.—See COMPANIES, Vol. X., p. 917, Nos. 6280–6282.

Statutory company for public purpose.—See COMPANIES, Vol. X., p. 1139, No. 8045.

Return of excess capital.—See COMPANIES, Vol. IX., p. 161, No. 933.

Recovery of dividends.—See COMPANIES, Vol. IX., p. 593, No. 3962; Vol. X., pp. 1159, 1160, No. 8205.

Borrowing by statutory company—Interest on securities.—See COMPANIES, Vol. X., p. 1192, No. 8458.

Contracts of guarantee—Surety's rights against principal debtor.—See GUARANTEE, Vol. XXVI., pp. 121–122, Nos. 855–866.

Covenants.—See Nos. 763–765, *post*.

SECT. 2.—PERIODS OF LIMITATION.

See Civil Procedure Act, 1833 (c. 42), s. 3.

756. Actions within two statutes—Whether shorter or longer period of limitation applies—Civil Procedure Act, 1833 (c. 42)—Real Property Limitation Act, 1833 (c. 27).—In covenant by mtgees. in possession for arrears of rent due under an indenture of demise for a term of years:—*Held*: a plea alleging that the sum sought to be recovered did not, nor did any part thereof, become due at any time within six years before the commencement of the suit, was bad upon demurrer, inasmuch as Real Property Limitation Act, 1833 (c. 27), s. 42, limiting the recovery of arrears of rent, or of interest in respect of any sum of money charged upon or payable out of any land or rent, or any damages in respect of such arrears of rent, to within six years next after the same, respectively, shall have become due, is *pro tanto* repealed by Civil Procedure Act, 1833 (c. 42), s. 3.

Qu.: whether the provisions of Real Property Limitation Act, 1833 (c. 27), refer to conventional rents created by agreement between landlord & tenant. *Semble*: they were intended to apply only to charges & incumbrances upon the land.—**PAGET v. FOLEY** (1836), 2 Bing. N. C. 679; 2 Hodg. 32; 3 Scott, 120; 5 L. J. C. P. 258; 132 E.

Annotations:—**Folld.** Strachan v. Thomas (1840), 12 Ad. & El. 536. **Refd.** Du Vigier v. Leo (1843), 2 Hare, 326; *Doe d. Angell v. Angell* (1846), 9 Q. B. 328; *Hunter v. Nockolds* (1850), 1 H. & Tw. 644; *Baines v. Lumley* (1868), 16 W. R. 674; *Howitt v. Harrington*, [1893] 2 Ch. 497; *Jones v. Withers* (1896), 74 L. T. 572.

757. — — — Real Property Limitation Act, 1874 (c. 57), s. 8.—The limitation of twelve years imposed by above sect. to actions & suits for the recovery of money charged on land applies to the personal remedy on the covenant in a mtge. deed as well as to the remedy against the land.—**SUTTON v. SUTTON** (1882), 22 Ch. D. 511; 52 L. J. Ch. 333; 48 L. T. 95; 31 W. R.

Annotations:—**Distd.** *Re Powers*, *Lindsell v. Phillips* (1885), 30 Ch. D. 291. **Consd.** *Re Frisby*, *Allison v. Frisby* (1889), 43 Ch. D. 106; *Barnes v. Glenton*, [1899] 1 Q. B. 885. **Appld.** *Shaw v. Crompton*, [1910] 2 K. B. 370. **Consd.** *Re Turner*, *Klaftenberger v. Groombridge*, [1917] 1 Ch. 422; *Re Jauncey*, *Bird v. Arnold*, [1926] Ch. 471. **Refd.** *Fearnside v. Flint* (1883), 22 Ch. D. 579; *Firth v. Slingsby* (1888), 58 L. T. 481; *Re Turner*, *Turner v. Spencer* (1894), 43 W. R. 153; *Re England*, *Steward v. England*, [1895] 2 Ch. 820; *Kibble v. Fairthorne*, [1895] 1 Ch. 219; *London & Midland Bank v. Mitchell*, [1899] 2 Ch. 161; *Kirkland v. Peatfield*, [1903] 1 K. B. 756; *Hervey v. Wynn* (1905), 22 T. L. R. 93; *Re Lacey*, *Howard v. Lightfoot*, [1907] 1 Ch. 330; *Re Jordison*, *Raine v. Jordison*, [1922] 1 Ch. 440. **Mentd.** *Powell v. Kempton Park Racecourse Co.*, [1897] 2 Q. B. 242; *De Beauvais v. Green* (1906), 22 T. L. R. 816.

758. — — — Real Property Limitation Act, 1874 (c. 57), s. 1.—The effect of Real Property Limitation Act, 1874 (c. 57), s. 1, upon Civil Procedure Act, 1833 (c. 42), s. 3, is to cut down the period within which a covenant to pay a rent-charge can be enforced, so that after the expiry of twelve years from the last payment without acknowledgment the remedy on the personal covenant is gone as well as the remedy against the land on which the money was charged.—**SHAW v. CROMPTON**, [1910] 2 K. B. 370; 80 L. J. K. B. 52; 103 L. T. 501, D. C.

PART III. SECT. 2.

h. Twenty years.—**WEIGALL v. GASTON** (1877), 3 V. L. R. L. 294.—**AUS.**

k. —.—**CHARD v. RAE** (1889), 18 O. R. 371.—**CAN.**

l. —.—**TORONTO GENERAL TRUSTS CORPN. v. CENTRAL ONTARIO RY. CO.** (1904), 8 O. L. R. 604; [1905] A. C. 576.—**CAN.**

m. —.—**RATEAU v. BALL** (1914), 14 E. L. R. 10; 15 D. L. R. 574; 47 N. S. R. 488.—**CAN.**

n. —.—**KEALY v. BODKIN** (1837), *Sau. & Sc.* 211.—**IR.**

o. —.—**CLARKE v. BODKIN** (1851), 13 I. Eq. R. 492.—**IR.**

p. —.—**Re DROGHEDA STRAM PACKET CO., LTD.**, [1903] 1 I. R. 512.—**IR.**

SECT. 3.—WHEN TIME BEGINS TO RUN.

See Civil Procedure Act, 1833 (c. 42), s. 3.

759. Bond—On each successive breach.]—Civil Procedure Act, 1833 (c. 42), s. 3, constitutes a bar to an action on a writing obligatory in those cases only where every breach of the condition has taken place more than twenty years previous to the commencement of the suit.—*SANDERS v. COWARD* (1845), 15 M. & W. 48; 3 Dow. & L. 281; 15 L. J. Ex. 97; 10 Jur. 186; 153 E. R. 756; *sub nom.* *SAUNDERS v. COWARD*, 6 L. T. O. S. 414.

Annotations :—*Consd.* *Amott v. Holden* (1852), 18 Q. B. 593. *Refd.* *Blair v. Ormond* (1851), 17 Q. B. 423.

760. ———.]—Declaration on the obligatory part only, upon two bonds, dated in 1828, & 1829, respectively. Pleas, (a) that the alleged causes of action did not accrue within twenty years; (b) that after the making of the bonds, & before the commencement of the action, deft. became bkpt., & that the said causes of action accrued before such bkpcy. At the trial, it appeared that deft. had become bkpt. in 1836; that M. had paid the annuities half-yearly down to 1848, but never till after the day of payment fixed by the condition, so that there had been breaches of the condition twenty years before action, & before the bkpcy.; & that the arrears suggested by pltf. were still due. Pltf. had not attempted to prove as annuity creditor under deft.'s bkpcy.:—*Held*: a new cause of action arose upon each successive breach of the condition; on the record as it stood, pltf. was entitled to prove, at the trial, breaches, within twenty years; & on such proof, he was entitled to a verdict upon the issue on Statute of Limitations.—*AMOTT v. HOLDEN* (1852), 18 Q. B. 593; 22 L. J. Q. B. 14; 19 L. T. O. S. 253; 17 Jur. 318; 118 E. R. 224.

Annotations :—*Refd.* *Forsyth v. Bristowe* (1853), 8 Exch. 347. *Mentd.* *Warburg v. Tucker* (1855), 5 E. & B. 384; *White v. Corbett* (1859), 1 E. & E. 692; *Wythes v. Labouchere* (1859), 3 De G. & J. 593.

761. ——— Post-obit bond—Time runs from death.]—To debt on a bond bearing date on a day more than twenty years before the commencement of the action, deft. pleaded that the debt & cause of action in the declaration mentioned, did not accrue at any time within twenty years next before the commencement of the suit. Replication, that the debt & cause of action did so accrue. At the trial, the bond was produced, & appeared to be a post-obit bond; & it was proved that the party upon whose death the sum secured was made payable, died within twenty years:—*Held*: pltf. was entitled to the verdict.—*TUCKEY v. HAWKINS* (1847), 4 C. B. 655; 16 L. J. C. P. 201; 11 Jur. 910; 136 E. R. 665; *sub nom.* *HUCKEY v. HAWKINS*, 9 L. T. O. S. 247.

Annotation :—*Folld.* *Amott v. Holden* (1852), 18 Q. B. 593.

762. ——— Death of obligor—No personal representative appointed for over twenty years—Action within year of appointment.]—Where an action on a money bond abates by the death of deft. & no personal representative is appointed for twenty years, but after that time letters of administration are granted, a fresh action may, notwithstanding the lapse of time, be maintained on the bond against the administrator, if commenced within a year after his appointment, as according to the equitable construction put upon Civil Procedure Act, 1833 (c. 42), s. 3,

adopted by analogy from Statute of Limitations, 1623 (c. 16), the right of action is not in such case barred.—*STURGIS v. DARELL* (1860), 6 H. & N. 120; 29 L. J. Ex. 472; 2 L. T. 808; 6 Jur. N. S. 1351; 8 W. R. 653; 158 E. R. 50, Ex. Ch.

Annotation :—*Apld.* *Swindell v. Bulkeley* (1886), 18 Q. B. D. 250.

763. Covenant—Dependent on fulfilment of trust deed—Time runs from such fulfilment.]—In July, 1817, a mtge. was executed by deft., for securing, first, to deft.'s bankers, the payment of a sum of £1,620 & upwards, & interest; & secondly, to pltf. a sum of £1,500 & interest, & pltf. thereby became a surety with deft. for payment to the bankers of the amount so due to them. A power of sale was given to the bankers, which they exercised in the year 1834, but the proceeds of the sale were not sufficient to satisfy the amount due to them. By a deed-poll, dated Aug. 7, 1817, after reciting the existence of the debt due from deft. to pltf., & the fact that pltf. had become surety for deft. in divers instances, & that deft. had considerable expectations from the relations & friends of himself & his wife, & that he was desirous as far as might be of securing the payment of the debt due to pltf., deft., in the most extensive terms, nominated pltf. his attorney irrevocable, to sue for & receive from all persons whomsoever, all sums of money, & all legacies & bequests, which should or might become due or payable to him, or his wife, etc. Several of the relatives of deft. & his wife, subsequently to the date of the deed-poll, bequeathed legacies to deft. & his wife respectively; & in the year 1842, pltf. filed this bill, seeking the benefit of the deed-poll, & a decree for payment to pltf. of the legacies so bequeathed to deft. & his wife in satisfaction, so far as the same would extend, of the debt due to pltf.:—*Held*: pltf.'s debt was not barred by Civil Procedure Act, 1833 (c. 42), notwithstanding the lapse of twenty-five years between the date of the security & the filing of the bill; the power of attorney contained in the deed-poll was in the nature of a covenant, & whilst the trusts of the indenture of July, 1817, remained unsatisfied, Statute of Limitations would not run against pltf.'s debt.

Whilst this trust was pending, & whilst he might expect to receive payment by means of it, & whilst steps were taking towards payment of the prior debt, until satisfaction of which he had no remedy for himself, it cannot, I think, be maintained that time ran against him, so as to deprive him of the benefit of his own securities; & it appears to me, that until the trust was exhausted in 1834, the covenant remained in force, wholly unaffected by time (LORD LANGDALE, M.R.).—*BENNETT v. COOPER* (1846), 9 Beav. 252; 15 L. J. Ch. 315; 7 L. T. O. S. 209; 10 Jur. 507; 50 E. R. 340.

Annotations :—*Consd.* *Re Seager's Estate, Seager v. Aston* (1857), 29 L. T. O. S. 154. *Mentd.* *Re Clarke, Coombe v. Carter* (1887), 36 Ch. D. 348; *Tailby v. Official Receiver* (1888), 13 App. Cas. 523.

764. ——— Time runs from breach.]—Deft. being seised in fee of land & coal beneath it, in 1844, let the coal, by a written agreement, to lessees for a term of twenty-five years, with power to enter & work & carry away the coal across the land, & all other powers fit & necessary for the working & carrying. The lessees entered & worked & carried away coal, & after they had

PART III. SECT. 3.

759 i. Bond—On each successive breach.]—*MADDOCK v. MALLET* (1860), 12 I. C. L. R. 173, 193.—IR.

761 i. ——— Post-obit bond—Time runs from death.]—The Statute of

Limitations does not begin to run against a judgment entered on a post obit bond, until the death occurs on which the bond is payable.—*BARKER v. SHORE* (1839), 1 Jebb & S. 610.—IR.

761 ii. ———.]—*GILMAN v.*

CHUTE (1847), 11 I. L. R. 442.—IR.

761 iii. ———.]—*KENNEDY*

v. WHALEY (1848), 12 I. L. R. 54.—IR.

q. ——— Payable by instalments.]—

When a bond is entered into to pay off money due under a decree monthly by

PART III.—SPECIALTIES.

ceased, deft., in 1845, conveyed by deed a portion of the land to J., a purchaser, who had previously been through the workings, but was not shown to have any knowledge of the agreement or its terms. By the deed deft. covenanted with J., his appointees, heirs & assigns for title, for quiet enjoyment, & against incumbrances. In 1846 J. appointed the portion of land to pltf., a purchaser, who afterwards built houses thereon, & who had no knowledge of the workings until the land & houses subsided, in 1865. The subsidence was caused by the workings which had been carried on before the conveyance to J. In 1848, the lessees entered the mine & took fireclay, which they had no right to take, & also fragments of coal of nominal value, but these acts did not contribute to cause the subsidence. In 1867, pltf., as appointee of J., sued deft. on the covenants for title & quiet enjoyment, that, after pltf. became seised, the lessees entered & worked, whereby the damage was caused:—*Held*: (BRAMWELL, B.) assuming the agreement to be a breach of the covenant for title, it was not a continuing breach, & the action was barred by Civil Procedure Act, 1833 (c. 42).—*SPOOR v. GREEN* (1874), L. R. 9 Exch. 99; 43 L. J. Ex. 57; 30 L. T. 393; 22 W. R. 547.

Annotation:—*Reid*. *Turner v. Moon*, [1901] 2 Ch. 825.

765. ———.]—By an indenture of conveyance, dated in 1898, deft. as beneficial owner granted to pltf., his heirs & assigns, certain land subject to specified rights of way over a road forming part of the property which had been previously granted by deft. to other persons. The land was bought & sold for building purposes, & pltf. having built a house thereon discovered that, in addition to the rights of way specified in the conveyance, there existed a further right of way over the road, which had been granted by deft. in 1891 to another person & was innocently undisclosed by him. In an action for damages for breach of the covenant for title implied by Conveyancing & Law of Property Act, 1881 (c. 41), s. 7:—*Held*: the breach was single, entire, & complete upon the execution of the conveyance; & the proper measure of damages was the difference between the value of the property as it purported to be conveyed, & its value as the vendor had power to convey it.

Such breach as there has been of the part of the covenant for good right to convey occurred & was complete upon the execution of the conveyance. . . . From the moment of the delivery of the conveyance Statute of Limitations in respect of this breach commenced to run (JOYCE, J.).—*TURNER v. MOON*, [1901] 2 Ch. 825; 70 L. J. Ch. 822; 85 L. T. 90; 50 W. R. 237.

Annotations:—*Mentd.* *G.W. Ry. v. Fisher*, [1905] 1 Ch. 316; *Eastwood v. Ashton*, [1913] 2 Ch. 39.

Contract of guarantee—Action against surety—Time runs from demand.—*See* GUARANTEE, Vol. XXVI., pp. 68, 69, Nos. 482, 483.

Company proceedings—Return of excess capital.—*See* COMPANIES, Vol. IX., p. 161, No. 933.

— **Recovery of dividend.**—*See* COMPANIES, Vol. IX., p. 593, No. 3962.

SECT. 4.—DISABILITIES.

Compare, generally, Part II., Sect. 5, sub-sect. 4, ante.

instalments, each monthly instalment becomes a separate cause of action, & limitation applies to each instalment

separately.—*MUSSAMAT KHEDU v. KALU SAHU* (1869), 3 B. L. R. Ap. 112; 12 W. R. 71.—*IND.*

Infancy & mental infirmity.—*See* Civil Procedure Act, 1833 (c. 42), s. 4.

Absence beyond seas.—*See* Civil Procedure Act, 1833 (c. 42), ss. 4, 7; Mercantile Law Amendment Act, 1856 (c. 97), s. 10.

Coverture.—*See* Married Women's Property Act, 1882 (c. 75), ss. 1 (2), 25.

SECT. 5.—ACKNOWLEDGMENT.

SUB-SECT. 1.—BY WHOM MADE.

See Civil Procedure Act, 1833 (c. 42), s. 5; Mercantile Law Amendment Act, 1856 (c. 97), s. 14.

766. Party able to plead statute of limitation.—*RODDAM v. MORLEY*, No. 772, *post*.

767. Where several obligors—Acknowledgment by one obligor.—*RODDAM v. MORLEY*, No. 772, *post*.

768. ———.]—A testator who died in 1823 had covenanted in 1815 with trustees of a settlement made on the marriage of his son, that he, his heirs, exors., or administrators, would, during his life, or within three months after his death, pay to the trustees £3,000, to be held by them upon the trusts of the settlement. Testator, by his will, devised his P. estate to trustees for sale for payment of his debts, the trustees of that estate being also his exors., & he devised his D. estate, to which he was entitled in remainder expectant on the death of F., who died in 1860, to trustees upon trust for E. for life, with remainders over. E. mortgaged his equitable life-interest in 1863, the £3,000 not having been paid, though interest thereon had been paid down to 1849 by the exors. & trustees of the P. estate, the trustees of the son's marriage settlement instituted a suit for the purpose of having that sum, with interest, raised by sale or mtge. of the D. estate:—*Held*: the payment of interest by the exors. & trustees of the P. estate, was not such an acknowledgment "by the party liable by virtue of such indenture or specialty, or his agent," within Civil Procedure Act, 1833 (c. 42), s. 5, as would take the debt out of the Statute: consequently the debt was barred as against the appealing defts.—*COOPE v. CRESSWELL* (1866), 2 Ch. App. 112; 36 L. J. Ch. 114; 15 L. T. 427; 15 W. R. 242, L. C.

Annotations:—*Apld.* *Re England, Steward v. England* (1895), 65 L. J. Ch. 21. *Consd.* *Re Lacey, Howard v. Lightfoot*, [1907] 1 Ch. 330. *Reid.* *Pears v. Laing* (1871), L. R. 12 Eq. 41; *Re Hollingshead, Hollingshead v. Webster* (1888), 37 Ch. D. 651; *Re Hyatt, Bowles v. Hyatt* (1888), 38 Ch. D. 609; *Edwards v. Walters*, [1896] 2 Ch. 157; *Astbury v. Astbury*, [1898] 2 Ch. 111; *Re Chant, Bird v. Godfrey*, [1905] 2 Ch. 225; *Read v. Price*, [1909] 2 K. B. 724. *Mentd.* *British Mutual Investment Co. v. Smart* (1875), 10 Ch. App. 567; *Re Atkinson, Proctor v. Atkinson*, [1908] 2 Ch. 307.

769. ———.]—In 1822, A. mortgaged part of his V. estate & some renewable leaseholds to secure £1,000, & the deed contained the usual covenant by A. for himself, his heirs, exors., & administrators, for payment of principal & interest. A. died in 1825, having by his will devised to B. his son, & C. his X. estate, in trust for his daughters D. & E. for life, with remainder, in the events which happened, to his other children, & the whole of his V. estate to the same trustees in trust for his daughter F. for life, with remainder to her children. The trustees were empowered to sell both estates, & apply the proceeds upon the trusts declared of the same; & the will contained a devise

r. — *Continuing breach.*—*MORROGH v. ALLEYNE* (1873), 7 I. R. Eq. 487.—*IR.*

Sect. 5.—Acknowledgment: Sub-sects. 1, 2 & 3, A.

to the same trustees of his other real estates, the renewable leaseholds, & his personal estate, upon trust to sell & apply the proceeds in payment of legacies & the mtges. on V. & X. estates, & his other debts, the general residue being given to B. B. died in 1830, having by will given all his estate to his sisters D. & E. & appointed them his ex-trices. In 1831, mtges. affecting X. estate, & the part of V. estate not comprised in the mtge. of 1822, were paid off out of A.'s general estate, & reconveyances were executed to C. as surviving trustee of his will. D. received the rents of a moiety of X. estate, & paid interest on the mtge. of 1822, until her death in 1859. In 1864, G. who had by representation become the surviving trustee of A.'s will, & as such trustee for the persons beneficially interested of the equity of redemption of the property comprised in the mtge. of 1822, sold the renewable leaseholds, & applied the purchase money in discharging the arrears of interest due on that mtge., & in satisfaction *pro tanto* of the principal. In a creditors' suit instituted in 1867 by the administrator of the transferee of the mtge. of 1822 for an account, sale of the mtged. property, & in case the money to arise by the sale should be insufficient, that the deficiency might be made good out of the assets of A.:—**Held**: the claim was not barred by Real Property Limitation Act, 1833 (c. 27), & Civil Procedure Act, 1833 (c. 42), as independently of the application of the proceeds of the sale in 1864 in satisfaction *pro tanto* of the debt & interest, the payment of interest by D. until her death in 1859 was binding upon all persons interested either in the mtged. property or in the other property of A. which was liable, by reason of the covenant, for repayment of interest, & kept the specialty alive against them.—**PEARS v. LAING** (1871), L. R. 12 Eq. 41; 40 L. J. Ch. 225; 24 L. T. 19; 19 W. R. 653.

Annotations:—**Refd.** *Barclay v. Owen* (1889), 60 L. T. 220; *Re England, Steward v. England* (1895), 65 L. J. Ch. 21; *Re Lacey, Howard v. Lightfoot*, [1907] 1 Ch. 330.

770. ———.]—**Re LACEY, HOWARD v. LIGHTFOOT**, No. 919, *post*.

771. ———.]—(1) An acknowledgment in writing by one of several obligors is an acknowledgment by a party liable by virtue of the specialty within Civil Procedure Act, 1833 (c. 42), s. 5, as interpreted by *Roddam v. Morley*, No. 772, *post*, so as to take out of the operation of sect. 3 of that Act an action founded on the liability of the surviving obligors, & stands on the same footing as payment.

(2) Parol evidence is admissible to prove the contents of a written acknowledgment which has been lost.—**READ v. PRICE**, [1909] 2 K. B. 724; 78 L. J. K. B. 1137; 101 L. T. 60; 25 T. L. R. 701, C. A.

772. Any one party liable—Devisee.—A tenant for life under the will of a person who, in 1826, gave a bond, in which his heirs were bound, to secure payment of £300, paid interest upon the bond debt up to 1847. Upon a bill filed by the bond creditor, after the death of the tenant for life, to enforce payment of the bond debt against the estate of the obligor:—**Held**: (1) acknowledgment by the "party liable" within Civil Procedure Act, 1833 (c. 42), s. 5, extends to the case of acknowledgment by one of the parties liable; (2) under the Statutes of Fraudulent Devises, a devisee liable by virtue of its provisions, is a party liable within Civil Procedure Act, 1833 (c. 42), s. 5; (3) acknowledgment within Civil

Procedure Act, 1833 (c. 42), s. 5, by the tenant for life, sets free the right of action generally, & not merely against the party making the acknowledgment; (4) an acknowledgment within Civil Procedure Act, 1833 (c. 42), does not operate on the footing of a fresh promise, & as constituting upon that ground a new cause of action, as under Statute of Limitations, 1623 (c. 16), & Statute of Frauds Amendment Act, 1828 (c. 14); & an action in which such acknowledgment is to be operative must be maintained upon the original obligation; (5) an acknowledgment by one of several obligors is an acknowledgment by the party liable within the statute; & any party who could plead the limitation given by Civil Procedure Act, 1833 (c. 42), s. 3, to an action on the bond, is capable under sect. 5 of making an acknowledgment so as to prevent the operation of sect. 3 in his favour.

(6) A bond debt is not "charged upon" or "payable out of land" within Real Property Limitation Act, 1833 (c. 27), s. 40.—**RODDAM v. MORLEY** (1857), 1 De G. & J. 1; 26 L. J. Ch. 438; 29 L. T. O. S. 151; 3 Jur. N. S. 449; 5 W. R. 510; 44 E. R. 622, L. C.

Annotations:—**As to** (1) **Distd.** *Coope v. Cresswell* (1866), 2 Ch. App. 112. **As to** (2) **Distd.** *Dickenson v. Teasdale* (1862), 1 De G. J. & Sm. 52. **Refd.** *Edwards v. Walters*, [1896] 2 Ch. 157. **As to** (3) **Consd.** *Pears v. Laing* (1871), L. R. 12 Eq. 41; *Re Hollingshead, Hollingshead v. Webster* (1888), 37 Ch. D. 651. **Apld.** *Dibb v. Walker*, [1893] 2 Ch. 429; *Re Chant, Bird v. Godfrey*, [1905] 2 Ch. 225; *Re Lacey, Howard v. Lightfoot*, [1907] 1 Ch. 330. **Refd.** *Barclay v. Owen* (1889), 60 L. T. 220; *Re England, Steward v. England*, [1895] 2 Ch. 100; *Astbury v. Astbury*, [1898] 2 Ch. 111. **As to** (5) **Apld.** *Read v. Price*, [1909] 2 K. B. 724.

773. ——— **Interests distinct.**—**COOPE v. CRESSWELL**, No. 768, *ante*.

774. ———.]—**Re LACEY, HOWARD v. LIGHTFOOT**, No. 919, *post*.

775. Receiver—Payment not authorised by order of appointment.—Payments made by a receiver in a suit, but which were not authorised by the order appointing him, held not to take the case out of Statute of Limitations.

In a suit by the exors. of two deceased partners against the third, who survived, to take the accounts of the concern, a receiver was appointed, & ordered to pay the proceeds of the assets into ct. Instead of this, he paid them over to one of pl'tfs., in part discharge of the debt due to their testator from the estate of the other deceased partner, upon the balance of the accounts as then estimated:—**Held**: such payment did not take such debt out of Statute of Limitations.—**WHITLEY v. LOWE** (1858), 25 Beav. 421; 31 L. T. O. S. 5; 4 Jur. N. S. 197; 6 W. R. 236; 53 E. R. 697; *affd.* 2 De G. & J. 704, L. JJ.

776. Acknowledgment by party actually chargeable—Necessity for.—The acknowledgment provided for by Civil Procedure Act, 1833 (c. 42), s. 5, in order to take a specialty debt out of the operation of that statute, need not be made by the person chargeable to the person entitled, or amount to a promise to pay. Therefore, an admission of a bond debt, contained in the answer of the exors. of the obligor in a suit to which the obligee was not a party:—**Held**: sufficient to take the bond debt out of the operation of that statute.—**MOODIE v. BANNISTER** (1859), 4 Drew. 432; 28 L. J. Ch. 881; 32 L. T. O. S. 376; 5 Jur. N. S. 402; 7 W. R. 278; 62 E. R. 166.

Annotations:—**Refd.** *Gopeekishen Goshamee v. Brindabunchunder Sircar Chowdry* (1869), 13 Moo. Ind. App. 37; *Re Lacey, Howard v. Lightfoot*, [1907] 1 Ch. 330. **Mentd.** *Fuller v. Redman* (No. 2) (1859), 26 Beav. 614; *Lucas v. Dixon* (1889), 58 L. J. Q. B. 161; *Trevor v. Hutchins*, [1896] 1 Ch. 844.

SUB-SECT. 2.—TO WHOM MADE.

See Civil Procedure Act, 1833 (c. 42), s. 5.

777. Whether to be made to person entitled—knowledge to person other than creditor—fatal in deed.]—In an action of covenant on an indenture of mtge. of certain houses, executed in 1744, by deft., in favour of pltf.'s testator, to secure payment of £400, & interest, pltf., in order to take the case out of Civil Procedure Act, 1833 (c. 42), gave in evidence a deed executed by deft., within twenty years before action brought, but in which deed pltf.'s testator was no party. The deed, after reciting that deft. had executed a mortgage of the houses in question to pltf.'s testator, & securing to him a sum of £320 & interest, stated that he conveyed that & other properties to trustees in trust to sell, & out of the proceeds of the sale to pay off all the mtges. & other incumbrances affecting the property, & then to pay the creditors, with an ultimate trust as to the surplus:—*Held*: this was not an acknowledgment of the debt within the meaning of sect. 5 of the statute, so as to take the case out of the operation of sect. 3.—*HOWCUTT v. BONSER* (1849), 3 Exch. 491; 18 L. J. Ex. 262; 154 E. R. 319; *sub nom.* *HOWKETT v. BONSOR*, 13 L. T. S. 97.

778. ——— Admission in pleading.]—*MOODIE v. BANNISTER*, No. 776, *ante*.

779. ——— Or his agent.]—*FORSYTH v. BRISTOWE*, No. 789, *post*.

780. ———.]—*Re LACEY, HOWARD v. LIGHTFOOT*, No. 919, *post*.

SUB-SECT. 3.—SUFFICIENCY.

A. In General.

See Civil Procedure Act, 1833 (c. 42), s. 5.

781. Payment—By receiver—Payment not authorised by order of appointment.]—*WHITLEY v. LOWE*, No. 775, *ante*.

782. ——— Separate sum secured by one bond—Payment in respect of one sum.]—By an agreement, a sum of £1000, part of the purchase-money of real estate, was secured by a bond. The arrangement was that £750 was to be paid to a person named on a given event, & the remaining £250, to another person on another event. The event upon which the £250 became payable happened more than twenty years before the filing of the bill, & it was alleged that that sum had never been paid. The event on which the £750 became payable happened within the twenty years, & the £750 was then paid:—*Held*: where two separate sums are secured by one bond, a payment in respect of one sum does not prevent the Statute of Limitations running in respect of the other. The payment of the £750 did not prevent the £250 being barred by the statute.—*ASHLIN v. LEE* (1875), 44 L. J. Ch. 376; 32 L. T. 348; 23 W. R. 458, L. J.

783. ——— Evidence—Indorsement of part payment.]—*TURNER v. CRISP* (1740), 2 Stra. 827; 93 E. R. 876.

Annotations:—*Reid*. *Gleadow v. Atkin* (1833), 1 Cr. & M. 410; *Briggs v. Wilson* (1853), 5 De G. M. & G. 12.

784. Promise to pay—Acknowledgment need not amount to.]—*MOODIE v. BANNISTER*, No. 776, *ante*.

785. Admission of debt—In suit to which obligee not party.]—*MOODIE v. BANNISTER*, No. 776, *ante*.

786. Lost acknowledgment—Admissibility of parol evidence.]—*READ v. PRICE*, No. 771, *ante*.

B. Payment of Interest.

See Civil Procedure Act, 1833 (c. 42), s. 5.

787. Law similar to payment on simple contract debts.]—(1) The law in regard to the effect of payment of interest on a simple contract debt of a testator by the tenant for life of the real estate stands on the same footing as that in respect of payment of interest on a specialty debt.

(2) Payments made by a tenant for life under a will of real estate held to be sufficient admission of the liability of the real estate, & sufficient evidence to keep alive a simple contract debt of testator.—*Re HOLLINGSHEAD, HOLLINGSHEAD v. WEBSTER* (1888), 37 Ch. D. 651; 57 L. J. Ch. 400; 58 L. T. 758; 36 W. R. 660; 4 T. L. R. 275.

Annotations:—*As to* (1) *Reid*. *Dibb v. Walker*, [1893] 2 Ch. 429; *Re Chant, Bird v. Godfrey*, [1905] 2 Ch. 225. *As to* (2) *Consd.* *Dibb v. Walker*, [1893] 2 Ch. 429. *Expld.* *Astbury v. Astbury*, [1898] 2 Ch. 111. *Reid*. *Edwards v. Walters*, [1896] 2 Ch. 157; *Re Macdonald, Dick v. Fraser*, [1897] 2 Ch. 181; *Re Chant, Bird v. Godfrey*, [1905] 2 Ch. 225; *Re Lacey, Howard v. Lightfoot*, [1907] 1 Ch. 330.

788. Bond to replace stock—Payments by way of interest—Bond conditioned for such payments.]—

An action upon a bond conditioned for the replacement of stock is barred by the lapse of twenty years after the time at which the stock ought to be replaced, & cannot be kept alive by the payment of sums by way of interest upon the money which the stock would represent. *Aliter*, upon a bond conditioned for the annual payment of such sums as the obligor would have been entitled to receive by way of dividends upon the stock if replaced.—*BLAIR v. ORMOND* (1851), 17 Q. B. 423; 20 L. J. Q. B. 444; 18 L. T. O. S. 18; 15 Jur. 1054; 117. E. R. 1341.

Annotation:—*Expld.* *Amott v. Holden* (1852), 18 Q. B. 593.

789. Interest on mortgage debt.]—A deed by which the mtgor. conveyed the equity of redemption, after reciting the mtge. deed, contained a recital that the principal sum still remained due, all the interest thereon having been paid up to the date thereof. The deed also contained a covenant by the assignee of the equity of redemption to pay the principal sum and interest thereon:—*Held*: (1) in an action by the mtgee. against the mtgor. upon the mtge. deed, the recital in the deed of conveyance which was made within twenty years of action brought, was evidence of the payment of interest on the mtge. debt, so as to take the case out of Statute of Limitations, Civil Procedure Act, 1833 (c. 42), s. 5, & 7 Will. 4 & 1 Vict., c. 28; (2) the subsequent payment of interest by the assignee of the equity of redemption was payment by the "agent" of the mtgor. within the meaning of the statute.

Qu.: whether the "acknowledgment" required to take the case out of Civil Procedure Act, 1833 (c. 42), s. 5, must be an acknowledgment made to the creditor or his agent.—*FORSYTH v. BRISTOWE* (1853), 8 Exch. 716; 1 C. L. R. 262; 22 L. J. Ex. 255; 21 L. T. O. S. 130; 17 Jur. 675; 1 W. R. 356; 155 E. R. 1540; *previous proceedings*, 8 Exch. 347.

Annotations:—*As to* (2) *Expld.* *Coope v. Cresswell* (1866), 2 Ch. App. 112. *Appld.* *Dibb v. Walker*, [1893] 2 Ch. 429. *Reid*. *Roddam v. Morley* (1857), 1 De G. & J. 1; *Francis v. Hawkesley* (1859), 28 L. J. Q. B. 370; *Re England, Steward v. England* (1895), 65 L. J. Ch. 21; *Re Lacey, Howard v. Lightfoot*, [1907] 1 Ch. 330.

790. ——— By tenant for life—Of settled equity of redemption.]—Payment of interest by tenant for life of a settled equity of redemption is sufficient to keep alive the right of action on the covenant of the settlor within Civil Procedure Act, 1833 (c. 42), s. 5.—*DIBB v. WALKER*, [1893] 2 Ch. 429; 62

PART III. SECT. 5, SUB-SECT. 3.—A.

t. Necessity for writing.]—*MARTIN v. BARNES* (1863), 5 N. S. R. (1 Old.) 291.—*CAN.*

Sect. 5.—Acknowledgment: Sub-sect. 3, B.; sub-sect. 4. Part IV. Sect. 1: Sub-sect. 1, A.]

L. J. Ch. 536; 68 L. T. 610; 41 W. R. 427; 37 Sol. Jo. 355; 3 R. 474.

*Annotations:—***Apld.** *Re Chant, Bird v. Godfrey*, [1905] 2 Ch. 225. **Refd.** *Re England, Steward v. England* (1895), 65 L. J. Ch. 21; *Re Lacey, Howard v. Lightfoot*, [1907] 1 Ch. 330.

791. Evidence of payment—Indorsement on bond—By obligee.]—The indorsement of interest being paid [on a bond] within twenty years shall be given in evidence though under the hand of the obligee.—**BARRINGTON (LORD) v. SEARLE** (1730), 3 Bro. Parl. Cas. 593; 3 P. Wms. 396, n.; 1 E. R. 1518; *sub nom.* **SERLE v. BARRINGTON (LORD)**, 2 Ld. Raym. 1870; 8 Mod. Rep. 278; *sub nom.* **SEARLE v. BARRINGTON (LORD)**, 2 Stra. 826, H. L. *Annotations:—***Consd.** *Glynn v. Bank of England* (1750), 2 Ves. Sen. 38; *Gleadow v. Atkin* (1833), 1 Cr. & M. 410. **Refd.** *Barnes v. Ransom* (1730), 1 Barn. K. B. 432; *Briggs v. Wilson* (1854), 5 De G. M. & G. 12; *Edye v. Kingsford* (1854), 2 C. L. R. 832.

792. — — — — —.]—Indorsements by obligee of payment of interest, evidence to take off presumption of time.—**GLYNN v. BANK OF ENGLAND** (1750), 2 Ves. Sen. 38; 28 E. R. 26, L. C. *Annotations:—***Refd.** *Gleadow v. Atkin* (1833), 1 Cr. & M. 410; *Briggs v. Wilson* (1854), 5 De G. M. & G. 12.

793. — — — — — Indorsement in own handwriting.]—Where, in debt on a bond more than twenty years old, to rebut the presumption of payment, the obligee gave evidence of payment of interest by the obligor to B. equal in amount to the interest that would become due on the bond:—**Held**: an indorsement on the bond in the handwriting of the obligee, & which appeared to have been made at or about the time when the bond was executed, but which was not proved to have been ever seen by the obligor, stating that the bond was given to the obligee in trust for B. was admissible in evidence to connect the payments of interest with the bond.—**GLEADOW v. ATKIN** (1833), 1 Cr. & M. 410; 3 Tyr. 289; 2 L. J. Ex. 153; 149 E. R. 459.

*Annotations:—***Refd.** *Briggs v. Wilson* (1854), 5 De G. M. & G. 12; *Edye v. Kingsford* (1854), 2 C. L. R. 832. **Mentd.** *Marks v. Lahée* (1837), 3 Bing. N. C. 408; *Ward v. Pitt, Lloyd v. Powell Duffryn Steam Coal Co.*, [1913] 2 K. B. 130.

794. — — — — — By obligor—Indorsement in own handwriting.]—**ROSE v. BRYANT** (1809), 2 Camp. 321, N. P.

*Annotation:—***Consd.** *Briggs v. Wilson* (1854), 5 De G. M. & G. 12.

795. — — — — — Indorsement not in own handwriting.]—**ROSE v. BRYANT** (1809), 2 Camp. 321, N. P.

*Annotation:—***Consd.** *Briggs v. Wilson* (1854), 5 De G. M. & G. 12.

796. — — — — —.]—Payment, within twenty years, of interest accruing before twenty years, indorsed on the bond, is an acknowledgment that the principal was then due, sufficient to negative a plea of *solvit post diem*. After twenty years, payment is presumed.

Payment within twenty years of interest which has accrued beyond the twenty years, is only proof that such a bond once existed. But the making of the indorsement on the bond itself, in 1808, is an admission that the debt was a valid subsisting debt within the twenty years (**PARKE, J.**).—**SANDERS v. MEREDITH** (1828), 3 Man. & Ry. K. B. 116.

*Annotation:—***Refd.** *Gleadow v. Atkin* (1833), 1 Cr. & M. 410.

797. Payment presumed—Same person to pay & receive.]—Pltfs., who were trustees of a marriage settlement, lent J. a sum of money which was settled to the separate use of his wife, H., on the

joint bond of J. & deff., dated Nov. 1, 1833. In 1847, no interest having been paid on the bond, it was arranged at an interview between pltfs. & J. & his wife that she should, as the interest on the trust money became due to her from pltfs., give pltfs. her receipt acknowledging the payment of such interest, & that the transaction should be considered by all the parties as a payment to pltfs. by J. of the interest due to them from him on the bond, & as a payment by pltfs. to H. of the interest due to her from pltfs., on the trust money. In pursuance of this arrangement H. gave pltfs. from time to time receipts, the last of which, dated Feb. 1, 1861, was in the following form: "Received of Mr. James Amos all the interest due upon £816 at £5 per cent. interest on bond given by J. & James Smith up to Nov. 1, 1859, upon my marriage settlement. Signed H." No money ever actually passed between the parties on any occasion:—**Held**: the transaction between the parties amounted to a payment of interest sufficient to take the case out of Civil Procedure Act, 1833 (c. 42).—**AMOS v. SMITH** (1862), 1 H. & C. 238; 31 L. J. Ex. 423; 7 L. T. 66; 10 W. R. 759; 158 E. R. 873.

*Annotations:—***Consd.** *Maber v. Maber* (1867), L. R. 2 Exch. 153; *Re Dixon, Heynes v. Dixon*, [1900] 2 Ch. 561.

798. — — — — —.]—Upon a marriage in 1818, a sum of £400 was handed over by the wife to the husband, & the husband executed a bond for repayment with interest at the expiration of six months, if required by the trustees of the marriage settlement. The trusts of the settlement were to pay the interest to the husband for life, then to the wife for life, & then for the benefit of the children, but if no children to transfer the trust funds to the next of kin of the wife. The husband died in 1853, leaving his wife his sole legatee & extrix., & his wife died in 1864. There were no children, & there had been no repayment & no demand:—**Held**: Statute of Limitations did not begin to run till the wife's death.—**MILLS v. BORTHWICK** (1865), 35 L. J. Ch. 31; 12 L. T. 600; 11 Jur. N. S. 558; 13 W. R. 707.

*Annotation:—***Mentd.** *Re Dixon, Heynes v. Dixon* (1900), 83 L. T. 129.

799. — — — — —.]—By a marriage settlement dated in 1847, a fund belonging to the wife was vested in trustees in trust for investment "on real or personal securities bearing interest," with power of varying investments with the written consent of the husband & wife or the survivor, & to pay the income to the wife for her separate use without power of anticipation, then to the husband for life, & after the death of the survivor, as to the capital, upon the trusts therein mentioned. In 1852, the trustees, on the written consent of the wife, lent the trust fund in cash to the husband on the security of his bond in a penal sum, conditioned for repayment to the trustees of the sum advanced with interest at 4 per cent. *per annum* six months after date. The bond contained no stipulation in terms for payment of interest beyond the six months. The husband & wife lived together in amity for more than twenty years after the date of the bond, the wife dying in 1876 & the husband in 1896. At his death the bond was found in his possession. He never, either during his wife's lifetime or afterwards, paid any interest on the bond or gave any written acknowledgment of his indebtedness under it:—**Held**: the bond debt was not barred by Civil Procedure Act, 1833 (c. 42), s. 5, on the grounds (a) that the bond, being a penalty bond, was an interest-bearing security carrying interest, though not mentioned, beyond the date fixed for payment of the debt; (b) that

the husband & wife had lived together in amity was unnecessary, in order to prevent the statute from running to go through the formality of the husband paying the interest to the trustees, the trustees paying it to the wife, & the wife paying it to the husband; & (c) that, as the husband took with full notice that the money lent was trust money & liable to investment on interest bearing security, he was in the position of an express trustee.—*Re DIXON, HEYNES v. DIXON*, [1900] 2 Ch. 561; 69 L. J. Ch. 609; 83 L. T. 129; 48 W. R. 665; 44 Sol. Jo. 515, C. A.

Annotations: — *Consd. Re Eyre-Williams, Williams v.*

Williams, [1923] 2 Ch. 533. *Reid. Re Drax, Savile v. Drax*, [1903] 1 Ch. 781.

.]—*Compare Nos. 929-932, post.*

SUB-SECT. 4.—EFFECT OF ACKNOWLEDGMENT.

800. Releases right of action generally—Not only against party acknowledging—Acknowledgment by tenant for life.]—*RODDAM v. MORLEY*, No. 772, *ante*.

801. Does not operate as fresh promise—Constituting new cause of action.]—*RODDAM v. MORLEY*, No. 772, *ante*.

Part IV.—Money Charged Upon or Payable out of Land or Rent, or Secured by a Judgment, and Legacies, and Personal Estates of Intestates.

SECT. 1.—PRINCIPAL MONEYS.

SUB-SECT. 1.—TO WHAT MONEYS LIMITATION APPLICABLE.

A. Money Charged also Secured by Trust.

See Real Property Limitation Act, 1874 (c. 57), s. 10.

802. Former law.]—R. in 1806 gave a bond for £1,500, with warrant of attorney, both conditioned to pay the principal at R.'s death, to his son T. & C. as marriage trustees of G. to pay interest to G. for life, & afterwards the principal to G.'s children. On T.'s marriage in 1807, R.'s real estates were settled on T., subject to a term of 300 years, for raising £5,000 to pay all "judgment & specialty debts now due & owing by R." R. died in 1816, leaving T. his exor., who survived C. his co-obligee. T. was in possession of the estates till his death in 1836, when his son & exor. B. came into possession. G. died in 1846, & G.'s children, in 1848, filed a bill against B. & his children, & the owners of the term, for an account & sale of the estates, to pay the bond, there being still part of the £5,000 unraised on the term:—*Held*: the bond debt was not a specialty debt owing by R. at the date of the creation of the term; the debt was not charged on the estate; the suit should have been against the personal representative of R. the term being part of his assets. Further, though the right to sue at law on the bond which accrued in 1816 was barred by Statute of Limitations, yet here R. the obligor, was a trustee for G.'s children, & the mere fact that R. had superadded a legal obligation, by giving a bond for the money, did not alter his position, & Statute of Limitations was no bar.

The effect of a charge of this nature, to be raised by express trust, falls within the saving as much as if the express trust had been applied not to charges upon the land but to the land itself (*LORD ST. LEONARDS*).—*BURROWES v. GORE* (1858), 6 H. L. Cas. 907; 32 L. T. O. S. 21; 4 Jur. N. S. 1245; 6 W. R. 699; 10 E. R. 1551, H. L.

Annotations:—*Consd. Re Jordison, Raine v. Jordison* [1922] 1 Ch. 440. *Reid. Mutlow v. Bigg* (1874), L. R. 18 Eq. 246; *Re Plumptre's Marriage Settlement, Underhill v. Plumptre*, [1910] 1 Ch. 609; *Re Turner, Klaffenberger v. Groombridge*, [1917] 1 Ch. 422.

803. Limitation period unaffected by trust.]—A testator devised his real estate to trustees for a term of five thousand years, to raise the de-

ficiency of his personal estate to pay his debts & legacies, & which term was to cease on the performance of the trusts; subject thereto he devised it to his son in fee. In 1807 the son conveyed his estate to a creditor, B., in trust, by sale or mtge., to raise & pay the debt. In 1811 a suit was instituted to administer testator's real & personal estate, but B. was not made a party until 1841. He took no steps to realise his security, & obtained no payment or acknowledgment. The estate was sold, & the surplus was in ct. In 1857:—*Held*: B.'s claim was barred by Statute of Limitations, & it was not protected either by the prior term or the pending litigation.—*HUMBLE v. HUMBLE* (1857), 24 Beav. 535; 30 L. T. O. S. 125; 3 Jur. N. S. 1289; 53 E. R. 464.

804. —.]—A testator gave all his property upon trust for sale & conversion into money, & "after payment thereof" of his debts & funeral & testamentary expenses, to be held upon certain trusts. The exor. advertised for creditors & a creditor sent in a claim. More than six, & less than twelve, years after the alleged debt was incurred the exor., having applied for & failed to obtain from the creditor particulars of the claim took out a summons asking that the claim might be adjudicated upon by the ct.:—*Held*: as to the real estate, the testator's debts being by his will charged thereon, the period of limitation was twelve years, and consequently the claim was not barred. *Qu.*: whether as to such proportion of the debt as was properly attributable to personal estate the claim ought not to be considered as barred.

I can have no doubt whatever that by this will at least a charge, if not an express trust, is created for payment of debts out of the proceeds of the real estate, & it is indifferent now whether it is a charge or a trust, because under the recent Act the time of limitation is the same, viz. twelve years, whether it be a charge or a trust (*KAY, J.*).—*Re STEPHENS, WARBURTON v. STEPHENS* (1889), 43 Ch. D. 39; 59 L. J. Ch. 109; 61 L. T. 609.

Annotations:—*Consd. Re Raggi, Brass v. Young*, [1913] 2 Ch. 206. *Reid. Barnes v. Glenton*, [1899] 1 Q. B. 885; *Re Balls, Trewby v. Balls*, [1909] 1 Ch. 791.

805. —.]—*Re WELCH, MITCHELL v. WILLIERS*, No. 872, *post*.

806. Conveyance to raise two sums—Right to raise one sum not barred—Effect on right to raise

Sect. 1.—Principal moneys: Sub-sect. 1, A., B., C. & D. (a).]

remainder.]—(1) A conveyance of land to trustees for a term of years upon trust to raise specific sums of money is an express trust within Real Property Limitation Act, 1874 (c. 57), s. 10.

(2) Where land is conveyed to trustees for a term of years upon trust to raise two sums of money, & it is held, in an action brought to recover both sums, that they are entitled to enter & raise one of these sums, but that the other is barred by Real Property Limitation Act, 1874 (c. 57), the right to raise the second sum is not preserved by the success of the action in respect of the first sum.—*WILLIAMS v. WILLIAMS, Re HARTLEY, WILLIAMS v. JONES*, [1900] 1 Ch. 152; 69 L. J. Ch. 77; 81 L. T. 804; 48 W. R. 245.

B. Claims to Personal Estate of Intestates.

NOTE.—The law on this subject was formerly governed by Law of Property Amendment Act, 1860 (c. 38), s. 13, now repealed by Law of Property Amendment Act, 1924 (c. 5). With regard to deaths occurring after Jan. 1, 1926, reference should be made to Administration of Estates Act, 1925 (c. 23), ss. 33, 46, 54; Trustee Act, 1888 (c. 59), ss. 1 (3), 8; Judicature Act, 1873 (c. 66), s. 25 (2), & Part VI., post.

807. Proceedings barred after twenty years.]—*Re JENNENS, WILLIS v. HOWE (EARL)*, No. 810, post.

808. —.]—(1) The words "a present right to receive," which occur in Real Property Limitation Act, 1833 (c. 27), s. 40, & also in Law of Property Amendment Act, 1860 (c. 38), mean a present right to receive from the exors. or administrators, or their representatives, & not from the debtor to the estate.

(2) The operation of Law of Property Amendment Act, 1860 (c. 38), s. 13, is retrospective so that the limitation of twenty years "next after a present right to receive the same shall have accrued" thereby imposed, in analogy to Real Property Limitation Act, 1833 (c. 27), s. 40, upon claims to recover personal estate of "any person dying intestate possessed by the legal personal representative of such intestate" is not confined to the case of persons dying intestate after Dec. 31, 1860, the time fixed by the sect. for commencement of the operation of the enactment. Accordingly a claim by next of kin for general administration of the estate of an intestate who died in 1848 was barred at the end of twenty-one years from that date; & leave to revive an administration suit relating to the same estate in which no proceeding had been taken since the decree in 1855 was refused. But with respect to assets of the intestate not received by the administrator until 1870 (more than twenty years after the death & within twenty years before the issue of the writ) the claim of the next of kin to administration limited to such assets was not barred; there being no "present right to receive" on the part of the next of kin until the assets had been actually recovered by the administrator.

The remark attributed to LORD ROMILLY in *Reed v. Fenn*, No. 813, post, that the Statute does not apply to assets remaining undistributed is not properly capable of being supported on the true construction of the statute (CHITTY, J.).

(3) Part payment by the administrator out of a particular asset which has so fallen in will not revive the right to sue for general administration which was at the time of payment barred by

statute.—*Re JOHNSON, SLY v. BLAKE* (1885), 29 Ch. D. 964; 52 L. T. 682; 33 W. R. 502.

Annotations:—As to (2) Distd. *Re Owen*, [1894] 3 Ch. 220. Rejd. *Re Lacy, Royal General Theatrical Fund Assocn. v. Kydd*, [1899] 2 Ch. 149; *Re Richardson, Pole v. Patten-den*, [1919] 2 Ch. 50.

809. —.]—An action brought against the representatives of deceased administrators, claiming to have the grant of letters of administration recalled, dismissed as being frivolous & vexatious, on the grounds that, as the powers conferred by the grant ceased on the death of the original grantees, it was not necessary to recall the grant; that the representatives of the grantees were not concerned with the question of the propriety of the grant; & that no good could result from the action, as any claim against the representatives of the original administrators in respect of their distribution of their intestate's estate would, having regard to the time which had elapsed since his death, be barred by Law of Property Amendment Act, 1860 (c. 38), s. 13.—*WILLIS v. BEAUCHAMP (EARL)* (1886), 11 P. D. 59; 55 L. J. P. 17; 54 L. T. 185; 34 W. R. 357; 2 T. L. R. 270, C. A.

Annotations:—Mentd. *Blair v. Cordner* (1887), 36 W. R. 64; *Barrett v. Day, Day v. Foster* (1890), 43 Ch. D. 435; *Remington v. Scoles*, [1897] 2 Ch. 1.

810. Operation of statute retrospective.]—Pltfs. sued to recover property, both real & personal, to which, as alleged, their predecessors in title had become entitled upon the death of a testator, in 1798, who had died intestate as to the whole property comprised in his will; & alleged fraud & concealment on the part of defts. & their predecessors in title, which could not, with reasonable diligence, have been discovered prior to 1879:—*Held*: upon demurrer, as to the real estate, the alleged fraud might, with reasonable diligence, have been sooner discovered, & therefore, pltfs.' title was barred by Real Property Limitation Act, 1833 (c. 27), s. 26; & as regards the personal estate, Law of Property Amendment Act, 1860 (c. 38), s. 13, was an absolute bar to pltfs.' claim, that sect. being held to be retrospective.—*Re JENNENS, WILLIS v. HOWE (EARL)* (1880), 50 L. J. Ch. 4; 43 L. T. 375; 29 W. R. 70.

Annotations:—Folld. *Re Johnson, Sly v. Blake* (1885), 29 Ch. D. 964. Rejd. *Re Lacy, Royal General Theatrical Fund Assocn. v. Kydd*, [1899] 2 Ch. 149.

811. —.]—*Re JOHNSON, SLY v. BLAKE*, No. 808, ante.

812. To what assets applicable—Assets misappropriated by mistake.]—*REED v. FENN*, No. 813, post.

813. — Assets distributed & assets retained.]—(1) Law of Property Amendment Act, 1860 (c. 38), s. 13, is no bar to a suit by the administrator *de bonis non* of an intestate against the personal representative of the original administrator to recover assets which by mistake had been misappropriated by the original administrator more than twenty years before, where the persons entitled were *sui juris* at the time.

(2) Sect. 13 applies to assets distributed by the administrator, not to assets retained by him (LORD ROMILLY, M.R.).—*REED v. FENN* (1866), 35 L. J. Ch. 464; 14 W. R. 704.

Annotations:—As to (1) Apld. *Re Johnson, Sly v. Blake* (1885), 29 Ch. D. 964. As to (2) Dbtd. *Re Johnson, Sly v. Blake* (1885), 29 Ch. D. 964.

814. —.]—*Re JOHNSON, SLY v. BLAKE* No. 808, ante.

815. — Assets received within statutor period.]—*Re JOHNSON, SLY v. BLAKE*, No. ante.

C. Judgment Debts.

See Real Property Limitation Act, 1874 (c. 57), s. 8.

816. Proceedings to be brought within twelve years.]—JAY v. JOHNSTONE, No. 819, *post*.

817. —.] — TAYLOR v. HOLLARD, No. 940, *post*.

818. To what judgments limitation applicable—Not only judgments operating as charge on land—Judgment as charge on personalty.]—Petitioner claimed a sum of money due from the estate of a testator on a judgment entered up on a bond given in 1793. Statute of Limitations was set up as a bar, & it was contended that the Statute did not apply to a charge upon personal estate, & that a suit instituted in 1817 against testator's estate would prevent the statute from running. That suit was for the arrears of an annuity due to the party who instituted it, & it prayed that the estate might be administered, & that certain documents, which were in the possession of the obligee, & upon which he claimed a lien in respect of the money due upon the bond, might be produced, & the lien, if any, of the obligee might be ascertained:—*Held*: Statute of Limitations was a bar to any proceedings upon a judgment after twenty years, although such judgment was a charge upon personal estate only, & the suit of 1817 was not in the nature of a creditor's suit, & there was not such an acknowledgment of the debt due upon the judgment as would prevent the statute from running.—WATSON v. BIRCH (1847), 15 Sim. 523; 16 L. J. Ch. 188; 8 L. T. O. S. 531; 11 Jur. 198; 60 E. R. 721.

Annotation:—*Apprvd.* Jay v. Johnstone, [1893] 1 Q. B. 189.

819. — Judgment on covenant.]—Real Property Limitation Act, 1874 (c. 57), s. 8, which provides that no action or suit or other proceeding shall be brought to recover any sum of money secured by any mtge., judgment, or lien, or otherwise charged upon or payable out of any land or rent, but within twelve years after the right to receive it has accrued, applies to proceedings to recover money upon a judgment obtained upon a covenant, & is not limited to judgments which operate as a charge upon land.—JAY v. JOHNSTONE, [1893] 1 Q. B. 189; 62 L. J. Q. B. 128; 68 L. T. 129; 57 J. P. 309; 41 W. R. 161; 9 T. L. R. 125; 37 Sol. Jo. 114; 4 R. 196, C. A.

Annotation:—*Refd.* Taylor v. Hollard, [1902] 1 K. B. 676.

PART IV. SECT. 1, SUB-SECT. 1.—C.

816 i. Proceedings to be brought within twelve years.]—McCOWEN & SONS, LTD. v. MCCARTHY, [1915] 2 I. R. 371.—IR.

a. Proceedings to be brought within twenty years.]—A judgment remains in force for twenty years at least, the only limitation that can be applicable to it being R. S. O., 1887, c. 60, s. 1.—MASON v. JOHNSTON (1893), 20 A. R. 412.—CAN.

b. —.]—ALLISON v. BREEN (1900), 20 C. L. T. 103, 207; 19 P. R. 119, 143.—CAN.

c. —.]—Twenty years is the period of limitation applicable to an action on a judgment of a Ct. of Record.—BUTLER v. McMICKEN (1900), 21 C. L. T. 71; 32 O. R. 422.—CAN.

d. —.]—BOAK v. FLEMMING (1909), 43 N. S. R. 360.—CAN.

e. — Leave to issue execution.]—The limit of twenty years being fixed by R. S. O., 1887, c. 60, s. 1, after which in the absence of payment or acknowledgment, an action cannot be brought upon a judgment, the analogy of the statute applies to application

for leave to issue execution after the lapse of twenty years from the date of the judgment or the return of the last execution.—PRICE v. WADE (1891), 14 P. R. 351.—CAN.

f. —.]—MCKENZIE v. FLETCHER (1897), 11 Man. L. R. 540.—CAN.

g. — Renewal of *fi. fa.*]—POUCHER v. WILKINS (1915), 7 O. W. N. 670; 33 O. L. R. 125.—CAN.

h. Proceedings to be brought within ten years.]—Real Property Limitation Act, s. 24, applies to any judgment whether charged on land or not, & no proceedings can be taken to enforce a judgment after the lapse of ten years from the date of its recovery.—PLANCHARD v. MUIR (1900), 13 Man. L. R. 8.—CAN.

k. — Writ of revivor or suggestion.]—A writ of revivor or suggestion entered upon the roll is a "proceeding," & a judgment is to be considered as "charged upon or payable out of land" within 38 Vict. c. 16, s. 11 (9), so that it cannot be revived by writ or suggestion after ten years.—CASPER v. KEACHIE (1877), 41 U. C. R. 599.—CAN.

820. — Judgments generally.]—"Judgment," in Real Property Limitation Act, 1874 (c. 57), s. 8, refers to judgments generally, & is not restricted to judgments which operate as charges upon land.—HEBBLETHWAITE v. PEEVER, [1892] 1 Q. B. 124; 40 W. R. 318.

Annotation:—*Apld.* Jay v. Johnstone, [1893] 1 Q. B. 25.

821. Application to proceedings to enforce judgment—Proceedings in bankruptcy of judgment debtor.]—A debtor, in failing circumstances, for his own purposes, caused judgment to be entered up against himself upon a warrant of attorney executed by him in favour of a creditor, who is ignorant both of the execution of the warrant of attorney & of the judgment being entered up until long afterwards. Upon the bkpcy. of the debtor:—*Held*: the creditor was not entitled to prove in respect of the judgment for the purpose of avoiding his debt's being barred by Statute of Limitations.—*Re* COPPLESTONE, *Ex p.* RORIE (1842), 6 Jur. 897, Ct. of R.

822. —.]—A judgment creditor is not entitled, after the expiration of twelve years without payment of interest or acknowledgment of his right, to obtain an adjudication in bkpcy. against the debtor, though within the twelve years a suggestion has been entered on the roll under Common Law Procedure Act, 1852 (c. 76), s. 129.—*Re* TYNTE, *Ex p.* TYNTE (1880), 15 Ch. D. 125; 42 L. T. 598; 28 W. R. 767.

Annotations:—*Refd.* Jay v. Johnstone (1892), 67 L. T. 655. *Mentd.* *Re* Whitley, *Ex p.* Mirfield Commercial Co. (1891), 65 L. T. 351; *Re* Outram, *Ex p.* Ashworth & Outram (1893), 63 L. J. Q. B. 308; *Re* Mendelssohn, *Ex p.* Mendelssohn, [1903] 1 K. B. 216.

Foreign judgments.]—See CONFLICT OF LAWS, Vol. XI., p. 488, Nos. 1396–1398.

D. Legacies.

See Real Property Limitation Act, 1874 (c. 57), s. 8.

(a) What Legacies within Limitation.

823. Residuary bequest.]—(1) In 1780 the interest of a sum of money was bequeathed to A. for her life, & after her decease the principal to her daughter B. Between 1784 & 1795 proceedings in Chancery, in which A. & B. were parties, were instituted against the exor., & a decree for an account was obtained, which was not acted upon. From that time till 1828, no application was made by B. for her legacy, nor did it appear

NEIL v. ALMOND (1897), 29 O. R. 63.—CAN.

m. To what judgments limitation applicable—Judgments in courts of record.]—R. v. RITCHIE, *Re* MCGINNIS (1891), 30 N. B. R. 591.—CAN.

n. Application to proceedings to enforce judgment—Execution.]—WHITE v. DIMOCK (1858), 2 Thom. 234.—CAN.

o. —.]—An application made in 1915 for leave to issue execution upon a judgment recovered in 1883:—*Held*: to have been properly refused on account of the bar imposed by the Limitation Act, 1914, s. 49 (1).—DOEL v. DERR (1915), 7 O. W. N. 826; 8 O. W. N. 244, 581; 34 O. L. R. 251; 25 D. L. R. 577.—CAN.

p. —.]—O'HARA v. CREAGH (1841), Long. & T. 65.—IR.

q. — Execution creditor appointed receiver.]—KINNEAR v. OLYNE (1909), 18 O. L. R. 457; 13 O. W. R. 1138.—CAN.

PART IV. SECT. 1, SUB-SECT. 1.—D. (a).

r. Legacy charged on farm—Legatee in occupation.]—Where a legatee continues to live on a farm

Sect. 1.—Principal moneys: Sub-sect. 1, D. (a) & (b) i.

that A. had of late years received her interest. On the other hand, it was stated by the representatives of the exor., & from circumstances it appeared probable, that the legacy was paid by the exor. many years ago to A. & B. jointly, or to one of them with the consent of the other:—*Held*: nevertheless, payment of the legacy in the mode suggested could not be presumed, such mode of payment being contrary to the presumed duty of an exor. Also, A. not dying till 1830, B.'s claim was not barred by Statute of Limitations.

(2) A residue bequeathed by will is clearly within the provisions of Real Property Limitation Act, 1833 (c. 27), s. 40.—*PRIOR v. HORNIBLOW* (1836), 2 Y. & C. Ex. 200; 160 E. R. 369.

Annotations:—As to (2) *Consd.* *Adams v. Barry* (1845), 2 Coll. 285. *Apld.* *Re Richardson, Pole v. Pattenden*, [1920] 1 Ch. 423. *Reid.* *Portlock v. Gardner* (1842), 1 Hare, 594; *Binns v. Nichols* (1866), L. R. 2 Eq. 256; *Re Smith, Prada v. Vandroy*, [1916] 1 Ch. 523.

824. —.] — *Semble*: the word "legacy" in Real Property Limitation Act, 1833 (c. 27), s. 40, includes a residue or share of a residue.—*CHRISTIAN v. DEVEREUX* (1841), 12 Sim. 264; 59 E. R. 1133.

Annotations:—*Apld.* *Re Richardson, Pole v. Pattenden*, [1920] 1 Ch. 423. *Reid.* *Re Rowe, Jacobs v. Hind* (1889), 60 L. T. 596; *Re Smith, Prada v. Vandroy*, [1916] 1 Ch. 523. *Mentd.* *Lord v. Colvin* (1867), L. R. 3 Eq. 737.

825. —.] — *PIGGOTT v. JEFFERSON*, No. 828, *post*.

826. — Confined to assets possessed beyond statutory period.]—(1) More than twenty years after the death of a testator the representative of one of his exors. & the residuary legatee under his will filed a bill against the representative of the co-exor. to recover residuary assets of testator alleged to have been possessed by the co-exor.:—*Held*: plffs. were barred by Real Property Limitation Act, 1833 (c. 27), s. 40, as to assets possessed by exor. more than twenty years before the filing of the bill, but they were not barred as to assets possessed by him since that time.

(2) Defts. by their answer claimed the benefit of "Statute" of Limitations:—*Held*: this was tantamount to claiming the benefit of the statute law of limitations & entitled them to the benefit of any statute of limitations that was applicable to their case.—*ADAMS v. BARRY* (1845), 2 Coll. 285; 63 E. R. 737.

Annotations:—As to (1) *Distd.* *Binns v. Nichols* (1866), L. R. 2 Eq. 256. *Apld.* *Re Johnson, Sly v. Blake* (1885), 29 Ch. D. 964. *Distd.* *Re Owen*, [1894] 3 Ch. 220. *Apld.* *Re Richardson, Pole v. Pattenden*, [1920] 1 Ch. 423. *Reid.* *Re Ludlam, Ludlam v. Ludlam* (1890), 63 L. T. 330.

827. Legacies payable out of personalty or charged on realty.]—Real Property Limitation Act, 1833 (c. 27), s. 40, applies to legacies payable out of personal estate as well as to legacies charged on real estate.—*SHEPPARD v. DUKE* (1839), 9 Sim. 567; 8 L. J. Ch. 228; 3 Jur. 168; 59 E. R. 477.

Annotation:—*Reid.* *Portlock v. Gardner* (1842), 1 Hare, 594.

(b) When Limitation Operative.

i. In General.

See Real Property Limitation Act, 1874 (c. 57), s. 8.

828. Proceedings to recover subject to limita-

tion.]—A testatrix, who died in 1808, gave a legacy of £200 to the daughter of a person whom she appointed residuary legatee & exor. This exor. died in 1824, without having paid the legacy, & left his daughter, the legatee, tenant for life of his property, which he charged with his debts. She attained twenty-one in 1815:—*Held*: the legacy could not be included in the charge for payment of debts under the exor.'s will, & the legatee was barred by lapse of time & non-claim, under Real Property Limitation Act, 1833 (c. 27), s. 40, from recovering the legacy.—*PIGGOTT v. JEFFERSON* (1841), 12 Sim. 26; 5 Jur. 796; 59 E. R. 1040.

829. — Unless legacy subject to trust.]—Bequest to A. for life, & afterwards to his children, & in default, "then" unto the persons "of the blood or next of kin" of the testator "as would, by virtue of Statute of Distributions, have become & been then entitled thereto, in case the testator had died intestate." A. died without issue:—*Held*: parties claiming a portion of the residue were not barred after twenty years' delay either by the Statute or by laches, the fund still existing as a trust fund, & all parties having acted under a misconception of rights.—*DOWNES v. BULLOCK* (1858), 25 Beav. 54; 3 L. T. 194; 53 E. R. 556; *affd. sub nom.* *BULLOCK v. DOWNES* (1860), 9 H. L. Cas. 1, H. L.

Annotations:—*Mentd.* *Chalmers v. North* (1860), 28 Beav. 175; *Lees v. Massey* (1861), 3 De G. F. & J. 113; *Royds v. Royds* (1863), 1 New Rep. 516; *Michel v. Bridges* (1864), 11 L. T. 727; *Travis v. Taylor* (1866), 12 Jur. N. S. 791; *Stockdale v. Nicholson* (1867), L. R. 4 Eq. 359; *Re Ranking's Settlement, Trusts* (1868), L. R. 6 Eq. 601; *White v. Springett* (1869), 4 Ch. App. 300; *Day v. Day* (1870), 18 W. R. 417; *Cusack v. Rood* (1876), 24 W. R. 391; *Re Morley's Trusts* (1877), 25 W. R. 825; *Mortimer v. Slater* (1877), 7 Ch. D. 322; *Mortimore v. Mortimore* (1879), 4 App. Cas. 448; *Sturge v. G. W. Ry.* (1881), 19 Ch. D. 444; *Clark v. Hayne* (1889), 37 W. R. 667; *Hood v. Murray* (1889), 14 App. Cas. 124; *Re King's Settlement, Gibson v. Wright* (1889), 60 L. T. 745; *Re Rees, Williams v. Davies* (1890), 44 Ch. D. 484; *Re Nash, Prall v. Bevan* (1894), 71 L. T. 5; *Re Ford, Patten v. Sparks* (1895), 72 L. T. 5; *Re Wilson, Wilson v. Batchelor*, [1907] 2 Ch. 572; *Re Roby, Howlett v. Newington*, [1908] 1 Ch. 71; *Re Nightingale, Bowden v. Griffiths*, [1909] 1 Ch. 385; *Re Winn, Brook v. Whitton*, [1910] 1 Ch. 278; *Re Helsby, Neate v. Bozle* (1914), 84 L. J. Ch. 682; *Re Mellish, Day v. Withers*, [1916] 1 Ch. 562; *Hutchinson v. National Refuges for Homeless & Destitute Children*, [1920] A. C. 795.

830. — —.] — *CADBURY v. SMITH*, No. 842, *post*.

831. — —.] — A testator mortgaged leaseholds. On his death his exors. took possession of his estate, including the leaseholds, & received rents, & for a long time paid the interest on mtges., & applied the surplus of the rents for the benefit of the beneficiaries. The mtged. property proved insufficient to pay the mtge. debt, & in an action for the administration of testator's estate the exors. claimed to be credited with the payments made to the beneficiaries on the ground of acquiescence on the part of the mtgees., & as to such of them as were made more than six years before the commencement of the action they relied on Statute of Limitations:—*Held*: acquiescence by the mtgees. had not been established, & as the executors were trustees for the creditors, Statute of Limitations furnished no bar to a claim in respect of a *devastavit* committed by them.—*Re MARSDEN, BOWDEN v. LAYLAND, GIBBS v.*

which is charged with a legacy of £100 in his favour, an agreement that the legatee's board & lodging is to be in lieu of the interest on the legacy may be implied so as to prevent the Statute of Limitations running against the legacy.—*HAMILTON v. MARTIN*

(1911), 45 I. L. T. 140.—*IR.*

PART IV. SECT. 1, SUB-SECT. 1.—D. (b) (i).

828 i. Proceedings to recover subject to limitation.]—*Re RUNCIMAN'S ESTATE*

(1905), 38 N. S. R. 89.—*CAN.*

829 i. — Unless legacy subject to trust.]—*DALY v. KIRWAN* (1839), 1 I. Eq. R. 156.—*IR.*

829 ii. — —.] — *Re M'CAUSLAND'S TRUSTS*, [1908] 1 I. R. 327.—*IR.*

LAYLAND (1884), 26 Ch. D. 783 ; 54 L. J. Ch. 640 ; 51 L. T. 417 ; 33 W. R. 28.

Annotations :—*Consd.* *Re Hyatt, Bowles v. Hyatt* (1888), 38 Ch. D. 609 ; *Lacons v. Warmoll*, [1907] 2 K. B. 350. *Refd.* *Re Blow, St. Bartholomew's Hospital v. Cambden*, [1914] 1 Ch. 233.

832. ———.]—*Re DAVIS, EVANS v. MOORE*, No. 847, *post*.

833. ———.]—Testatrix bequeathed an annuity to J. for his life. She also bequeathed several pecuniary legacies, payable after the death of the survivor of her mother & J., including a legacy to pltf. ; & she devised & bequeathed all her real & personal estate to trustees, upon trust for sale & conversion, & out of the proceeds to pay her debts & funeral & testamentary expenses, & invest the residue ; & out of the income to pay the annuity to J., & apply the residue of the income for the benefit of the mother, as therein mentioned ; & "subject to the several trusts, provisions, & directions hereinbefore contained, & to the payment of the several legacies, hereby bequeathed," testatrix directed that her trustees should stand possessed of the estate in trust for deft. absolutely. Testatrix died in June, 1860 ; she left no real estate. J. survived the mother, & died in Jan. 1866. Owing to the default of a former solr. of the exors. & trustees of the will, pltf.'s legacy was never paid. In 1891 pltf. took out a summons against the surviving exor. & trustee, who was also the residuary legatee, claiming administration of the estate :—*Held* : the legacy was not held upon an express trust, & therefore pltf.'s right was barred by Real Property Limitation Act, 1874 (c. 57), s. 8.—*Re BARKER, BUXTON v. CAMPBELL*, [1892] 2 Ch. 491 ; 62 L. J. Ch. 76 ; 66 L. T. 848.

Annotation :—*Apld.* *Re Lacy, Royal General Theatrical Fund Assocn. v. Kydd*, [1899] 2 Ch. 149.

834. ———.]—The trusteeship of exors. created by the Executors Act, 1830 (c. 40), was not intended to be different in its nature from that which existed previously under the rule established in cts. of equity, namely, that in the absence of special circumstances exors. were not to be regarded as express trustees.

A testator, who died in 1873, gave all his property charged with certain annuities to the trustees of a charity, & appointed K. to be his exor. & gave him a legacy. The estate included freehold & leasehold property. K. entered into possession, & received the income of testator's estate on behalf of the charity for a period of twenty years. Soon after testator's death he read over the will to testator's only son, who was his heir-at-law & sole next of kin, but gave him no information as to his rights under the will, having regard to the gift being to a charity. The son died in 1895 without ever having claimed the estate. In an action by the trustees of the charity for a declaration who was entitled to testator's estate :—*Held* : the gift to the charity failed under the Mortmain Act so far as testator's property consisted of realty or impure personalty. K. was not an express trustee for the next of kin, & the title of the heir-at-law to the freeholds & of the next of kin to the leaseholds was barred by statute.—*Re LACY, ROYAL GENERAL THEATRICAL FUND ASSOCN. v. KYDD*, [1899] 2 Ch. 149 ; 68 L. J. Ch. 488 ; 80 L. T. 706 ; 47 W. R. 664.

Annotations :—*Refd.* *Re Blow, St. Bartholomew's Hospital v. Cambden*, [1914] 1 Ch. 233 ; *Re Richardson, Pole v. Pattenden*, [1919] 2 Ch. 50 ; *Toates v. Toates*, [1926] 2 K. B. 30.

835. ———.]—A testator bequeathed all his

property to his wife & children, & appointed his wife sole extrix. He left him surviving his wife & two infant children, viz. a son, long since deceased, & a daughter, who attained twenty-one in 1876. The widow married again, & during her daughter's infancy she, in her character of extrix., advanced all testator's estate to her second husband upon the security of a mtge. which proved insufficient. She survived her second husband, & died in 1885, having left all her property away from her daughter. The daughter, as sole surviving beneficiary under her father's will, claimed the whole of her mother's estate upon the ground that it represented moneys retained by her mother under an order of the ct. in part satisfaction of the mtge., & in 1903 she commenced an action against her mother's exors. for an account on this footing :—*Held* : the mother was not an express trustee of these moneys for pltf. ; this was an action to recover a legacy within Real Property Limitation Act, 1874 (c. 57), s. 8, & the claim was statute-barred.—*Re MACKAY, MACKAY v. GOULD*, [1906] 1 Ch. 25 ; 75 L. J. Ch. 47 ; 93 L. T. 694 ; 54 W. R. 88 ; 50 Sol. Jo. 43.

——— What amounts to trust.]—*See* Subsect. 1, D. (b) ii., *post*.

836. ——— Unless executor & legatee same person.]—*BINNS v. NICHOLS*, No. 884, *post*.

837. ——— Effect of Trustee Act, 1888 (c. 59).]—*Re RICHARDSON, POLE v. PATTENDEN*, No. 1569, *post*.

838. ——— Administration action by residuary legatee—No allegation of possession of assets.]—*Re RICHARDSON, POLE v. PATTENDEN*, No. 1569, *post*.

ii. Legacies Subject to Trust.

See Real Property Limitation Act, 1874 (c. 57), s. 8.

839. Not within limitation provisions—What amounts to trust—Fund set apart.]—A suit to make an exor. account for a sum of money which had been bequeathed to him by his testator upon certain trusts, & which had been severed by the exor. from testator's personal estate, & the interest of which had for a time been applied upon the trusts of the will, is not a suit to recover a legacy within Real Property Limitation Act, 1833 (c. 27).

It is impossible to consider that an exor., so acting, is acting as an exor. ; he has all this while been acting as a trustee (LORD COTTENHAM, C.).—*PHILLIPO v. MUNNINGS* (1837), 2 My. & Cr. 309 ; 40 E. R. 658, L. C.

Annotations :—*Distd.* *St. John v. Boughton* (1838), 9 Sim. 219 ; *Sheppard v. Duke* (1839), 8 L. J. Ch. 228. *Apld.* *Dinsdale v. Dudding* (1842), 1 Y. & C. Ch. Cas. 265. *Consd.* *Freeman v. Dowding* (1856), 2 Jur. N. S. 1014. *Apld.* *Watson v. Saul* (1859), 1 Giff. 188. *Consd.* *Harcourt v. White* (1860), 28 Beav. 303 ; *Tyson v. Jackson* (1861), 30 Beav. 384. *Distd.* *Cadbury v. Smith* (1869), L. R. 9 Eq. 37. *Refd.* *Roch v. Callen* (1848), 6 Hare, 531 ; *Davenport v. Stafford* (1851), 14 Beav. 319 ; *Playfair v. Cooper*, *Prince v. Cooper* (1853), 17 Beav. 187 ; *Dix v. Burford* (1854), 19 Beav. 409 ; *Brougham v. Poulett* (1855), 19 Beav. 119 ; *Bullock v. Downes* (1860), 3 L. T. 194 ; *Re Lyman's Trust & Trustee Relief Amendment Act*, 1860 (1860), 2 L. T. 662 ; *Carey v. Cuthbert* (1873), 22 W. R. 249 ; *Re Rowe, Jacobs v. Hind* (1889), 58 L. J. Ch. 703 ; *Re Smith, Henderson-Roe v. Hitchins* (1889), 42 Ch. D. 302 ; *Re Davis, Re Davis, Evans v. Moore*, [1891] 3 Ch. 119 ; *Re Jordison, Raine v. Jordison*, [1922] 1 Ch. 440. *Mentd.* *Bond v. Graham* (1842), 11 L. J. Ch. 306 ; *Edgar v. Reynolds* (1858), 4 Jur. N. S. 399 ; *Noble v. Brett* (1853), 24 Beav. 499 ; *Ballard v. Marsden* (1880), 49 L. J. Ch. 614.

840. ———.]—(1) Upon a constructive admission of assets :—*Held* : residuary legatees were entitled to immediate payment of their legacies ; & , under circumstances, with

836 i. ——— Unless executor & legatee same person.]—*Held* : the hand to pay & the hand to receive being one & the same, the Statute of Limitations had no application.—*Re YATES* (1902), 22 C. L. T. 413 ; 4 O. L. R. 580 ; 1 O. W. R. 630.—*CAN.*

Sect. 1.—Principal moneys: Sub-sect. 1, D. (b) ii., E. & F.]

interest beyond the time allowed by Real Property Limitation Act, 1833 (c. 27), s. 40.

(2) With respect to interest it is doubtful whether the benefit of the statute [Real Property Limitation Act, 1833 (c. 27)] is claimed by the answer. But assuming it to be so, I am of opinion, that if a share of residue such as this is within sect. 40 of the statute, circumstances have occurred which take it out of that sect. & bring it within the rule laid down in *Phillipo v. Munnings*, No. 839, ante (KNIGHT BRUCE, V.-C.).—*DINSDALE v. DUDDING* (1842), 1 Y. & C. Ch. Cas. 265; 62 E. R. 883.

841. — — — — —.]—When a fund is set apart to answer an annuity, Statute of Limitations cannot be set up against the residuary legatee on the death of the annuitant forty years afterwards; but it can as against a pecuniary legatee, whose legacy was payable on testator's death.—*BRIGHT v. LARCHER* (1859), 27 Beav. 130; 54 E. R. 51; *affd.*, 4 De G. & J. 608, L. JJ.

Annotations:—Refd. Re Rowe, Jacobs v. Hind (1889), 58 L. J. Ch. 703. *Mentd. Bright v. Legerton* (No. 1) (1860), 29 Beav. 60.

842. — — — — —.]—A testatrix gave certain property, consisting partly of realty & partly of personalty, over which she had a power of appointment, & also all her own property to three gentlemen, whom she also appointed her exors., upon trust to pay the income to her daughter for life, & after her daughter's death, upon trust to pay several charitable legacies, & she constituted her exors. residuary legatees. On a bill, filed nearly thirty years after testatrix's death, to obtain payment of one of the legacies:—*Held*: the legacy was barred by Statute of Limitations, & there was no trust so as to take it out of the operation of the statute, inasmuch as there had been no fund set apart for the payment of it.—*CADBURY v. SMITH* (1869), L. R. 9 Eq. 37; 24 L. T. 52; 18 W. R. 105.

Annotations:—Consd. Re Stephens, Warburton v. Stephens (1889), 43 Ch. D. 39. *Mentd. Payne v. Tanner* (1886), 55 L. J. Ch. 611.

843. — — — — — Declaration by executor.]—*TYSON v. JACKSON*, No. 1616, *post*.

844. — — — — — Devise of realty — Charged with legacies.]—Where lands are devised to trustees, & an express trust is created for the payment of legacies, the claim of the legatees, is not barred by Statute of Limitations; & therefore, where a bill was filed by the *cestuis que trust*, more than twenty years after testator's death against the representatives of the deceased trustee, who had sold the estates, & committed a breach of trust:—*Held*: his real & personal estates was liable to make good the legacies, with interest at £4 per cent. from the expiration of one year from the death of testator.—*WATSON v. SAUL* (1859), 1 Giff. 188; 33 L. T. O. S. 55; 5 Jur. N. S. 404; 7 W. R. 197; 65 E. R. 880.

Annotation:—Consd. Re Jordison, Raine v. Jordison, [1922] 1 Ch. 440.

845. — — — — —.]—(1) A devise of real estate, subject & charged with legacies, does not create an express trust in favour of the legatees, & therefore such legacies are barred by Real Property Limitation Act, 1833 (c. 27), after twenty years, unless there has been some payment or signed acknowledgment.

(2) The existence of prior charges upon the property upon which the legacy is charged will not

prevent "a present right to receive" from accruing within Real Property Limitation Act, 1833.—*PROUD v. PROUD* (1862), 32 Beav. 234; 32 L. J. Ch. 125; 7 L. T. 553; 11 W. R. 101; 55 E. R. 92.

Annotation:—As to (1) *Refd. Cunningham v. Foot* (1878), 3 App. Cas. 974.

846. — — — — — Assent of executor to bequest of residue.]—An exor. by assenting to a bequest of residue, does not thereby constitute himself a trustee of the fund so as to prevent the operation of Statute of Limitations.

A. bequeathed her residuary personalty to her nephew J. & appointed her sister B. extrix. B. apparently thinking there was an intestacy as to the residue, in the residuary account prepared for the Revenue authorities, declared it was correct, & offered to pay duty on a certain sum as "being the said residue & moneys to which I am entitled, & intend to retain to my own use & for the use of J., being a sister & a descendant of a brother of the deceased":—*Held*: B. had not thereby declared a trust of the residue for J. so as to prevent Statute of Limitations from running against J.—*Re ROWE, JACOBS v. HIND* (1889), 58 L. J. Ch. 703; 61 L. T. 581, C. A.

Annotations:—Consd. Re Lacy, Royal General Theatrical Fund Assocn. v. Kydd, [1899] 2 Ch. 149; *Re Mackay, Mackay v. Gould*, [1906] 1 Ch. 25; *Re Gompertz, Parken v. Gompertz* (1910), 105 L. T. 664.

847. — — — — — Constructive trust.]—A suit to recover a legacy from an exor. is within Real Property Limitation Act, 1874 (c. 57), s. 8, unless the legacy is vested in him on express trusts. A mere constructive trust will not prevent the statute from being a bar.—*Re DAVIS, EVANS v. MOORE*, [1891] 3 Ch. 119; 61 L. J. Ch. 85; 65 L. T. 128; 39 W. R. 627; 35 Sol. Jo. 624, C. A.

Annotations:—Consd. Re Barker, Buxton v. Campbell, [1892] 2 Ch. 491; *Re Lacy, Royal General Theatrical Fund Assocn. v. Kydd*, [1899] 2 Ch. 149; *Re Mackay, Mackay v. Gould*, [1906] 1 Ch. 25. *Refd. Re Owen*, [1894] 3 Ch. 220; *Re Timmils, Nixon v. Smith*, [1902] 1 Ch. 176; *Re Richardson, Pole v. Pattenden*, [1920] 1 Ch. 423; *Toates v. Toates*, [1926] 2 K. B. 30.

E. Mortgages.

See, now, Real Property Limitation Act, 1874 (c. 57), s. 8.

848. Limitation relates only to recovery of money—Not to recovery of land.]—D. mortgaged land in fee to J., subject to a proviso of cesser upon payment of the money secured upon a day more than twenty years before the passing of Real Property Limitation Act, 1833 (c. 27). Within twenty years before the passing of the statute, D. acknowledged that the mtge. money was unpaid. On ejectment brought by the heir of J. within five years after the passing of the statute, the jury found that the mtge. money was unpaid:—*Held*: the ejectment was not barred by sect. 2, D.'s possession not being adverse at the time of passing the statute, & therefore the lessor of pltf. having, by sect. 15, five years from that time to bring the action, though no proof was given that he had ever been in possession, or received rent or interest.

Sect. 40 [of Real Property Limitation Act, 1833 (c. 27)] is not applicable; for this action is to recover the land, whereas sect. 40 relates to actions brought to recover the money (*LITTLEDALE, J.*).—*DOE d. JONES v. WILLIAMS* (1836), 5 Ad. & El. 291; 2 Har. & W. 213; 6 Nev. & M. K. B. 816; 5 L. J. K. B. 231; 111 E. R. 1175.

Annotations:—Consd. Dearman v. Wyche (1839), 9 Sim. 570; *Wrixon v. Vize* (1842), 3 Dr. & War. 104; *Heath v. Pugh* (1881), 6 Q. B. D. 345. *Refd. Du Vigier v. Lee* (1843), 2 Hare, 326; *Garrard v. Tuck* (1849), 8 C. B. 231;

PART IV. SECT. 1, SUB-SECT. 1.—E.

848 i. Limitation relates only to recovery of money—Not to recovery of land.]—*WRIXON v. VIZE* (1842), 3 Dr. & War. 104.—*IR.*

Doe d. Palmer v. Eyre (1851), 17 Q. B. 366; *Thorp v. Facey* (1866), Har. & Ruth. 678; *Hemming v. Blanton* (1873), 42 L. J. C. P. 158; *Re Frisby, Allison v. Frisby* (1889), 43 Ch. D. 106.

849. — Foreclosure suit.—Real Property Limitation Act, 1833 (c. 27), s. 40, may be pleaded to a bill of foreclosure. A foreclosure suit being, in fact, a suit for the recovery of the money secured by the mtge.—*DEARMAN v. WYCHE* (1839), 9 Sim. 570; 9 L. J. Ch. 76; 59 E. R. 478.

Annotations:—*Consd.* *Henry v. Smith* (1842), 2 Dr. & War. 381; *Wrixon v. Vize* (1842), 3 Dr. & War. 104; *Du Vigier v. Lee* (1843), 2 Hare, 326; *Dingle v. Coppen*, *Coppen v. Dingle*, [1899] 1 Ch. 726; *Re Lloyd, Lloyd v. Lloyd*, [1903] 1 Ch. 385. *Reid.* *Sinclair v. Jackson* (1853), 17 Beav. 405; *Bolding v. Lane* (1862), 3 Giff. 561; *Badeley v. Consolidated Bank* (1886), 34 Ch. D. 536.

850. ——(1) Under Real Property Limitation Act, 1833 (c. 27), s. 42, & Civil Procedure Act, 1833 (c. 42), s. 3, a mtgee. of land, whose mtge. debt & interest are secured also by a bond or covenant, is entitled in a foreclosure suit to charge the mtged. estate with the full arrears of interest accruing on the mtge. debt, within twenty years before the institution of the suit.

(2) The price of redeeming the mtged. premises is the same in a suit by the mtgor. to redeem as it would be in the like circumstances in a suit by the mtgee. to foreclosure.

(3) *Semble*: if the debt & interest are secured only by the mtge., the mtgee. is entitled to no more than six years' arrear of interest.—*DU VIGIER v. LEE* (1843), 2 Hare, 326; 12 L. J. Ch. 345; 7 Jur. 299; 67 E. R. 134.

Annotations:—*As to* (1) *Consd.* *Hunter v. Nockolds* (1850), 1 Mac. & G. 640. *Appld.* *Elvy v. Norwood* (1852), 5 De G. & Sm. 240. *Consd.* *Round v. Bell* (1861), 30 Beav. 121; *Shaw v. Johnson* (1861), 1 Drew. & Sm. 412; *Dingle v. Coppen*, *Coppen v. Dingle*, [1899] 1 Ch. 726; *Re Lloyd, Lloyd v. Lloyd*, [1903] 1 Ch. 385. *Reid.* *Bolding v. Lane* (1862), 3 Giff. 561; *Pile v. Pile* (1875), 23 W. R. 440. *As to* (3) *Reid.* *Blower v. Blower* (1858), 32 L. T. O. S. 193. *Generally, Reid.* *Sinclair v. Jackson* (1853), 17 Beav. 405.

851. — Action for damages against third party—Failure to pay money secured on land.—*Re POWERS, LINDSELL v. PHILLIPS*, No. 915, *post*.

852. Personal remedy on covenant—In mortgage deed.—*SUTTON v. SUTTON*, No. 757, *ante*.

853. — Though estate reversionary.—*KIRKLAND v. PEATFIELD*, No. 878, *post*.

854. — In collateral bond.—When a mtge. debt is secured by a collateral bond the remedy on the bond is, under Real Property Limitation Act, 1874 (c. 57), s. 8, barred by the lapse of twelve years since the last payment of interest or acknowledgment of the debt, equally with the remedy against the land comprised in the mtge.—*FEARN-SIDE v. FLINT* (1883), 22 Ch. D. 579; 52 L. J. Ch. 479; 48 L. T. 154; 31 W. R. 318.

Annotations:—*Reid.* *Re Powers, Lindsell v. Phillips* (1885), 30 Ch. D. 291; *Re Frisby, Allison v. Frisby* (1889), 43 Ch. D. 106; *Re Lacey, Howard v. Lightfoot*, [1907] 1 Ch. 330.

8511. — Action for damages against third party—Failure to pay money secured on land.—*WILSON v. GRAHAM* (1906), 16 Man. L. R. 101.—CAN.

8521. Personal remedy on covenant—In mortgage deed.—38 Vict. c. 16 (O), s. 11, merely limits suits which directly affect the land or its proceeds to ten years, but an action on a covenant in a mtge. for the payment of the mtge. money may still be brought within twenty years.—*ALLAN v. MCTAVISH* (1878), 2 A. R. 278.—CAN.

8541. — In collateral bond.—*BULAKHI GANU SHET v. TUKARAMBHAT BIN MOTIRAMBHAT* 1890), 1 L. R. 14 Bom. 377.—IND.

t. Right to foreclose — Whether limited.—There is nothing in law to limit the time within which a mtgee. may foreclose, if, notwithstanding

one or more default, the mtgee.'s right is not repudiated, but recognised. The mtgee.'s right to sue for possession accrues upon the final foreclosure, & he can sue at any time within twelve years from that date.—*BULDEEN v. MUSST GOLAB KOONWER* (1867), Agra, F. B. 102.—IND.

a. Mortgage under Land Transfer Act, 1870—Limitation applies to land & money.—*SHIRLEY v. TAPPER* (1904), 23 N. Z. L. R. 849.—N.Z.

b. Right to recover on mortgage barred—Mortgage still defence to action of ejectment.—*DOE d. SLASON v. HANSON* (1857), 3 All. 427.—CAN.

c. Land mortgaged outside provincial jurisdiction—Limitation applicable.—Real Property Limitation Act, 1892, s. 24, applies to any land, as well outside as within the province.—

855. — Whether available against surety.—

By a mtge. deed dated in 1872, F. the mtgor. & M. as his surety, jointly & severally covenanted for payment of the mtge. debt with interest on June 10, 1873. F. paid the interest till 1880, but paid nothing afterwards. M. died in 1888, never having made any payment or given any acknowledgment. The extrix. of the mtgee. claimed to be a creditor against M.'s estate for the mtge. debt & interest:—*Held*: assuming Real Property Limitation Act, 1874 (c. 57), s. 8, to apply to an action brought on a covenant in a mtge. deed, not against the mtgor. as in *Sutton v. Sutton*, No. 757, *ante*, but against a surety, the payment of interest by the mtgor. prevented the statute from running in favour of the surety, & the right against M.'s estate was not barred.—*Re FRISBY, ALLISON v. FRISBY* (1889), 43 Ch. D. 106; 59 L. J. Ch. 94; 61 L. T. 632; 38 W. R. 65; 6 T. L. R. 40, C. A.

Annotations:—*Consd.* *Re Wolmershausen, Wolmershausen v. Wolmershausen* (1890), 62 L. T. 541; *Re England, Steward v. England*, [1895] 2 Ch. 820; *Barnes v. Glenton*, [1898] 2 Q. B. 223. *Reid.* *Kirkland v. Peatfield*, [1903] 1 K. B. 756; *Re Lacey, Howard v. Lightfoot*, [1907] 1 Ch. 330.

856. Mortgage of reversionary interest in realty.—*HUGILL v. WILKINSON*, No. 1365, *post*.

857. ——*Re OWEN*, No. 889, *post*.

858. ——*KIRKLAND v. PEATFIELD*, No. 878, *post*.

859. — & personalty—Rights in respect of realty barred.—*Re WITHAM, CHADBURN v. WINFIELD*, No. 1367, *post*.

860. ——A person entitled under a will to a reversionary interest in a residuary trust fund, consisting of the proceeds of personalty & of land devised upon trust for sale, mortgaged his interest to secure the repayment of a sum of money. No interest was paid & no acknowledgment of the debt given within twelve years from the date when the principal money became due. The mtgor. died insolvent & his interest in the fund was claimed by his trustee in bkpcy., on the ground that the rights of the mtgee. were statute-barred, & by the mtgee., who contended his rights were not barred:—*Held*: the mtgee.'s right against such part of the fund as consisted of the proceeds of the sale of land was barred by Real Property Limitation Act, 1874 (c. 57), s. 8, but he was entitled to enforce his security against so much of the mtgor.'s interest in the fund as consisted of personalty.—*Re JAUNCEY, BIRD v. ARNOLD*, [1926] Ch. 471; 95 L. J. Ch. 377; 134 L. T. 728; 70 Sol. Jo. 527.

F. Rent, Rentcharges and Royalties.

See, now, Real Property Limitation Act, 1874 (c. 57), s. 8.

861. Rent—Secured by deed.—*LEWIS v. GRAHAM* (1885), 80 L. T. Jo. 66.

McLENAGHAN v. HETHERINGTON (1892), 8 Man. L. R. 357.—CAN.

d. Equitable mortgage by deposit.—The Statute of Limitations is a valid defence to a bill to enforce a security by deposit of deeds without writing where the deposit was made more than fifteen years before suit, & there has been no subsequent payment of principal or interest, or acknowledgment by the depositor.—*KEMP v. DOUGLAS* (1875), 1 V. L. R. (Eq.) 92.—AUS.

e. ——*BARNET v. WILLIAMS* (1889), 15 V. L. R. 205.—AUS.

PART IV. SECT. 1, SUB-SECT. 1.—F.

f. Tithe rentcharge.—No more than six years' arrears of tithe rentcharge can be recovered by the owner of such tithe rentcharge from the

Sect. 1.—Principal moneys: Sub-sect. 1, F., G. & H.; sub-sect. 2, A., B. & C. (a).]

862. Rent or royalty — Mining lease.]—A lease, dated in 1859, of mines contained a covenant by the lessees to pay a rent or royalty in respect of minerals from other lands carried, by or by the authority of the lessees, over the surface of the mining ground. In 1883 an action on the covenant was brought to recover royalties in respect of minerals so carried since 1866:—*Held*: 37 & 38 Vict. c. 57, s. 8, did not apply; but pltf. was entitled to an account of the royalties become payable since 1866.—*DARLEY v. TENNANT* (1885), 53 L. T. 257.

863. Rentcharge—Granted by will.]—*JAMES v. SALTER*, No. 1134, *post*.

864. —.]—*SHAW v. CROMPTON*, No. 758, *ante*.

G. Simple Contract Debts Charged on Land.
See No. 84, ante.

H. Other Cases.

See Real Property Limitation Act, 1874 (c. 57), s. 8.

865. Right to marshal real estate—Right of simple contract creditor.]—A simple contract creditor who has acquired a right of marshalling real estate is not barred by the lapse of less than twenty years.

Upon the death of a testator who had devised his real estates for payment of his debts a bill was filed on behalf of his creditors, both by specialty & simple contract, to have his assets administered & his real estates marshalled. In that suit a receiver was, in 1821, appointed of all his estates. It was afterwards discovered that testator had died seised of an estate which had not passed by his will, but had descended to his heiress at law, M., upon whose death, in 1822, it descended to O. In 1840, eighteen years after M.'s death, a supplemental bill was filed against O. by one of the pltf. in the original suit, being a simple contract creditor of the testator, praying to have the benefit of that suit as against the descended estate:—*Held*: as the original suit was treated as a suit for the administration of all testator's real estates, & as pltf. sought to affect the descended estate by standing in the place of the specialty creditors, he was not barred by Statute of Limitations, but was entitled to have the descended estate marshalled in his favour.—*VICKERS v. OLIVER* (1842), 1 Y. & C. Ch. Cas. 211; 11 L. J. Ch. 112; 6 Jur. 273; 62 E. R. 859.

Annotation:—*Refd. Fordham v. Wallis* (1853), 10 Hare, 217.

866. Vendor's lien for purchase-money.]—*TOFT v. STEPHENSON (OR STEVENSON)*, No. 1010, *post*.

867. Produce of realty—Directed to be sold.]—*Qu.*: whether the produce of real estate directed to be sold is a "sum charged upon or payable out of land" within Real Property Limitation Act, 1833 (c. 27), s. 40.—*PAWSEY v. BARNES*

owner of the lands.—*ECCELESIASTICAL COMRS. v. SLIGO (MARQUIS)* (1855), 5 I. Ch. R. 46; 7 Ir. Jur. 261.—*IR.*

g. —.]—*NETTERVILLE v. POWER* (1861), 13 Ir. Jur. 123.—*IR.*

h. Quit-rent.]—Quit-rent, being vested in the Crown, is not bound by the Statute of Limitations.—*HATTON v. WADDY* (1837), 2 Jo. Ex. Ir. 541; *Hayes & Jo.* 601.—*IR.*

k. Fee farm rent.]—Where such a rent had remained unpaid for more than twelve years, & no acknowledg-

ment had been given in respect thereof, the same was held to be barred by the Statutes of Limitations.—*Re MAUNSELL'S ESTATE*, [1911] 1 I. R. 271.—*IR.*

PART IV. SECT. 1, SUB-SECT. 1.—H.

l. "Money charged upon immovable property."]—*BARHAMDES PRASAD v. TARA CHAND* (1913), 30 T. L. R. 143.—*IND.*

m. Taxes charged on land — Limitation of municipality's right to

(1851), 20 L. J. Ch. 393; 17 L. T. O. S. 302; 15 Jur. 942.

Annotation:—*Distd. Mutlow v. Bigg* (1874), L. R. 18 Eq. 246.

868. Money due on bond by ancestor.]—*RODDAM v. MORLEY*, No. 772, *ante*.

869. Money payable under covenant—Money never raised.]—A testator, having covenanted with trustees for the payment of a sum of money after his death, to be held upon trusts under which his son was tenant for life, & charged the same with interest upon certain land, by his will devised the land, subject to the charge, to his son in fee. The money was never raised, nor any interest actually paid in respect of it, but the son entered into possession of the land & for more than twelve years received the rents & profits:—*Held*: the son not being liable to pay the interest on the charge no presumption of payment of interest by him, on the ground of any duty to keep down the charge, could be made; & therefore the claim of the trustees under the covenant of the testator against his personal estate was barred by Real Property Limitation Act, 1874 (c. 57), s. 8.—*Re ENGLAND, STEWARD v. ENGLAND*, [1895] 2 Ch. 820; 65 L. J. Ch. 21; 73 L. T. 237; 44 W. R. 119; 39 Sol. Jo. 704; 12 R. 539, C. A.

Annotations:—*Apld. Re Allen, Bassett v. Allen*, [1898] 2 Ch. 499. *Refd. Re Lacey, Howard v. Lightfoot* (1907), 76 L. J. Ch. 316.

870. All realty subject to charge — Specific devise of part & of residue—Charge paid out of residue—Contribution from specific devisee.]—A testator, by his will dated Jan. 11, 1845, devised his real estate & bequeathed his personal estate to trustees, upon trust for sale & to hold the proceeds of sale upon trust to pay his debts, & to hold the residue on trust to pay the income to his wife for her life, with remainder in trust for his children living at her death, or the issue of those then dead leaving issue then living. By a codicil dated Jan. 30, 1855, testator revoked the devise of real estate contained in his will so far as regarded certain specified closes of land, & he devised those closes to his wife for her life, with remainder to his two sons in equal shares as tenants in common in fee. The whole of the real estate was subject to a charge of £3,000 created by a predecessor of testator. In 1865 the trustees sold the greater part of the real estate, other than that specifically devised by the codicil, & out of the proceeds paid the £3,000, & some of testator's own debts. The widow died in 1895. After the sale until her death she received the income of the residue of the proceeds of sale & also the rents of the unsold land, including those of the specifically devised land. She never gave to the trustees any acknowledgment of the liability of the specifically devised land to bear a proportionate part of the £3,000, or paid to them any part of the £3,000, or any interest thereon:—*Held*: the widow being under no legal obligation to pay any part of the £3,000 or any interest thereon, the right of the persons interested in the real estate, other than that specifically devised, to

sell.—Real Property Limitation Act, 1902, s. 24, applies to proceedings taken by a municipality to sell lands for taxes which are a lien or charge on the land, & the municipality will be restrained by injunction from taking such proceedings after the lapse of ten years from the time when the taxes fell due.—*ROYCE v. MACDONALD* (1909), 19 Man. L. R. 191.—*CAN.*

n. Rates charged on land.]—Statute of Limitations, s. 47, is not a bar to the enforcement of a charge

compel contribution out of the specifically devised estate to the payment of the £3,000 was barred by Real Property Limitation Act, 1874 (c. 57), s. 8.—*Re ALLEN, BASSETT v. ALLEN*, [1898] 2 Ch. 499; 67 L. J. Ch. 614; 79 L. T. 107; 47 W. R. 55; 42 Sol. Jo. 687.

871. Money paid in redemption of land tax.]—*SKENE v. COOK*, No. 950, *post*.

872. Money chargeable on realty—Insufficient personalty of testator—Payment by executor out of own moneys—Right of recoupment.]—In or about 1885 a widow, who was tenant for life of the real estate of her husband & also his exor., paid some of his debts out of her own money because his property was not sufficient to pay his debts, but took no steps by administration proceedings to get herself recouped out of testator's realty for thirty years:—*Held*: (1) as to the residuary real estate, the widow, although she was the tenant for life, who as such had in fact elected to keep the realty intact & not recover thereout what she had paid out of her own moneys for testator's debts, was nevertheless the person, having regard to Real Property Limitation Act, 1874 (c. 57), s. 8, who at the time she paid her husband's debts had "a present right to receive" the moneys so paid, & could in an action for administration of the real estate of testator have recovered the amount, because the persons to pay were all the persons entitled to the real estate; (2) with regard to the portion of realty bequeathed by testator on trust for payment of debts, the creditors would be barred by Real Property Limitation Act, 1874 (c. 57), s. 10. Accordingly, her claim was barred.—*Re WELCH, MITCHELL v. WILLIAMS*, [1916] 1 Ch. 375; 85 L. J. Ch. 500; 114 L. T. 685; 32 T. L. R. 314; 60 Sol. Jo. 368.

Paying expenses—Recovery by local authority.]—*See HIGHWAYS*, Vol. XXVI., p. 535, No. 2351.

SUB-SECT. 2.—WHEN TIME BEGINS TO RUN.

A. In General.

See Real Property Limitation Act, 1874 (c. 57), s. 8.

873. Present right to receive—What amounts to—Whether right to enforce payment.]—(1) A present right to receive is not in ordinary English the same as a present right to enforce payment (*LORD ESHER, M.R.*).

It seems to me clear that the meaning is that in each case the moment to be looked to is the moment when the charge comes into present operation (*LINDLEY, L.J.*).

(2) There may be persons who are subject to some legal incapacity which would prevent them from giving a receipt or discharge, so as to bind them, such as infants or lunatics, & it is to meet such cases I think that the words "capable of giving a discharge" were probably inserted (*LORD ESHER, M.R.*).—*HORNSEY LOCAL BOARD v. MONARCH INVESTMENT BUILDING SOCIETY* (1889), 24 Q. B. D. 1; 59 L. J. Q. B. 105; 61

under Local Government Act, 1903, s. 341.—*RICHMOND CORPN. v. FEDERAL BUILDING SOCIETY*, [1909] V. L. R. 413.—*AUS.*

PART IV. SECT. 1, SUB-SECT. 2.—A.

o. From date of judgment.]—*BANK OF MONTREAL v. CORNISH*, *Temp. Wood*, 272.—*CAN.*

p. Appeal against part of decree—Decree affirmed on appeal—Period from which limitation runs after an appeal.]—*SAKHALCHAND RIKHAWDAS v. VEL*

CHAND GUJAR (1893), I. L. R. 18 Bom. 203.—*IND.*

PART IV. SECT. 1, SUB-SECT. 2.—B.

q. Judgment registered as mortgage on debtor's land—Time runs from date of judgment—Not of mortgage.]—*JOHNSON v. LOWRY*, [1900] 1 I. R. 316.—*IR.*

r. Interest payable on mortgage—Principal due on default in interest—Time runs from first default.]—*MOFAD-*

L. T. 867; 54 J. P. 391; 38 W. R. 85; 6 T. L. R. 30, C. A.

Annotations:—*As to* (1) *Reid. Re Owen*, [1894] 3 Ch. 220; *Re Witham, Chadburn v. Winfield*, [1922] 2 Ch. 413. *Generally, Mentd. Stock v. Meakin*, [1899] 2 Ch. 496; *R. v. L. G. Board, Ex p. Thorp* (1914), 84 L. J. K. B. 1184; *Re Jauncey, Bird v. Arnold* (1926), 134 L. T. 728.

874. ———.]—*Re PARDOE, McLAUGHLIN v. PENNY*, No. 893, *post*.

B. Money Charged on Land.

See Real Property Limitation Act, 1833 (c. 27), s. 6; Real Property Limitation Act, 1874 (c. 57), s. 8.

875. Sale of land—Unpaid purchase-money—Right accrues on completion.]—*TOFT v. STEVENSON (OR STEPHENSON)*, No. 1010, *post*.

876. Chattel interest in land—Claim by administrator—Time runs from death of intestate—Not from date of grant of administration.]—*Re WILLIAMS, DAVIES v. WILLIAMS*, No. 1181, *post*.

877. Mortgage or charge on reversionary interest in realty—Whether time runs from falling in of interest.]—*HUGILL v. WILKINSON*, No. 1365, *post*.

878. ——— Personal action on covenant.]—A testatrix died having devised her real estate to trustees in trust for A. for life, & after A.'s death in trust to sell & divide the proceeds among debts. Debts. joined in executing a mtge. of their reversionary interest in the property to pltf. to secure an advance. The mtge. deed contained a joint & several covenant to repay the loan with interest. More than twelve years & less than twenty years after the last payment of interest or acknowledgment by debts. pltf. brought his action to recover the amount of principal & interest due under the covenant in the mtge. deed. A. was still living at the date of the action:—*Held*: the money payable under the covenant was money "charged upon or payable out of land" within Real Property Limitation Act, 1874 (c. 57), s. 8, & the limitation of twelve years imposed by that sect. applied to the personal action upon the covenant, even though the subject-matter of the mtge. was a reversion, & though that reversion had not yet fallen into possession at the date of the action.—*KIRKLAND v. PEATFIELD*, [1903] 1 K. B. 756; 72 L. J. K. B. 355; 88 L. T. 472; 51 W. R. 544; 19 T. L. R. 362; 47 Sol. Jo. 420.

Annotation:—*Folld. Re Fox, Brooks v. Marston*, [1913] 2 Ch. 75.

C. Legacies.

(a) In General.

879. Time runs from present right to receive—Legacy payable on happening of future event.]—*PRIOR v. HORNIBLOW*, No. 823, *ante*.

880. ———.]—By will, dated in 1829, testator gave to A. £800 "to enable him to take his father's farm after his decease, if the landlord will consent, or to place him in any other situation which the trustees might think fit" & if not, then the interest was to be paid to A. for life,

DEN v. BRANDON (1904), 24 C. L. T. 393; 8 O. L. R. 610; 4 O. W. R. 349.—*CAN.*

PART IV. SECT. 1, SUB-SECT. 2.—C. (a).

879 i. Time runs from present right to receive—Legacy payable on happening of future event.]—*CARTER v. CARTER* (1895), 16 N. S. W. L. R. (Eq.) 129.—*AUS.*

879 ii. ———.]—*WADDELL v. HARSHAW*, [1905] 1 I. R. 416.—*IR.*

Sect. 1.—Principal moneys: Sub-sect. 2, C. (a) & (b), & D.; sub-sects. 3 & 4, A. (a).]

with remainder to his son, if he should have any. Testator died the same year. In 1831 A. went to America, where he died intestate & unmarried in 1854. No part of the legacy or interest was ever paid to A. or applied for his benefit. In 1856 A.'s administrator filed this suit for the legacy, with interest since the testator's decease:—**Held:** Statute of Limitations was no bar.—**LORD v. LORD** (1857), 3 Jur. N. S. 485.

881. — Effect of prior charge—On property charged with legacy.]—The legatees whose claims are subsequent to the mtge. have never yet been in a position to claim payment of their legacies against the mtgees., & therefore I cannot hold them at all affected by the past dealings with this estate. They could never have insisted on the appropriation of any part of the estate for payment of their legacies, till the mtgees. were paid off, & they are not therefore in default (**WIGRAM, V.-C.**).—**FAULKNER v. DANIEL** (1843), 3 Hare, 199; 67 E. R. 355; *sub nom.* **FALKNER v. DANIEL**, 8 Jur. 29.

Annotations:—Mentd. **Davis v. Chanter** (1848), 2 Ph. 545; **Byam v. Sutton** (1854), 19 Beav. 556; **Dowdeswell v. Dowdeswell** (1878), 9 Ch. D. 294.

882. — — — — —.]—**PROUD v. PROUD**, No. 845, *ante*.

883. — Legacy payable out of proceeds of sale—Discretionary power to postpone sale.]—**Re HULL, MELHUSH v. FLETCHER** (1896), 40 Sol. Jo. 257.

884. Legatee & also executor — Limitation not operative—Lunacy of executor—Administration granted to third party.]—(1) By the will of a testator who died in 1827, of which W. was sole exor., a legacy was bequeathed to E., who died in 1830, having bequeathed her residuary personal estate to W. E.'s will was proved in 1835 by W., who was afterwards found lunatic from Dec. 3 1840. On Oct. 12, 1848, administration with the will annexed of testator's estate, during the lunacy, was granted to M. W. died in 1857, & in Dec. 1858, a bill was filed for the administration of his estate. The legacy had never been paid. The Statute of Limitations which applies to the recovery of legacies was passed in 1833:—**Held:** a present right to receive the legacy, within Real Property Limitation Act, 1833 (c. 27), s. 40, did not accrue to any one until the administration granted to M. in Oct. 1848; & hence the right to sue for the legacy was not barred.

(2) Where the person liable for the payment of a legacy, & the person entitled to receive it, are the same, no question of limitation under the statute can arise.—**BINNS v. NICHOLS** (1866), L. R. 2 Eq. 256; 35 L. J. Ch. 635; 14 W. R. 727.

Annotation:—As to (2) Consd. **Re Pardoe, McLaughlin v. Penny**, [1906] 1 Ch. 265.

(b) Reversionary Legacies.

885. Time runs from falling in of reversion.]—A legacy was bequeathed out of testator's reversionary interest in stock:—**Held:** (1) the legacy carried interest only from the time when the reversion fell in; (2) the time from which interest on a legacy was payable, was the period from which Statute of Limitations began to run.—**EARLE v. BELLINGHAM** (No. 2) (1857), 24 Beav. 448; 27 Jur. 1237; 6 W. R. 45; 53 E. R. 430.

Annotations:—As to (1) Consd. **Walford v. Walford**, [1912] A. C. 658. **Refd.** **Re Johnson, Sly v. Blake** (1885), 29 Ch. D. 964; **Hornsey L. R. v. Monarch Investment Bldg. Soc.** **As to (2) Consd.** **Hornsey L. R. n.**

886. —.]—**Re SEAGER'S ESTATE, SEAGER v. ASTON**, No. 902, *post*.

887. —.]—A married woman, who had a general testamentary power of appointment over a trust fund, which was subject to the life interests of herself & her husband, but had no separate property & no other power of disposition or appointment over property, by her will, dated in 1865, not referring to the power, bequeathed a sum of £400 to her brother, & the residue of all her properties, of whatsoever kind, " & any properties which may have become to me, or may become to me hereafter by will or otherwise," to her husband, whom she appointed exor. She died in 1886, leaving her husband & brother surviving. The will was not discovered until 1888. It was disputed by the brother, but was proved by the husband in 1889. The question was whether the legacy of £400 was presently payable:—**Held:** the will must be construed as an appointment of the reversionary fund, as to £400 part thereof to the brother, & as to the residue thereof to the husband; & therefore, the legacy of £400 was not payable until the reversionary fund actually fell into possession.

Time would not begin to run until the property had been actually got in by the exor. (**KAY, J.**).—**Re LUDLAM, LUDLAM v. LUDLAM** (1890), 63 L. T. 330.

Annotation:—Refd. **Re Walford, Kenyon v. Walford** (1911), 81 L. J. Ch. 128.

888. — Only available assets reversionary—Immediate realisation of interest inadvisable.]—Where it is for the benefit of all entitled that a reversionary interest should not be realised at once, a legatee, whose legacy could not be paid out of any other fund than this reversion, is entitled, not only to six years' interest, but to interest from the expiration of one year from the death of testatrix.—**Re BLACHFORD, BLACHFORD v. WORSLEY** (1884), 27 Ch. D. 676; 54 L. J. Ch. 215; 33 W. R. 11.

Annotations:—Refd. **Re Johnson, Sly v. Blake** (1885), 29 Ch. D. 964. **Mentd.** **Re Campbell, Campbell v. Campbell**, [1893] 3 Ch. 468.

889. Time runs from when legacy first payable—If legatee can require sale of fund—Before falling into reversion.]—Where a testator gives a legacy charged on a contingent reversionary interest in land & not payable out of his personal estate, the time during which the legatee can recover begins to run from the date when the legacy was first made payable, not from the date when the reversionary interest falls into possession. The remedy of a legatee whose legacy is simply charged on a contingent reversionary interest in land is by mtge. or sale of that interest, & not, in the absence of a direction by testator to that effect, by foreclosure; therefore he cannot bring an action for recovery of the land, & his right of action does not accrue when the reversion falls in, as provided by Real Property Limitation Act, 1874 (c. 57), s. 2, but at the time when the legacy was made payable by the will & such right is governed by Real Property Limitation Act, 1874 (c. 57), s. 8.—**Re OWEN**, [1894] 3 Ch. 220; 63 L. J. Ch. 749; 71 L. T. 181; 43 W. R. 55; 38 Sol. Jo. 617; 8 R. 566.

Annotations:—Consd. **Re Witham, Chadburn v. Winfield**, [1922] 2 Ch. 413. **Mentd.** **Re Lloyd, Lloyd v. Lloyd**, [1903] 1 Ch. 385.

D. Personal Estate of Intestates.

See Note on p. 402, *ante*.

890. From last possession of assets.]—**ADAMS v. BARRY**, No. 826, *ante*.

891. —.]—*Re* JOHNSON, SLY *v.* BLAKE, No. 808, *ante*.

892. Present right to receive—Receipt from representatives—Not debtors to estate.]—*Re* JOHNSON, SLY *v.* BLAKE, No. 808, *ante*.

893. — Right to recover payment—By action at law.]—In 1864, a trust fund, payable to E. as the administratrix of the intestate appointee of the fund, was paid to E. & to her husband, G., in her right. E. was beneficially entitled to one moiety of the fund, & the other moiety was payable to E., G., & J. as the exors. of M., in whose estate E. had a life interest. G. paid the money into his private banking account, & never accounted for or gave any acknowledgment in respect of it. G. died in 1884, J. in 1886, & E. in 1903. In an action by the administrator *de bonis non* of the appointee for a declaration that G.'s estate was liable to make good the portion of the fund unaccounted for, the exor. of G.'s residuary legatee pleaded the statutory bar under Law of Property Amendment Act, 1860 (c. 38), s. 13:—*Held*: "a present right to receive" the share within the sect. 13 meant a right in the person capable of giving a discharge" of recovering payment of the share into his own hands by an action at law, & inasmuch as J. could not have sued his co-exors. at law, there was in 1864 no person who had a present right to receive the share in question and consequently the statute had not run. The fact that J. might by suit in equity against his co-exors. for the administration of the appointee's estate, have secured to M.'s estate the share in question, did not constitute him a person to whom "a present right to receive the same" had accrued within sect. 13.

It seems to me that a "present right to receive the same" means a right to recover by legal proceedings (KEKEWICH, J.).—*Re* PARDOE, McLAUGHLIN *v.* PENNY, [1906] 1 Ch. 265; 75 L. J. Ch. 161; 94 L. T. 88; 54 W. R. 210; *reversd.* on other grounds, [1906] 2 Ch. 340, C. A.

894. — Administration suit against co-executors.]—*Re* PARDOE, McLAUGHLIN *v.* PENNY, No. 893, *ante*.

895. From grant of administration—To representatives of original administrators.]—MARTIN *v.* BEAUCHAMP (EARL), [1888] W. N. 247.

SUB-SECT. 3.—DISABILITIES.

896. Of person liable to pay—Lunacy—Limitation operative.]—A legatee, after the lapse of twenty-three years, sent in a claim for his legacy. The surviving extrix. had, during part of the time, been a lunatic:—*Held*: her lunacy was no bar to Statute of Limitations running.—BOLDERO *v.* HALPIN, *Ex p.* HAWES (1870), 19 W. R. 320.

897. Of person having right to receive—Lunacy or infancy—Limitation not operative.]—HORNSEY LOCAL BOARD *v.* MONARCH INVESTMENT BUILDING SOCIETY, No. 873, *ante*.

SUB-SECT. 4.—ACKNOWLEDGMENT AND PAYMENT.

A. Acknowledgment.

(a) By and to Whom Made.

See Real Property Limitation Act, 1874 (c. 57), s. 8.

898. By whom made—Person liable for payment

or his agent.]—CHINNERY *v.* EVANS, No. 912, *post*.

899. — No admission of agency.]—TOFT *v.* STEPHENSON (OR STEVENSON), No. 901, *post*.

900. — Trustees or agent—Signed acknowledgment.]—Where an estate is devised to a trustee in trust to sell & pay testator's debts, & subject thereto, in trust for A., an acknowledgment of a debt in writing, signed by the trustee or his agent, is sufficient to preserve the creditor's right of suit for twenty years after the giving of the acknowledgment.—ST. JOHN (LORD) *v.* BOUGHTON (1838), 9 Sim. 219; 7 L. J. Ch. 208; 2 Jur. 413; 59 E. R. 342.

Annotations:—*Consd.* Toft *v.* Stephenson (1848), 7 Hare, 1. *Reid.* Toft *v.* Stephenson (1851), 1 De G. M. & G. 28; Fordham *v.* Wallis (1853), 1 W. R. 118; Watson *v.* Saul (1859), 1 Giff. 188; *Re* Lacey, Howard *v.* Lightfoot, [1907] 1 Ch. 330; *Re* Jordison, Raine *v.* Jordison, [1922] 1 Ch. 440.

901. — Solicitor trustees.]—On Mar. 4, 1811, an agreement was entered into for the purchase of freehold land for £6,300, to be paid on May 13, 1811, & the purchasers were immediately put into possession. In 1827 the purchaser, before any conveyance was made to him, & before he had paid any part of the purchase-money, died, having devised the lands to trustees. The trustees disclaimed, & others were appointed by the Ct. of Ch. In 1834 the attorney of these trustees wrote to the assignees of the vendor, who had become bkpt., stating that the purchase-money was ready to be paid on the purchase being completed. On a bill filed by the assignees in 1844 to enforce the lien, to which Real Property Limitation Act, 1833 (c. 27), was set up as a defence by answer:—*Held*: (1) the trustees were persons by whom the purchase-money was payable within Real Property Limitation Act, 1833 (c. 27), s. 40; (2) the acknowledgment of their attorney in 1834 was sufficient within the meaning of the exception in the Act to withdraw the case from its operation, & for this purpose, to bind the *cestuis que trust*, although the trustees were appointed not by or under any powers contained in the will, but by the Ct. of Ch.; (3) the answers claiming the benefit of the statute must be considered as alleging that no acknowledgment of the right to receive the money had been given or signed by the person by whom it was payable, or his agent; & therefore, although the bill did not allege any acknowledgment to have been made, plffs. were entitled to put the acknowledgment in evidence on an appeal, although it was not read or proved at the original hearing; (4) this only applied to the trustees who had admitted the agency of the attorney, but, as against other defts. who had not made a similar admission, the assignees were entitled to an inquiry as to any acknowledgment having been given.—TOFT *v.* STEPHENSON (OR STEVENSON) (1851), 1 De G. M. & G. 28; 21 L. J. Ch. 129; 18 L. T. O. S. 114; 15 Jur. 1187; 42 E. R. 461, L. JJ.; *previous proceedings* (1848), 7 Hare, 1; *subsequent proceedings* (1854), 5 De G. M. & G. 735, L. JJ.

Annotations:—As to (2) *Reid.* Fordham *v.* Wallis (1853), 1 W. R. 118; Pears *v.* Laing (1871), L. R. 12 Eq. 41; Adnam *v.* Sandwich (1877), 46 L. J. Q. B. 612; Lewin *v.* Wilson (1886), 11 App. Cas. 639.

902. — Surety to principal debtor.]—(1) S. being entitled, after the death of his mother, to a legacy of £250 charged upon land, in Nov. 1844, assigned his reversionary interest by way of mtge. to B. to secure a debt of £200 & interest. A

PART IV. SECT. 1, SUB-SECT. 3.

t. Of person having right to receive—Absence of debtor from province.]—

STEWART *v.* GUIBORD (1903), 23 C. L. T. 242; 6 O. L. R. 262; 2 O. W. R. 168, 554.—CAN.

a. — Lunacy.]—TRUSTS & GUAR-

ANTEE CO. *v.* TRUSTS CORPN. OF ONTARIO (1901), 21 C. L. T. 373; 2 O. L. R. 97.—CAN.

Sect. 1.—Principal moneys: Sub-sect. 4, A. (a) &

bond of even date, conditioned to be void on the payment of £200 & interest, was executed by S. as principal, & his mother, the tenant for life, as surety, by way of collateral security for the debt. Interest was paid by S. the principal, up to 1828, & afterwards a payment in respect of interest was made by the surety in 1846. S., the mtgor., died in 1847. The tenant for life died in 1851. A fund representing the legacy was standing in ct. to the account of the representatives of S. & his incumbrancers. Petition by the personal representative of S. for payment of the fund in ct. to her, on the ground that the assignment had become inoperative because the debt was barred by Statute of Limitations, dismissed. The effect of Real Property Limitation Act, 1833 (c. 27), s. 40, upon these facts is, that the period of twenty years, within which the mtgee. is entitled to sue, commenced at the death of the tenant for life.

(2) The acknowledgment of the debt by the surety in 1846, was also sufficient to render the bond a subsisting & valid security against the principal, who was also the mtgor.

(3) *Qu.*: whether Mercantile Law Amendment Act, 1856 (c. 97), s. 14, which provides that no payment or acknowledgment by a co-contractor shall deprive any other co-contractor of the benefit of certain enactments therein specified applies to the case of principal & surety.—*Re SEAGER'S ESTATE, SEAGER v. ASTON* (1857), 26 L. J. Ch. 809; 29 L. T. O. S. 154; 3 Jur. N. S. 481; 5 W. R. 548.

903. — One devisee — Effect as against co-devisee.]—*DICKENSON v. TEASDALE*, No. 1682, *post*.

904. To whom made—Party entitled to demand payment.]—*HOLLAND v. CLARK*, No. 906, *post*.

905. — Or agent.]—*HERVEY v. WYNN*, No. 911, *post*.

(b) Sufficiency.

See Real Property Limitation Act, 1874 (c. 57), s. 8.

906. Intention to admit liability.]—H. died in 1811, having bequeathed a legacy to a woman who afterwards married pltf. In Dec. 1825, the two exors. of H. gave pltf. a written acknowledgment whereby they separately & jointly acknowledged that they owed pltf. £150 for the legacy & £50 for interest. In 1835 pltf.'s wife died. Matters of business having occurred between pltf. & the exors., in which mutual demands & accounts arose, pltf., in Sept. 1839, brought his action against the exors. to recover what he alleged to be due on those accounts, including the £200 mentioned in the memorandum, & interest thereon. In this action defts. pleaded separately, & one of them paid £46 into ct., which pltf. received, & abandoned the action as to him. Pltf. then filed his bill against both defts. for payment of the legacy, & in defence to the bill defts., amongst other things, insisted by their answers on Real Property Limitation Act, 1833 (c. 27), & that the action was a bar to the demand in equity:—*Held*: (1) the written memorandum amounted to an acknowledgment taking the claim to the legacy out of the operation of the statute; (2) pltf.

was not entitled to arrears of interest on the legacy beyond six years before the filing of the bill.

(3) In order that an acknowledgment may have the effect of taking a demand out of the operation of Real Property Limitation Act, 1833 (c. 27), the acknowledgment must appear to have been made with a view of rendering the party making it liable to the demand, & it must have been made to the party entitled to make the demand.

Where a bill was brought against two exors. for payment of a legacy bequeathed to pltf.'s wife, & for arrears of interest accrued since her death, & pltf., with a view of taking his demand for interest out of the operation of Real Property Limitation Act, 1833 (c. 27), s. 42, relied on certain letters written by one of the exors. to his, pltf.'s, attorney:—*Held*: the letters had not the effect ascribed to them by pltf., because they had been written by the party, not for the purpose of charging himself, but of throwing the burden of payment on the co-exor.; even if they had been written for the purpose of charging himself, it was questionable whether they would avail pltf., inasmuch as they were written before pltf. had taken out letters of administration to his wife.—*HOLLAND v. CLARK* (1842), 1 Y. & C. Ch. Cas. 151; 62 E. R. 831; *subsequent proceedings* (1843), 2 Y. & C. Ch. Cas. 319.

907. Agreement between parties—As to priority of charges.]—Prior mtgees. of the works & tolls of a harbour agreed that, on the Exchequer Comrs. making an advance, the tolls should be applied, first, in paying interest on the Comrs.' advances, secondly, in paying interest on the prior mtges.; thirdly, in reduction of the principal of the Comrs.' advance till it was paid off, & the tolls being insufficient to keep down the interest on the Comrs.' advances, sold the subject of their security to a railway co. with notice of the agreement. The agreement was made in 1818. In 1833, before the sale to the railway co., one of the prior mtgees., wrote to the treasurer of the harbour co. complaining of non-payment of interest. The treasurer replied that no interest had been paid since 1821, as the income of the harbour left but a small surplus after payment of expenses; but that he was at all times willing to give information to the mtgee. or to any other gentleman who had embarked property in the undertaking:—*Held*: the agreement & the correspondence took the case out of Statute of Limitations both as to principal & interest.—*JORTIN v. SOUTH EASTERN RY. CO.* (1855), 6 De G. M. & G. 270; 3 Eq. Rep. 281; 24 L. J. Ch. 343; 25 L. T. O. S. 16; 1 Jur. N. S. 433; 3 W. R. 190; 43 E. R. 1237, L. JJ.; *reversd.* on other grounds, *sub nom.* *SOUTH EASTERN RY. CO. v. JORTIN* (1857), 6 H. L. Cas. 425, H. L.

Annotations:—*Mentd.* *Re Burdett, Ex p. Byrne* (1888), 2 Q. B. D. 310; *Davis v. Petrie* (1905), 93 L. T. 511.

908. Correspondence between parties — Relating to debt.]—*JORTIN v. SOUTH EASTERN RY. CO.*, No. 907, *ante*.

909. Order of court — Executive & legatees— Lunacy of executrix—Funds paid into court.]—Testator gave a legacy to be equally divided, within twelve months, between the children of W., who should be living at his, testator's, death, such sum to be raised out of the property thereafter

PART IV. SECT. 1, SUB-SECT. 4.— A. (b).

908 i. Correspondence between parties —Relating to debt.]—*SMITH v. CHISHOLM* (1894), 12 N. Z. L. R. 529.—N.Z.

b. Written acknowledgment of mort-

gagor's debt to mortgagee — Where only money due money secured on mortgage.]—*BARWICK v. BARWICK* (1874), 21 Gr. 39.—CAN.

c. Claim by legal mortgagees for principal & interest due—Written acknowledgment by owner of equity of

redemption.]—*WATERS v. LLOYD*, [1911] 1 I. R. 153.—IR.

d. Report of master—In action in which debtor defendant.]—*HILL v. WELL* (1840), 2 I. L. R. 302.—IR.

e. Admission by bankrupt—In

given to his extrix. for life. He then gave to his extrix. certain real & personal estate for her life, & after her death to the children of W., living at his, testator's, death. At testator's death in Jan. 1847, there were four children of W. living, but another, J., had not been heard of since Feb. 1845, & nothing ever was heard of him afterwards. The extrix. paid to the four children who were known to be living, four fifth shares of the legacy, but did not raise the remaining fifth. In 1851 she became lunatic, & in 1852 the funds, to the income of which she was entitled for life, were transferred to the credit of the lunacy to the account of the lunatic & the children of W., & the income was ordered to be applied for her benefit. In 1871 the four surviving children of W. & the administrator of J. petitioned that the remaining fifth share of the legacy, with interest, might be paid to the four children, or, if not, then to the administrator of J.:—*Held*: there being no proof that J. survived testator, the share must be paid to the four children who were known to have survived him; the manner in which the ct. had dealt with the fund took the case out of the statute as to the principal, but that only six years' arrears of interest should be given.—*Re WALKER* (1871), 7 Ch. App. 120; 41 L. J. Ch. 219; 25 L. T. 775; 20 W. R. 171, L. JJ.

Annotations:—*Reid*. *Lewis v. McKay*, *Algate v. Vugler*, *Clark v. Potter* (1924), 93 L. J. K. B. 840. *Mentd. Re Benjamin*, *Neville v. Benjamin*, [1902] 1 Ch. 723.

910. Statutory declaration — By debtor — On lunacy summons relating to creditor.—*HERVEY v. WYNN*, No. 911, *post*.

911. Acknowledgment after debt statute-barred.—A mtge. of land was executed in 1875 to secure an advance, & in 1879 a deed of further charge on the land was executed as security for a further advance. The latter deed recited the mtge. of 1875, & that the date fixed for redemption had passed & contained a covenant by the mtgor. that he would upon receipt of notice as mentioned in the mtge. of 1875, pay to the mtgee. the money advanced, with interest, & it declared that the power of sale & other powers contained in the earlier deed should extend to & be a security for the further advance & interest thereon. No interest was ever paid on these mtges. In 1899 the mtgee. became of unsound mind, & his next of kin petitioned for an inquiry in lunacy & issued a summons for directions. Upon that summons the mtgor. made a statutory declaration as to the mtge. debts. The mtgee. having died, his exors. sued the mtgor. to enforce the mtges.:—*Held*: the statutory declaration was not an "acknowledgment of the right" to the money within Real Property Limitation Act, 1874 (c. 57), s. 8, it being equally consistent with the intention to show that the debt was statute-barred, nor was it given "to the person entitled thereto or his agent"; even if it was an acknowledgment, it was not effectual to take the case out of the statute, because at the time it was made both the remedy against the land & the personal remedy

on the covenant were gone; & as regards the deed of further charge, there existed when it was executed a "present right to receive" the mtge. money within sect. 8; & therefore the action was statute-barred.—*HERVEY v. WYNN* (1905), 22 T. L. R. 93; 50 Sol. Jo. 94.

B. Payment.

(a) By Whom Made.

See Real Property Limitation Act, 1874 (c. 57), s. 8.

912. By person liable to pay or his agent.—(1) Payment of interest on an Irish mtge. made by a receiver appointed under 11 & 12 Geo. 3, c. 10 (Ir.), over the estates mortgaged, is, within the terms of Real Property Limitation Act, 1833 (c. 27), payment by "an agent" of the party liable.

(2) The words in Real Property Limitation Act, 1833 (c. 27), s. 40, "by the person by whom the same shall be payable or his agent," apply equally to the making of a payment & the signing of an acknowledgment.

M. was possessed of estates in three counties, Cork, Kerry & Limerick. In 1776 he mortgaged them to F. The interest on the mtge. was not regularly paid, & on a petition presented by F., under the Irish Act, a receiver was appointed. In form, his appointment embraced the three estates; in fact, he never entered into possession of any but the Limerick estate, from which alone he took the money necessary to keep down the interest on the mtge. M. afterwards, without any knowledge of the matter on the part of F., sold the Cork & Kerry estates to C., & certain outstanding terms & judgments were assigned & conveyed to a trustee for C. to protect the title. After the lapse of nearly twenty years, since the last payment made by the receiver, F. claimed to have a sale of all the estates included in the original mtge. in order to cover arrears of interest:—*Held*: the payment by the receiver out of the rents of the Limerick estate, was a payment which in law must be considered as made by the mtgor. in respect of the mtge. debt, & therefore prevented Statute of Limitations operating as a bar to the demand as to any of the estates comprised in the mtge.

(3) The assignment, to a trustee for the purchaser of an estate, of outstanding terms affecting it, & of judgments on which *elegits* had been issued, does not constitute the purchaser an incumbrancer within Real Property Limitation Act, 1833 (c. 27), s. 42, so as to prevent the operation of the statute on the claim of the mtgee.:—*Held*: therefore, the mtgee. was only entitled to demand six years' arrears of interest up to the filing of his petition in which the holder of the estates sold was, for the first time, made a party to the suit.

(4) *Qu.*: whether the payment of interest on a mtge. by a mere stranger would be a payment within Real Property Limitation Act, 1843 (c. 27), ss. 40, 42.—*CHINNERY v. EVANS* (1864), 11 H. L.

debt sworn after bankruptcy.—An admission made by a bkpt. in an affidavit sworn after his bkpcy., is not a sufficient acknowledgment in writing of the existence of a debt which he swears he owes, to prevent that debt being barred by the Statute of Limitations.—*Re GLENDENNING* (1859), 33 L. T. O. S. 291.—*IR.*

1. Acknowledgment in written statement—Not necessarily addressed to — *SHRINIWAS v. NARHAR*

(1908), 1 L. R. 32 Bom. 298.—*IND.*

g. Mere deposit of title deeds.—An acknowledgment within Real Property Act, 1915, s. 47, may be given after the expiration of fifteen years from the accrual of a present right to recover money charged on land by mere deposit of title deeds, so as to revive the right to sue on the simple contract debt.—*NATIONAL BANK OF TASMANIA (IN LIQUIDATION) v. MCKENZIE*, [1920] V. L. R. 411.—*AUS.*

PART IV. SECT. 1, SUB-SECT. 4.—B. (a).

912.1. By person liable to pay or his agent.—A payment of principal or interest of a sum of money charged upon lands by a person expressly or impliedly authorised to make it, will be equivalent to a payment by the party liable, so as to prevent the operation of the Statute of Limitations, but a payment by a stranger will not.—*HOMAN v. ANDREWS* (1850), 1 I. Ch. R. 106.—*IR.*

Sect. 1.—Principal moneys: Sub-sect. 4, B. (a) & (b) i.]

Cas. 115; 4 New Rep. 520; 11 L. T. 68; 10 Jur. N. S. 855; 13 W. R. 20; 11 E. R. 1274, H. L.

Annotations:—As to (1) Rejd. Astbury v. Astbury, [1898] 2 Ch. 111; Bradshaw v. Widdrington, [1902] 2 Ch. 430. As to (2) Apld. Pears v. Laing (1871), L. R. 12 Eq. 41; Harlock v. Ashberry (1882), 19 Ch. D. 539. Rejd. Lewin v. Wilson (1886), 11 App. Cas. 639; Barclay v. Owen (1889), 60 L. T. 220; Re Fresby, Allison v. Fresby (1889), 43 Ch. D. 106; Dibb v. Walker, [1893] 2 Ch. 429; Re Hale, Lilley v. Foad, [1899] 2 Ch. 307; Re Lacey, Howard v. Lightfoot, [1907] 1 Ch. 330. As to (4) Rejd. Re Clifden, Annaly v. Agar-Ellis, [1900] 1 Ch. 774. Generally, Rejd. Lawton v. Ford (1866), L. R. 2 Eq. 97. Mentd. Cockburn v. Edwards (1881), 18 Ch. D. 449; Re Glasdir Copper Mines, English Electro-Metallurgical Co. v. Glasdir Copper Mines, [1906] 1 Ch. 365.

913. Principal & surety—Payment by surety.]—Re SEAGER'S ESTATE, SEAGER v. ASTON, No. 902, ante.

914. ———.]—Re FRISBY, ALLISON v. FRISBY, No. 855, ante.

915. ——— Payment by principal.]—In 1867, P. mortgaged an estate to L. & A. for £1,000, & at the same time E. & C. gave to L. & A. a joint & several bond in the penal sum of £4,000, reciting that the £1,000 had been advanced at the request of E. & C. & that they had agreed to give as a better security for part thereof a bond conditioned for payment of £200 & interest. The bond was conditioned to be void if the mtgor. paid the mtge. money & interest according to his covenant. P. paid the interest till Dec. 1877, after which it fell into arrear, & in 1880 the mtgees. entered into possession. E. died in 1883 without having made any payment or given any acknowledgment. L. & A. as creditors under the bond, took out a summons for administration of his estate. E.'s representatives disputed the claim on the ground that this was a proceeding to recover money secured on land, & was barred by the lapse of twelve years under Real Property Limitation Act, 1874 (c. 57):—*Held*: (1) this was not a proceeding to recover money secured on land, but to recover damages because another person failed to pay money secured on land, & it did not come within the scope of Real Property Limitation Act, 1874 (c. 57), s. 8; (2) if remedy on the bond had been barrable by the lapse of twelve years under that sect. the payments of interest by the mtgor. would have prevented the bar.—*Re* POWERS, LINDSELL v. PHILLIPS (1885), 30 Ch. D. 291; 53 L. T. 647, C. A.

Annotations:—As to (1) Consd. Re Frisby, Allison v. Frisby (1889), 43 Ch. D. 106. Generally, Mentd. Nutter v. Holland, [1894] 3 Ch. 408.

———.]—*See, generally*, GUARANTEE, Vol. XXVI., pp. 105, 106, Nos. 725–736.

916. Part or limited owner — Widow entitled to dower—Mortgage.]—On the death of a mtgor. in 1833, his widow, who was entitled to dower, took possession of the mtged. estate, with the consent of the co-heirs, & she paid interest on the mtge. In 1858 the mtgee. instituted a suit to realise his mtge., in which it did not appear that any interest had been paid by one of the co-heirs during the interval:—*Held*: the payment of the interest by the widow prevented the statute running, for either such co-heir was himself barred, or the payment of interest had been made on his behalf.—*AMES v. MANNERING* (1859), 26 Beav. 583; 53 E. R. 1023.

917. ——— Tenant for life.]—PEARS v. LAING, No. 769, ante.

918. ———.]—Re HOLLINGSHEAD, HOLLINGSHEAD v. WEBSTER, No. 787, ante.

919. ——— Specific devisee — Of mortgaged portion of realty.]—Payment of interest by the specific devisee of part of a testator's real estate, which was subject to a mtge. created by testator, is sufficient to keep the mtgee.'s right of action alive against the specific devisees of other parts of the real estate which was not subject to the mtge. & thus entitle the mtgee. to an order for administration of the whole of testator's real estate.

It will be observed that there is [in Civil Procedure Act, 1833 (c. 42), s. 5] no person named to whom the acknowledgment should be made, although it is obvious of course that the payment can only be made to the persons entitled to receive it (FARWELL, L.J.).

It appears to me to be clear that resps. in this case would have been co-debtors within & entitled to the benefit of this section [sect. 14] of Mercantile Law Amendment Act, 1856 (c. 97), if it had not been that in 1874 Real Property Limitation Act, 1874 (c. 57), was passed, which by sect. 8 reduced the period for recovering moneys charged on land from the twenty years given by Real Property Limitation Act, 1833 (c. 27), s. 40, to twelve years, but left the twenty years for recovering specialties given by Civil Procedure Act, 1833 (c. 42), s. 3, untouched (FARWELL, L.J.).

By the words "persons liable to the debt" I understand to be meant the persons who could be made poorer by being called upon to pay the debt (BUCKLEY, L.J.).—*Re* LACEY, HOWARD v. LIGHTFOOT, [1907] 1 Ch. 330; 76 L. J. Ch. 316; 96 L. T. 306, C. A.

Annotations:—Rejd. Re Atkinson, Proctor v. Atkinson, [1908] 2 Ch. 307; Read v. Price, [1909] 2 K. B. 724.

920. Receiver—Of several estates—Payment out of profits of one estate only.]—CHINNERY v. EVANS, No. 912, ante.

921. Tenant of mortgaged property — Payment of rent to mortgagee.]—HARLOCK v. ASHBERRY, No. 1379, post.

922. Debtor after transfer of property.]—LYALL v. FLUKER, [1873] W. N. 208.

923. ——— Mortgagor after assignment of mortgaged property.]—(1) N., a solr., lent money to S., a client, on equitable mtge., & on Feb. 12, 1866, an account was settled between them as to the amount due. After this there were no entries relating to S. in N.'s ledger. In July, 1878, S. assigned the mtged. property to his two nephews, subject to all incumbrances. In a diary kept by N., who had since died, was an entry dated Sept. 10, 1878, of the receipt of money from S. for interest. There was nothing else to show payment of interest after 1866. In an action to enforce the security against the nephews:—*Held*: assuming the entry to be admissible in evidence, as to which the ct. gave no opinion, it proved nothing but a payment on account of interest by a person who when he made it had no interest in the mtged. property, & was not shown to be agent of the assignees, & this could not take the case out of the statute as against the assignees.

(2) S., in 1863, mortgaged other property to A., a client of N. N. paid interest on the mtge. & charged S. with it in account till 1866. After this, N. went on paying interest to A., who believed that it came from S., but it was not shown that N. had ever acted as solr. to S. after 1866, nor was

923 i. Debtor after transfer of property — Mortgagor after assignment of mortgaged property.]—DOE d. FOX v. WRIGHT (1865), 6 All. 241.—CAN.

923 ii. ———.]—DOMI LAL SARU v. ROSHAN DOBAY (1906), I. L. R. 33 Calc. 1278.—IND.
h. Any person entitled to pay—Ac-

cording to terms of mortgage contract. —The rule that the only person whose payment on account will prevent foreclosure from being barred is the mtgor.

there anything showing that N. was authorised to make the payments as agent for S.:—*Held*: the payments of interest after 1866 did not take the case out of Statute of Limitations.

(3) A letter from N. to A. stating that he had paid to A.'s account a sum received from S. for interest:—*Held*: not an admission against interest so as to be admissible in evidence to show payment by S.—*NEWBOULD v. SMITH* (1886), 33 Ch. D. 127; 55 L. J. Ch. 788; 55 L. T. 194; 34 W. R. 690, C. A.; *affd.* on other grounds (1889), 14 App. Cas. 423.

Annotation:—Generally, *Mentd.* *Crichton v. Crichton* (1895), 13 R. 770.

924. Agent of party liable to pay — No evidence of agency.]—*NEWBOULD v. SMITH*, No. 923, *ante*.

925. — Solicitor.] — The solr. who acted for a mtgor. & after his death for his exors., & also for the mtgees., paid the interest upon the mtge. debt to the mtgees. regularly up to a period within twelve years before the commencement of an action to enforce the mtge.:—*Held*: (1) this was *prima facie* a payment within Real Property Limitation Act, 1874 (c. 57), s. 8, "by the person by whom the same shall be payable," so as to throw on the representatives of the mtgor. the onus of proving that the statute had run & the mtge. debt had not been kept alive.

(2) The payment of interest by a person who, as between himself & the mtgor. was bound to pay it, though he was under no contract with the mtgee. to do so, was a payment, "by the person by whom the same shall be payable" within Real Property Limitation Act, 1874 (c. 57), s. 8, so as to prevent the statute from running.—*BRADSHAW v. WIDDRINGTON*, [1902] 2 Ch. 430; 71 L. J. Ch. 627; 86 L. T. 726; 50 W. R. 561; 46 Sol. Jo. 530, C. A.

Annotation:—As to (2) *Consd.* *Re Lacey*, *Howard v. Lightfoot*, [1907] 1 Ch. 330.

926. —.] — *BERWICK & Co. v. PRICE*, No. 935, *post*.

927. Person bound to pay as between himself & debtor—No contract with creditor to pay.]—*BRADSHAW v. WIDDRINGTON*, No. 925, *ante*.

928. Trustees of settled property — Subject to mortgage by settlor.]—*ALSTON v. MINEARD* (1906), 51 Sol. Jo. 132.

(b) Sufficiency.

i. Payment of Interest.

See Real Property Limitation Act, 1874 (c. 57), s. 8.

929. Same person entitled to pay & receive interest—Charge on settled realty—Tenant for life to pay & receive.]—If a tenant for life, out of his own money, pays off charges upon an estate, but expressing, or by his acts indicating no intention either of exonerating the estate or continuing the charges for his own benefit, the presumption of law is in favour of the continuance; & though more than twenty years elapse between the period of payment & the death of the tenant for life, & no notice of them during all the time has been taken, the tenant for life being in the receipt of the whole rents & profits, the remainderman cannot set up Statute of Limitations against the personal representatives of the tenant for life.—*BURRELL v. EGREMONT (EARL)* (1844), 7 Beav. 205; 13 L. J. Ch. 309; 8 Jur. 587; 49 F. R.

or his privy in estate, or the agent of either of them, must be qualified so as to include any person who by the terms of the mtge. contract is entitled to make payments.—*LEWIN v. WILSON*

(1886), 11 App. Cas. 639.—*CAN.*

k. By assignee of equity of redemption.]—Payment of the interest by the assignee of the equity of redemption is a sufficient acknowledgment to

1043; *sub nom.* *BARRELL v. EGREMONT (EARL)*, 3 L. T. O. S. 72.

Annotations:—*Apld.* *Topham v. Booth* (1887), 35 Ch. D. 607. *Consd.* *Re England*, *Steward v. England*, (1895) 65 L. J. Ch. 21. *Refd.* *Spickernell v. Hotham* (1854), Kay, 669; *Roddam v. Morley* (1856), 2 K. & J. 336; *Knight v. Bowyer* (1857), 23 Beav. 609; *Burrowes v. Gore* (1858), 6 H. L. Cas. 907; *Kensington v. Bouverie* (1859), 7 H. L. Cas. 557; *Re Allen*, *Bassett v. Allen*, [1898] 2 Ch. 499; *Re Welch*, *Mitchell v. Willders*, [1916] 1 Ch. 375. *Mentd.* *Byam v. Sutton* (1854), 19 Beav. 556; *Patten v. Bond* (1889), 60 L. T. 583; *Re Harvey*, *Harvey v. Hobday*, [1896] 1 Ch. 137; *Gifford v. Fitzhardinge*, [1899] 2 Ch. 32; *Whiteley v. Delaney*, [1914] A. C. 132.

930. — Mortgagee — Separate trusts]. — S. was, under a will, entitled for her life to the interest on a sum of money which had been invested by the trustees of the will on mtge. of land. The mtgor. had afterwards conveyed the land, subject to the mtge., to trustees on trust for S. for her life. During her life she received & retained the rents for more than twenty years:—*Held*: though no interest had been actually paid, yet as the person who was entitled to the rents was also entitled to the interest, the rights of the trustee of the mtge. were not barred by Real Property Limitation Act, 1833 (c. 27), s. 40, & the fact of the rents being payable to one set of trustees & the interest being payable to another set of trustees did not alter the case where the *cestui que trust* was in each case the same.—*TOPHAM v. BOOTH* (1887), 35 Ch. D. 607; 56 L. J. Ch. 812; 57 L. T. 170; 35 W. R. 715.

Annotations:—*Refd.* *Re Hawes*, *Re Burchell*, *Burchell v. Hawes* (1892), 62 L. J. Ch. 463; *Re England*, *Steward v. England* (1895), 65 L. J. Ch. 21; *Re Allen*, *Bassett v. Allen*, [1898] 2 Ch. 499.

931. — Wife mortgagee of husband's estate.]—Where a married woman was under a will entitled for life for her separate use to the income of a sum of money which the trustee of the will had lent to the husband on the security of a mtge. of two freehold houses, & the husband & wife had lived together in amity for a period of more than twenty years after the date of the mtge., & during that time the husband had never paid any interest on the mtge. debt, or given any written acknowledgment of the mtge. to the mtgee. trustee for the wife:—*Held*: the husband retained the interest as a gift from the wife; it was the same hand to pay & to receive, therefore no payment over was requisite; & consequently, Statute of Limitation did not run, & the mtge. was still subsisting.—*Re HAWES*, *Re BURCHELL*, *BURCHELL v. HAWES* (1892), 62 L. J. Ch. 463; 67 L. T. 756; 41 W. R. 173; 3 R. 133.

Annotation:—*Apld.* *Re Dixon*, *Heynes v. Dixon* (1900), 83 L. T. 129.

932. — Lien.] — In 1824 the Ct. of Lunacy made an order directing a purchase of freehold property to be completed on behalf of a lunatic out of the rents & profits of his estate, in pursuance of which the property was conveyed to trustees in trust for the lunatic, & the conveyance contained a declaration that the amount of the purchase-money should be a lien on the property in trust for the lunatic, his exors. & administrators, but neither the order nor the conveyance contained any mention of interest. In 1828 the lunatic died intestate, leaving a married sister his sole heiress-at-law & next of kin. She died in 1853, leaving her husband tenant by the curtesy. He took out administration to her estate, & died in 1887. The question was whether the lien was a subsisting

prevent the remedy against the mtgor. upon a mtge. being barred by the Statute of Limitations.—*ROSS & PHILLIPS v. SCHMITZ* (1913), 25 W. L. R. 828.—*CAN.*

Sect. 2.—Arrears of rent or interest: Sub-sect. 1, A., B., C. & D.; sub-sect. 2, A. & B.]

Act, cannot be recovered after the expiration of sixty years after the right to it has first accrued.—*ASPLEN v. PULLIN*, [1917] 1 K. B. 187; 86 L. J. K. B. 237; 115 L. T. 786, D. C.

949. ———.] — (1) A rentcharge is a "rent" within Real Property Limitation Act, 1833 (c. 27), & the owner thereof is barred from the remedy of distress after the right to recover the rentcharge has become extinguished by non-payment during the period limited by the statute.

(2) The statute is not prevented from running by the fact that the land subject to the rentcharge is in the possession of a statutory corpn.—*JONES v. WITHERS* (1896), 74 L. T. 572, C. A.

Annotation:—As to (1) Rejd. Shaw v. Crompton, [1910] 2 K. B. 370.

950. ——— Money paid in consideration of redemption of land tax.]—Where land tax is redeemed under Land Tax Redemption Act, 1802 (c. 116), the money paid as consideration for the redemption & the yearly sum payable by way of interest thereon are a charge upon the land under sect. 123, of the Act, & the charge may be enforced in equity in the same way as any other charge may be enforced, & therefore Real Property Limitation Act, 1874 (c. 57), s. 8, bars the right of action thereon after the prescribed period of twelve years. The annual payment is also a "rent" within Real Property Limitation Act, 1874 (c. 57), s. 1, & cannot be recovered after the twelve years therein prescribed.—*SKENE v. COOK*, [1902] 1 K. B. 682; 71 L. J. K. B. 446; 86 L. T. 319; 50 W. R. 506; 18 T. L. R. 431; 46 Sol. Jo. 356, C. A.

951. What arrears recoverable—At suit of issue in tail barring entail.]—*GIBBONS v. SNAPE* (1863), 1 De G. J. & Sm. 621; 2 New Rep. 563; 33 L. J. Ch. 103; 9 L. T. 132; 9 Jur. N. S. 1096; 11 W. R. 1087; 46 E. R. 246, L. JJ.

Annotation:—Mentd. Green v. Paterson (1886), 32 Ch. D. 95.

952. ——— By remainderman — Against mortgagee in possession.]—In 1859 a suit for administration was instituted by the tenant for life under a will of certain leaseholds, who subsequently mortgaged her life interest. The mtgee. obtained, under an order made in 1860, liberty to enter, & did enter, into possession of the rents for the purpose of keeping down the interest on her mtge., & paying the balance to the tenant for life. In Mar. 1866, the tenant for life left her home, & was never heard of afterwards. On a petition presented in 1875 by the persons entitled in remainder, it was held that, under the circumstances, the tenant for life must be taken to have died soon after June, 1866. On a petition now presented by the same parties for an account of arrears of rent received by the mtgee.:—*Held*: petitioners had been guilty of no laches in not filing their petition till the expiration of seven years after the disappearance of the tenant for life, & they were, therefore, entitled to an account of rents; but there was no fiduciary relation between the mtgee. & petitioners, & therefore, they were only entitled to arrears for six years before the filing of the petition.

If this had been a legal claim, the legal remainderman would have been entitled to eject the person in possession & to recover six years' arrears of rents. That is the analogy which ought to be followed (*JAMES, L.J.*).—*HICKMAN v. UPSALL* (1876), 4 Ch. D. 144; 46 L. J. Ch. 245; 35 L. T. 919; 25 W. R. 175, C. A.

953. Provision for disabilities — Real Property

Limitation Act, 1833 (c. 27), s. 42.]—*DE BEAUVOIR v. OWEN*, No. 1284, *post*.

B. Rent Secured by Speciality.

954. What arrears recoverable — Action on covenant.]—*PAGET v. FOLEY*, No. 756, *ante*.

955. ———.] — An action of covenant lies for rent reserved by indenture & accruing before a re-entry for a forfeiture, notwithstanding the lessor under such re-entry is to have the premises again, "as if the indenture had never been made." It is established that to an action of covenant, six years is not a good plea of limitation.—*HARTSHORNE v. WATSON* (1838), 4 Bing. N. C. 178; 6 Dowl. 404; 1 Arn. 15; 5 Scott, 506; 7 L. J. C. P. 138; 2 Jur. 155; 132 E. R. 756.

Annotations:—Rejd. Bamberger v. Commercial Credit Mutual Assoc. (1855), 24 L. J. C. P. 115; *Blore v. Giuliani*, [1903] 1 K. B. 356; *Richmond v. Savill*, [1926] 2 K. B. 530. *Mentd. Marshall v. Mackintosh* (1898), 78 L. T. 750; *Elliott v. Boynton*, [1924] 1 Ch. 236.

956. ———.] — *DARLEY v. TENNANT*, No. 862, *ante*.

957. ——— By distress.] — A landlord levied a distress for rent, & before he sold the tenant was adjudicated bkpt., & then the sale took place under the distress. The comr. decided that the landlord was only entitled to retain one year's rent; but on appeal:—*Held*: the landlord was, under Real Property Limitation Act, 1833 (c. 27), s. 42, entitled to six years' rent out of the proceeds of the sale.—*Re LOUGHER, Ex p. BAYLY* (1852), 22 L. J. Bcy. 26; 20 L. T. O. S. 267; 1 W. R. 93, L. JJ.

Annotation:—Mentd. Re Stending, Ex p. Green (1856), 28 L. T. O. S. 36.

958. ——— Fee farm rent — Created by letters patent.]—*HUMFREY v. GERY*, No. 945, *ante*.

C. Debt Secured by Speciality and Charged on Land.

959. What arrears recoverable — Action on covenant.]—Real Property Limitation Act, 1833 (c. 27), s. 42, has reference only to the land on which a demand is secured, the object being to relieve land from arrears of charges beyond six years, & this object is not affected by Civil Procedure Act, 1833 (c. 42), s. 3, which relates to a different subject, namely, to personal actions only.

Civil Procedure Act, 1833 (c. 42), s. 3, is to be treated as an exception out of Real Property Limitation Act, 1833 (c. 27), s. 42, & the construction of the two Acts taken together is that no more than six years' arrears of rent or interest, in respect of any sum charged upon or payable out of land or rent, shall be recovered by any distress, action, or suit, other than & except in actions upon covenant or debt upon speciality, in which case the limitation shall be twenty years.

Where an annuity was charged on lands, & secured by the personal covenant of the grantor:—*Held*: under the provisions of above-mentioned statutes six years was the limitation of the arrears which could be recovered, & this period was to be reckoned from the time when the claim was made in the suit under which the incumbrance was established.—*HUNTER v. NOCKOLDS* (1850), 1 Mac. & G. 640; 1 H. & Tw. 644; 19 L. J. Ch. 177; 14 Jur. 256; 41 E. R. 1413, L. C.

Annotations:—Expld. Snow v. Booth (1855), 2 K. & J. 132; *Lewis v. Duncombe* (No. 2) (1861), 29 Beav. 175; *Shaw v. Johnson* (1861), 1 Drew. & Sm. 412. *Consd. Mason v. Broadbent* (1863), 33 Beav. 296; *Sutton v. Sutton* (1882), 22 Ch. D. 511; *Re Lloyd, Lloyd v. Lloyd*, [1903] 1 Ch. 385. *Rejd. Greenway v. Bromfield, Handley v. Wood* (1851), 9 Hare, 201; *Cox v. Dolman* (1852), 2 De G. M. & G. 592; *Elvy v. Norwood* (1852), 5 De G. & Sm. 240;

Sinclair v. Jackson (1853), 17 Beav. 405; *Kensington v. Bouverie* (1854), 19 Beav. 39; *Round v. Bell* (1861), 30 Beav. 121; *Edmunds v. Waugh* (1866), 35 L. J. Ch. 234; *Darley v. Tennant* (1885), 53 L. T. 257; *Re Frisby*, *Allison v. Frisby* (1889), 43 Ch. D. 106; *Dingle v. Coppen*, *Coppen v. Dingle*, [1899] 1 Ch. 726; *Shaw v. Crompton*, [1910] 2 K. B. 370. *Mentd.* *Chambers v. Howell* (1850), 12 Beav. 563; *L. & Y. Ry. v. Evans* (1851), 15 Beav. 322; *Barnard v. Hunter* (1856), 2 Jur. N. S. 1213; *Blower v. Blower* (1858), 32 L. T. O. S. 193; *Lawton v. Ford* (1866), L. R. 2 Eq. 97; *McKewan v. Sanderson* (1873), L. R. 16 Eq. 316.

960. ———.] — *MANNING v. PHELPS*, No. 1047, *post*.

D. Rentcharges.

961. **Extinguishment of title to property — Bars right to recover arrears.**] — *JONES v. WITHERS*, No. 949, *ante*.

962. ———.] — *SHAW v. CROMPTON*, No. 758, *ante*.

SUB-SECT. 2.—ANNUITIES.

A. In General.

See Real Property Limitation Act, 1874 (c. 57), s. 8.

963. **When remedy for arrears of annuity barred.**] — *JAMES v. SALTER*, No. 1134, *post*.

964. ———.] — Debt for arrears of an annuity is barred after twenty years by Civil Procedure Act, 1833 (c. 42), s. 3, but not after six years under Real Property Limitation Act, 1833 (c. 27), s. 42. — *STRACHAN v. THOMAS* (1840), 12 Ad. & El. 536; 4 Per. & Dav. 229; 9 L. J. Q. B. 397; 4 Jur. 1183; 113 E. R. 916.

Annotations :—*Reid. Du Vigier v. Leo* (1843), 2 Hare, 326; *Hunter v. Nockolds* (1850), 1 H. & Tw. 644.

965. **What arrears recoverable—When annuity barred.**] — Testator gave an annuity to A., & charged the same upon all his freehold & leasehold estate. He afterwards devised his freehold estates to trustees, who were also his exors., upon trust, subject to the charge, to & for the use of his grandson & his heirs. The trustees, being in possession of the estates, paid the annuity to A. during the minority of the grandson, & within twenty years before the filing of the bill by A. against the grandson :—*Held* : (1) such payment of the annuity by the trustees prevented the claim of A. to the annuity from being barred by Real Property Limitation Act, 1833 (c. 27), ss. 2, 3; (2) the grandson was not a trustee for the annuitant within Real Property Limitation Act, 1833 (c. 27), s. 25, or otherwise; (3) under sect. 42 of same statute, the annuitant was not entitled to recover the arrears of the annuity for more than six years before the filing of the bill. — *FRANCIS v. GROVER* (1845), 5 Hare, 39; 15 L. J. Ch. 99; 6 L. T. O. S. 235; 10 Jur. 280; 67 E. R. 818.

Annotations :—*As to* (2) *Consd. Cunningham v. Foot* (1878), 3 App. Cas. 974. *Reid. Hughes v. Williams* (1852), 3 Mac. & G. 683; *Petre v. Petre* (1853), 1 Drew. 371; *Re Jordison, Raine v. Jordison*, [1922] 1 Ch. 440. *As to*

Reid. Hughes v. Williams (1852), 3 Mac. & G. 683; *Re Ashwell's Will* (1859), John. 112. *Generally, Reid. Lewis v. McKay, Algato v. Vugler, Clark v. Potter* (1924), 93 L. J. K. B. 840.

966. ———.] — *Re TURNER, KLAFTENBERGER v. GROOMBRIDGE*, No. 972, *post*.

967. **Annuity charged upon reversion.**] — Arrears of an annuity charged upon a reversionary interest in land, held recoverable more than six years after same became payable, Real Property Limitation Act, 1833 (c. 27), s. 42, having no application so long as the interest is reversionary. — *WHEELER v. HOWELL* (1857), 3 K. & J. 198; 69 E. R. 1079.

Annotations :—*Consd. Smith v. Hill* (1878), 9 Ch. D. 143. *Mentd. Groville v. Browne* (1859), 7 H. L. Cas. 689; *Re Lloyd, Lloyd v. Lloyd* (1902), 87 L. T. 541.

B. Effect of Trust.

See, now, Real Property Limitation Act, 1874 (c. 57), s. 10.

968. **What arrears recoverable.**] — Testator devised his real estates to trustees, upon trust to pay certain annuities, which were to be increased in certain events, & a term of ninety-nine years was vested in other trustees, for better securing the annuities, & subject thereto, the estates were limited to testator's sons for life, with divers remainders over. The first tenant for life entered into possession, & soon afterwards the events happened by which the annuities were to be increased; the original annuities were regularly paid, but no payment was made in respect of the increased annuities; after the death of the tenant for life, & much more than six years after the period when such increased payments ought to have been made, a bill was filed by one of the annuitants to have the whole arrears raised out of the estate of the tenant for life, & by sale or mtge. of the term :—*Held* : the term being a subsisting term, on which the trustees might obtain possession, the case was within the saving of Real Property Limitation Act, 1833 (c. 27), s. 25, & the annuitant was not barred by sect. 42 of that Act from recovering the entire arrears. — *COX v. DOLMAN* (1852), 2 De G. M. & G. 592; 22 L. J. Ch. 427; 20 L. T. O. S. 171; 17 Jur. 97; 1 W. R. 93; 42 E. R. 1003, L. C. & L. JJ.

Annotations :—*Folld. Lewis v. Duncombe* (1861), 29 Beav. 175. *Consd. Shaw v. Johnson* (1861), 1 Drew. & Sm. 412. *Distd. Mason v. Broadbent* (1863), 33 Beav. 296. *Reid. Drysdale v. Mace* (1854), 5 De G. M. & G. 103; *Snow v. Booth* (1856), 8 De G. M. & G. 69; *Blower v. Blower* (1858), 32 L. T. O. S. 193; *Burrowes v. Gore* (1858), 6 H. L. Cas. 907; *Knight v. Bowyer* (1858), 2 De G. & J. 421; *Round v. Bell* (1861), 30 Beav. 121; *Lawton v. Ford* (1866), L. R. 2 Eq. 97; *Williams v. Williams* (1899), 69 L. J. Ch. 77; *Re Jordison, Raine v. Jordison*, [1922] 1 Ch. 440.

969. ———.] — Real estate was settled to the use that A. should take an annuity of £400 during the lives of A. & B., with remainder to trustees for a term of one thousand years to secure it, with remainder to the use of B. for life, with remainder to the use of A. in fee. By a deed, dated in 1828,

will of R. :—*Held* : pltf. was entitled to a declaration that the premises devised in trust were chargeable, & that so much of the arrears as fell within six years from the commencement of the action must be paid out of the same, but no interest should be allowed thereon. — *ROOHE v. ROOHE* (1890), 22 N. S. R. 211.—CAN.

968 ii. ———.] — *Re MACKENZIE ESTATE* (1913), 24 O. W. R. 678; 4 O. W. N. 1392; 11 D. L. R. 818.—CAN.

968 iii. ———.] — *Re WYSE, Ex p. GORE* (1855), 4 I. Ch. R. 297.—IR.

968 iv. ———.] — *MONTGOMERY v. SOUTHWELL* (1843), 2 Con. & Law. 263.—IR.

PART IV. SECT. 2, SUB-SECT. 1.—D.

d. **Increased rental—Right to entire arrears accumulating.**] — *BATTESBY v. ROCHFORD* (1847), 10 I. Eq. R. 439.—IR.

e. **Civil bill decree—Accrual from date of decree.**] — *IRISH LAND COMMISSION v. JUDKIN* (1888), 24 L. R. Ir. 40.—IR.

PART IV. SECT. 2, SUB-SECT. 2.—A.

963 i. **When remedy for arrears of annuity barred.**] — *DROUGHT v. JONES* (1840), 2 I. Eq. R. 303.—IR.

963 ii. ———.] — *Re WEST'S ESTATE* (1879), 3 L. R. Ir. 77.—IR.

963 iii. ———.] — *Re NUGENT'S TRUSTS* (1885), 19 L. R. Ir. 140.—IR.

963 iv. ———.] — *DOWER v. DOWER* (1885), 15 L. R. Ir. 264.—IR.

963 v. ———.] — *PUBLIC TRUSTEE v. STEWART*, [1916] N. Z. L. R. 1149.—N.Z.

f. **Sale of land charged—Annuity not fully discharged—Right of annuitant to main fund—Without limitation.**] — *Re BELTON'S ESTATE*, [1894] 1 I. R. 537.—IR.

PART IV. SECT. 2, SUB-SECT. 2.—B.

968 i. **What arrears recoverable.**] — In an action to recover arrears of an annuity charged upon land under the

Sect. 2.—Arrears of rent or interest: Sub-sect. 2, B.; sub-sects. 3 & 4, A.]

A. granted an annuity of £45 to C., for certain uses, & charged it on the annuity of £400, & the settled estate, & demised the settled estate to D., as trustee, for a term of one thousand years, upon trust for better securing it. The deed contained the usual proviso for cesser. The last payment of the annuity of £45 was made in 1833. B. died in 1844. In a foreclosure suit, instituted by a mtgee. of the settled estate, a reference was made to the master to inquire & state incumbrances, & their priorities. C. claimed, before the master, to be entitled to the arrears & future payments of the annuity of £45:—*Held*: C. was not barred by Real Property Limitation Act, 1833 (c. 27), & was entitled to such arrears & future payments.—*MANSFIELD (EARL) v. OGLE* (1855), 24 L. J. Ch. 700; 1 Jur. N. S. 414; *subsequent proceedings* (1859), 4 De G. & J. 38.

970. —.] — The owner of a reversion in fee simple of land subject to life estates to two persons & the life of the survivor, granted an annuity during the lives & life of four persons & the survivor of them, & demised the reversion to two trustees for five hundred years, upon trust to sell one month after any arrear in payment of the annuity, either before or after the cesser of the life estate. The grantor became bkpt., & the reversion was sold, subject to the annuity, & from that time the annuity fell into arrear. Twenty four years after this, & when one of the tenants for life of the estate was still living, & two of the lives named in the annuity deed were still in existence, the grantee of the annuity filed his bill against the assignee of the estate of the grantor, & against the purchaser of the reversion, praying a sale of the term, & payment of the arrears of the annuity, & the investment of the surplus, & payment out of the interest of the annuity in future:—*Held*: Real Property Limitation Act, 1833 (c. 27), s. 42, did not restrict the grantee to receiving, by means of a sale of the term, only six years' arrears of the annuity.—*SNOW v. BOOTH* (1856), 8 De G. M. & G. 69; 25 L. J. Ch. 417; 27 L. T. O. S. 7; 2 Jur. N. S. 244; 4 W. R. 345; 44 E. R. 315, L. J.J.

Annotations:—*Appld.* *Dickinson v. Teasdale* (1862), 31 Beav. 511. *Refd.* *Lewis v. Duncombe* (1861), 29 Beav. 175.

971. — **Effect of Real Property Limitation Act, 1874 (c. 57), s. 10.]**—By an indenture executed in 1883, real estate was conveyed to trustees & their heirs, upon trust as to one moiety that immediately after the death of M. they should out of the moiety & the rents & profits thereof pay unto J. & to his heirs & assigns, or permit him or them to receive it, an annuity of £8 half-yearly. M. died in 1857. No payment was ever made in respect of the annuity & the annuitant first made a claim in 1884. The chief clerk had certified that he was entitled to a perpetual annuity. On summons to vary the certificate:—*Held*: by above Act, s. 1, no proceeding to recover any "rent," which, inasmuch as by sect. 9, above Act, must be construed with Real Property Limitation Act, 1833 (c. 27), meant by the interpretation clause of that Act any annuity charged upon land, could be taken after twelve years from the time when the right first accrued, therefore if there had not been any trust, those twelve years having elapsed, none of the past instalments of the annuity could be recovered, & the effect of above Act, sect. 10, was that no payment of the annuity, which became due before the application, was made was recoverable, the remedy being only the same as if there had not been any trust.—*HUGHES v. COLES*

(1884), 27 Ch. D. 231; 53 L. J. Ch. 1047; 51 L. T. 226; 33 W. R. 27.

Annotations:—*N.F.* *Re Turner, Klaffenberger v. Groombridge*, [1917] 1 Ch. 422. *Overd.* *Re Jordison, Raine v. Jordison*, [1922] 1 Ch. 440. *Refd.* *Williams v. Williams* (1899), 69 L. J. Ch. 77.

972. —.] — (1) Where an annuity is charged upon the proceeds of sale of real & personal estate, & power is given to postpone the sale of real estate, it is charged upon land within Real Property Limitation Act, 1833 (c. 27), s. 42, & six years' arrears of such annuity only are recoverable by virtue of that sect., the remedy being barred not only against the real estate, but against the personal estate to the same extent, & though the annuity is charged not only upon land but upon the continuing rents of land.

(2) The fact that there is an express trust makes no difference, having regard to above Act, s. 10.—*Re TURNER, KLAFTENBERGER v. GROOMBRIDGE*, [1917] 1 Ch. 422; 86 L. J. Ch. 290; 116 L. T. 278; 61 Sol. Jo. 300.

Annotation:—*As to* (2) *Overd.* *Re Jordison, Raine v. Jordison*, [1922] 1 Ch. 440.

973. — **Where trustee still in possession—Appellant limiting his claim.]**—(1) Above Act, s. 10, does not extend to an annuity charged upon real estate & secured by an express trust where the trustee still remains in possession of the property upon which it was charged.

(2) Testator, who died in 1898, devised & bequeathed his real & personal estate to trustees upon trust for sale & conversion & investment of the proceeds, & directed them out of the income to pay his wife an annuity of £500 a year for her life & subject thereto to stand possessed of the corpus of the fund upon certain trusts for his children. Testator had one child, who became absolutely entitled to the trust fund subject to the annuity. The widow died on Jan. 20, 1908. At her death there were large arrears of the annuity unpaid, the income of the estate never having been sufficient to pay it in full, & no payment having been made out of capital. No payment in respect of the arrears had ever been made nor had any acknowledgment of a right thereto been given. Early in 1921 part of the residuary real estate was sold, & the surviving trustee thereupon presented an originating petition in the Lancaster Palatine Ct. asking for the determination of the questions: (a) whether on the true construction of the will the annuity was charged upon the corpus of the residuary estate; & (b) if so, whether the estate of the widow was entitled to any & what sum in respect of the arrears of the annuity. The Vice-Chancellor held (a) the annuity was a charge upon the corpus; & (b) the arrears of the annuity were statute barred with the exception of a sum of £108 4s. 4d., less income tax, representing the apportioned part of the quarterly payment due to the widow at her death. Deft. appealed, & by her notice of appeal claimed to be entitled to the arrears of the annuity for the six years immediately preceding the death of the widow:—*Held*: the claim to the arrears of the annuity was not barred by above Act, sect. 10, & the interest of the son was therefore subject not only to the apportioned part of the last payment of the annuity due to the widow at her death, but also to the full arrears of the annuity; inasmuch, however, as applt. had by her notice of appeal confined her claim to the arrears for the six years immediately preceding the death of the widow the order in the present case would be similarly confined.—*Re JORDISON, RAINE v. JORDISON*, [1922] 1 Ch. 440; 91 L. J. Ch. 497; 126 L. T. 490; 66 Sol. Jo. 282, C. A.

SUB-SECT. 3.—INTEREST ON LEGACIES.

See Real Property Limitation Act, 1833 (c. 27), s. 42.

974. What arrears recoverable—Legacy charged on land—Effect of constructive admission of assets.]—DINSDALE v. DUDDING, No. 840, ante.

975. ———.]—Testator charged by will, under a power, the real estate of his son with £5,000, & died in 1835. Certain judgment creditors of the son filed a bill in 1840 to charge their debts on his real estate. In 1845 the exors. of testator carried in a state of facts & claim under the decree made in the suit, to which they were not parties, for the £5,000, & interest at £4 per cent., from the death of their testator:—Held: the proceedings took the case of the exors. out of Real Property Limitation Act, 1833 (c. 27), s. 42, but they were only entitled to interest for six years prior to carrying in their claim.—GREENWAY v. BROMFIELD, HANDLEY v. WOOD (1851), 9 Hare, 201; 22 L. J. Ch. 162; 17 L. T. O. S. 283; 68 E. R. 474.

976. ———.]—Among incumbrances on an estate, was a legacy of £800, subject to the payment of which the estate had been devised to A.; testator's death took place in 1810, & the bill was filed in 1843, at which time the legacy & the arrears of interest thereon remained unpaid:—Held: the arrears of interest on such legacy could only be recovered from within six years from the filing of the bill.—HUGHES v. WILLIAMS (1852), 3 Mac. & G. 683; 19 L. T. O. S. 341; 16 Jur. 415; 42 E. R. 423.

977. ——— Legacy of personalty.]—HOLLAND v. CLARK, No. 906, ante.

978. ——— Executrix retaining legacy for missing legatee.]—Re WALKER, No. 909, ante.

979. ——— Legacy in hands of trustee.]—PHILIPPO v. MUNNINGS, No. 839, ante.

980. ———.]—Testator by his will gave a certain sum to trustees, upon trust to place out at interest & continue same "until his youngest child F. should attain the age of twenty-one years," with trusts for maintenance, etc., of his children generally, "& when & as soon as his said youngest child F. should attain the age of twenty-one years, upon trust to call in & divide the same amongst certain persons in certain proportions," & if his wife were then dead, then "amongst all & every his children that should be then living in equal shares; £200, as further part thereof unto his said son G., to whom he gave & bequeathed the same accordingly." The trustees set apart the £200 & paid £50 part of it, to apprentice out G. G. afterwards in July, 1856, died before attaining twenty-one. The youngest child of testator, F. attained her age of twenty-one years on Sept. 1, 1840:—Held: interest at 4 per cent. from Sept. 1, 1840, when the youngest child came of age, was payable by the exors. on the balance of the £200 & Statute of Limitations did not apply.—Re LYMAN'S TRUST (1860), 2 L. T. 662.

981. ——— Trust to raise legacy by sale of realty.]—Testator who died in 1823 directed the trustees of his will to raise a legacy by sale of his real estates:—Held: the legatee was not barred

by Real Property Limitation Act, 1833 (c. 27), s. 42, from claiming interest on the legacy from the end of the first year after testator's death.—GOUGH v. BULT (1848), 16 Sim. 323; 17 L. J. Ch. 486; 12 Jur. 859; 60 E. R. 898.

*Annotations:—*Folld. Mutlow v. Bigg (1874), L. R. 18 246. *Reid.* Hughes v. Williams (1852), 3 Mac. & G. 683; Petre v. Petre (1853), 1 Drew. 371; Obee v. Bishop (1859), 1 De G. F. & J. 137; Watson v. Saul (1859), 33 L. T. O. S. 55; *Re* Jordison, *Raine v. Jordison*, [1922] 1 Ch. 440.

982. ——— Legacy payable out of reversionary interest.]—EARLE v. BELLINGHAM (No. 2), No. 885, ante.

983. ———.]—Re BLACHFORD, BLACHFORD v. WORSLEY, No. 888, ante.

SUB-SECT. 4.—INTEREST ON MORTGAGES.

A. In General.

Mortgage generally, see MORTGAGE.

984. What arrears recoverable—Mortgage with no covenant to repay.]—A canal co. conveyed, under their common seal, the canal, works & rates to a mtgee., to hold, etc., until repayment of certain money borrowed & interest. There was no covenant to repay:—Held: under Statutes of Limitations, although the mtgee. could recover the principal within twenty years, yet his remedy for arrears of interest was limited to six years.—HODGES v. CROYDON CANAL CO. (1840), 3 Beav. 86; 49 E. R. 34.

*Annotations:—*Consd. Hunter v. Nockolds (1850), 1 Mac. & G. 640. *Distd.* Toft v. Stevenson (1854), 5 De G. M. & G. 735. *Mentd.* Kinnaird v. Trollope (1889), 42 Ch. D. 610.

985. ——— Money charged on reversion — Action on covenant to pay.]—SINCLAIR v. JACKSON, No. 995, post.

986. ——— Reversionary interest in money charged on lands.]—Where a married woman entitled after the death of a tenant for life, to a share of a fund arising from moneys the proceeds of lands devised upon trust for sale, joined with her husband in a mtge. by deed acknowledged of her reversionary estate, such mtge. containing a covenant by husband & wife to pay full interest:—Held: the wife's estate was "money payable out of land" within Real Property Limitation Act, 1833 (c. 27), s. 42; & the mtgee. could not recover more than six years' arrears of interest on the mtge. of such an estate.—BOWYER v. WOODMAN, *Ex p.* CLARKE (1867), L. R. 3 Eq. 313.

*Annotations:—*Distd. Smith v. Hill (1878), 9 Ch. D. 143. *Reid.* Mutlow v. Bigg (1874), L. R. 18 Eq. 246; *Re* Lloyd, *Lloyd v. Lloyd*, [1903] 1 Ch. 385. *Mentd.* *Re* Stephens, *Warburton v. Stephens* (1889), 43 Ch. D. 39; *Re* Berchtold, *Berchtold v. Capron*, [1923] 1 Ch. 192.

987. ——— Interest accruing while property reversionary.]—SMITH v. HILL, No. 988, post.

988. ——— Reversionary interest in money outstanding on mortgage of realty.]—(1) A. was legatee in reversion after certain life interests of testatrix's residuary personal estate. The estate consisted wholly or chiefly of a sum of £3,000 invested on mtge. of real estate by testatrix & continued on such investment by her trustees. A. mortgaged his interest in the £3,000, & after sixteen

secured by a certain mtgo., etc.:—*Held:* the legatee was entitled to claim more than six years' arrears of interest, the trust being express, & the Statute of Limitations therefore not applying to the case.—LORING v. LORING (1866), 12 Gr. 374.—CAN.

982 i. ——— Legacy payable out of reversionary interest.]—VINCENT v. GOING (1844), 7 I. Eq. R. 463.—IR.

PART IV. SECT. 2, SUB-SECT. 3.

975 i. What arrears recoverable — Legacy charged on land.]—Re YATES (1902), 22 C. L. T. 413; 4 O. L. R. 580; 1 O. W. R. 630.—CAN.

975 ii. ———.]—HUGHES v. KELLY (1843), 5 I. Eq. R. 286; 3 Dr. & War. 482; 2 Con. & Law. 223.—IR.

975 iii. ———.]—ARCHDALL v.

ANDERSON (1890), 25 L. R. Ir. 433.—IR.

979 i. ——— Legacy in hands of trustee.]—A testator bequeathed his personal estate to his exors., in trust for the purposes of his will, & gave to them, in the quality of trustees, for the use of his son for life, & after his death for the use of his son's children, "the sum of £1,500, due to me by C., &

Sect. 2.—Arrears of rent or interest: Sub-sect. 4, A., B., C. & D.]

years, during which A. paid no interest on his mtge., A.'s reversion fell into possession:—*Held*: A.'s mtgee. was entitled as against the residuary estate to recover the whole arrears of interest, the mtge. by A. not being a charge on real estate within Real Property Limitation Act, 1833 (c. 27), s. 42.

(2) *Semble*: if it had been a charge on real estate, the fact of the interest being reversionary would not have prevented the operation of Real Property Limitation Act, 1833 (c. 27), s. 42, in barring arrears of interest beyond six years.—*SMITH v. HILL* (1878), 9 Ch. D. 143; 47 L. J. Ch. 788; 38 L. T. 638; 26 W. R. 878.

Annotations:—*Appl.* *Mellersh v. Brown* (1890), 45 Ch. D. 225. *Consd.* *Re Stucley, Stucley v. Kekewich*, [1906] 1 Ch. 67. *Reid.* *Re Marshfield, Marshfield v. Hutchings, Hutchings v. Hutchings* (1887), 56 L. T. 694; *Re Lloyd, Lloyd v. Lloyd* (1902), 87 L. T. 541.

989. — Purchaser taking assignment of incumbrances—Not in position of prior incumbrancer.]—CHINNERY v. EVANS, No. 912, ante.

Foreclosure action.]—See Sub-sect. 4, B., post.

— Redemption suits.]—See Sub-sect. 4, C., post.

Petition for payment out of court.]—See Sub-sect. 4, D., post.

990. — Sale of mortgaged property under power of sale—Action by mortgagor to recover balance.]—MASON v. BROADBENT, No. 1449, post.

991. Real Property Limitation Act, 1833 (c. 27), s. 42—What mortgages are within section—Mortgages of reversionary interests in personalty—Invested in mortgage of realty.]—SMITH v. HILL, No. 988, ante.

992. — — — Covenant for capitalisation of interest.]—A. & B., reversioners after a life interest in C. mortgaged their property & covenanted that interest in arrear should be capitalised & bear interest after the same rate; & C. also assigned her life interest as part of the security:—*Held*: the covenant was good & valid; & the mtgee. was not limited to six years' interest.—*CLARKSON v. HENDERSON* (1880), 14 Ch. D. 348; 49 L. J. Ch. 289; 43 L. T. 29; 28 W. R. 907.

Annotations:—*Mentd.* *Re Middlesbrough Bldg. Soc.* (1884), 54 L. J. Ch. 592; *Mainland v. Upjohn* (1889), 41 Ch. D. 126.

993. — Sale by first mortgagee under power—Retention of interest by mortgagee.]—Real Property Limitation Act, 1833 (c. 27), s. 42, does not affect the right of a mtgee. who has sold under his power of sale to retain out of the proceeds more than six years' arrears of interest. After the judgment for the administration of the estate of a second mtgee. of real estate, the first mtgees. sold the mtged. property under their power of sale & received the proceeds. A summons in the action was then taken out by pltf., a beneficiary under the will of the second mtgee., to determine the question whether the first mtgees. were entitled to retain more than six years' arrears of interest. The first mtgees. were not parties to the action, but consented to appear on the summons to argue the question. The second mtge. absorbed all the possible surplus of the proceeds of sale:—*Held*: the first mtgees. were entitled to retain more than six years' arrears of interest.—*Re*

MARSHFIELD, MARSHFIELD v. HUTCHINGS, HUTCHINGS v. HUTCHINGS (1887), 34 Ch. D. 721; 56 L. J. Ch. 599; 56 L. T. 694; 35 W. R. 491.

Annotations:—*Appl.* *Dingle v. Coppen, Coppen v. Dingle*, [1899] 1 Ch. 726. *Consd.* *Re Lloyd, Lloyd v. Lloyd*, [1903] 1 Ch. 385. *Reid.* *Re Hancock, Hancock v. Berrey* (1888), 57 L. J. Ch. 793.

994. Action or suit for recovery of interest—What amounts to—Summons by second mortgagee against first mortgagee—To determine title to repayment of moneys owing on second mortgage.]—*Re THOMSON'S MORTGAGE TRUSTS, THOMSON v. BRUTY*, No. 1454, post.

B. On Foreclosure.

Foreclosure generally, see MORTGAGE.

995. What amount of arrears recoverable.]—

(1) A mtgee., notwithstanding the interest mortgaged is reversionary, can only recover six years' arrears of interest as against the land mortgaged, although he may recover twenty years' arrears on the covenant to pay.

(2) The interest on money secured by mtge. of land & by covenants being sixteen years in arrear, the mtgee. filed his bill of foreclosure against the heir of the mtgor., raising no question of liability on the covenant or of any right of tacking. A decree was made to take an account of what was due on the mtge. Under Statutes of Limitation twenty years' arrears could be recovered on the covenant, but six only as against the land. The master refused to allow pltf. to tack his two claims:—*Held*: on exceptions, he was right. *Qu.*: whether the right to tack in such a case would be different in a suit for foreclosure from what it is in a suit for redemption.—*SINCLAIR v. JACKSON* (1853), 17 Beav. 405; 1 W. R. 400; 51 E. R. 1090.

Annotations:—*As to* (1) *Consd.* *Smith v. Hill* (1878), 9 Ch. D. 143; *Dingle v. Coppen, Coppen v. Dingle*, [1899] 1 Ch. 726; *Re Lloyd, Lloyd v. Lloyd*, [1903] 1 Ch. 385.

996. —.]—Although there is in a mtge. deed a covenant to pay principal & interest, a mtgee. cannot in foreclosing have an account of arrears of rent for more than six years. But if there is a term in a trustee to secure the mtge., the mtgee. will have a general account of arrears; & it is the same if there is an agreement that an outstanding term shall be assigned in trust.—*SHAW v. JOHNSON* (1861), 1 Drew. & Sm. 412; 30 L. J. Ch. 646; 4 L. T. 461; 7 Jur. N. S. 1005; 9 W. R. 629; 62 E. R. 437.

Annotations:—*Consd.* *Re Lloyd, Lloyd v. Lloyd*, [1903] 1 Ch. 385. *Reid.* *Re Stead's Mortgaged Estates* (1876), 2 Ch. D. 713; *Re Jordison, Raine v. Jordison*, [1922] 1 Ch. 440.

997. —.]—When money is secured by an ordinary mtge. by covenant & bond, the mtgee., in a suit to foreclose, can only recover six years' arrears of interest, but the case is different when there is a trust to secure it.—*ROUND v. BELL* (1861), 30 Beav. 121; 31 L. J. Ch. 127; 5 L. T. 15; 7 Jur. N. S. 1183; 9 W. R. 846; 54 E. R. 834.

Annotations:—*Consd.* *Re Jordison, Raine v. Jordison*, [1922] 1 Ch. 440. *Reid.* *Re Lloyd, Lloyd v. Lloyd*, [1903] 1 Ch. 385.

998. —.]—*Re LLOYD, LLOYD v. LLOYD*, No. 1007, post.

999. Whether tacking of specialty debt permitted—As against other specialty creditors.]—*SINCLAIR v. JACKSON*, No. 995, ante.

PART IV. SECT. 2, SUB-SECT. 4.—A.

989 i. What arrears recoverable—Purchaser taking assignment of incumbrances—Not in position of prior incumbrancer.]—*COLQUHOUN v. MURRAY* (1899), 26 A. R. 204.—*CAN.*

g. — Statutory sale of land—

Portion of arrears already barred.]—*Re BLENNERHASSETT'S ESTATE*, [1911] 1 I. R. 16.—*IR.*

h. — Mortgage on minor's estate.]—*Re FITZMAURICE* (1864), 15 I. Ch. R.

445.—*IR.*

PART IV. SECT. 2, SUB-SECT. 4.—B.

995 i. What amount of arrears recoverable.]—*THWAITES v. M'DONOUGH* (1839), 2 I. Eq. R. 97.—*IR.*

C. On Redemption.

Redemption generally, *see* MORTGAGE.

1000. What arrears of interest payable—Debt secured by covenant as well as by mortgage of land.]—*Du Vigier v. Lee*, No. 850, *ante*.

1001. — Right of mortgagee to tack specialty debt & mortgage.]—The heir of a mtgor., who has covenanted for himself & his heirs to pay the mtge. debt & interest, cannot redeem without paying arrears of interest to the extent of twenty years, the mtgee. being entitled to tack the arrears of interest to the debt as against the heir.—*Elvy v. Norwood* (1852), 5 De G. & Sm. 240; 21 L. J. Ch. 716; 19 L. T. O. S. 198; 16 Jur. 493; 64 E. R. 1099.

*Annotations:—*Consd. *Sinclair v. Jackson* (1853), 17 Beav. 405. *Reid. Roddam v. Morley* (1856), 2 K. & J. 336; *Round v. Bell* (1861), 30 Beav. 121; *Re Stead's Mortgaged Estates* (1876), 2 Ch. D. 713. *Mentd. Kensington v. Bouverie* (1854), 24 L. T. O. S. 187.

1002. — Reversionary interest subject of mortgage—Proviso for redemption on payment of principal & interest—Separate covenant for payment of interest.]—A mtge. of a reversionary share in the proceeds of realty & in personalty in ct. contained a proviso for redemption upon payment, on or before the death of the life tenant, of the principal sum "with interest for the same in the meantime" at the specified rate. Then followed distinct covenants for payment of principal on the life tenant's death, & of interest in the meantime half-yearly respectively; but the proviso did not refer to these covenants. When the life tenant died some thirteen years' interest was unpaid:—*Held*: the proviso for redemption was a distinct contract & the covenant for payment of interest ought not to be imported into it; &, therefore, the mtgee.'s right to all the interest unpaid, which was expressly given by the proviso, was unaffected by any statute of limitations or principle of equity.—*Re Turner, Turner v. Spencer* (1894), 43 W. R. 153; 39 Sol. Jo. 59; 13 R. 132.

*Annotation:—**Reid. Williams v. Morgan*, [1906] 1 Ch. 804.

1003. —]—Testator, who died in 1878, devised some cottages & marshlands upon trust for his wife for life, she out of the rents & profits keeping "the premises in good tenantable repair & condition," & after her death upon trust for C. in fee. In 1882 C. mortgaged his reversion in fee to the widow, who was in receipt of the rents & profits of the property as tenant for life. She died in 1897, & her exors. brought an action of foreclosure against C. who had made no payment either of principal or interest since the date of the mtge., & who set up Statutes of Limitations. At the trial C. submitted to the usual judgment for foreclosure with arrears of interest limited to six years prior to the date of the writ, but counter-claimed damages against the estate of the tenant for life for non-repair of the cottages & depreciation of the marsh lands, alleging that the latter had been continuously mown against all custom, and had thereby been greatly impoverished, & offered to redeem on the footing that any damages awarded him should be set off in account against what was due on the mtge., & contended that on redeeming he was only bound to pay six years' arrears of interest prior to the date of the writ. Testator had in 1874, granted a seven years' lease of the marsh lands, with a covenant by the lessee not to mow them oftener than once in any one

year, but to keep them during the term in good condition, & the tenant for life in granting subsequent leases of the same lands had inserted covenants as to mowing similar to that in testator's lease. The cottages were out of repair & the marsh lands had been depreciated to some extent by mowing:—*Held*: C. on redeeming was not limited to six years' arrears of interest prior to the date of the writ, but must pay all arrears of interest with principal & costs from the date of the mtge.—*Dingle v. Coppen, Coppen v. Dingle*, [1899] 1 Ch. 726; 68 L. J. Ch. 337; 79 L. T. 693; 47 W. R. 279.

*Annotations:—**Reid. Re Lloyd, Lloyd v. Lloyd*, [1903] 1 Ch. 385. *Mentd. Powell v. Brodhurst*, [1901] 2 Ch. 160.

1004. Accounts as between mortgagor & mortgagee in possession—Whether all profits must be accounted for.]—Certain hereditaments, containing a coal mine, were conveyed by way of mtge. from H. to L., the former covenanting that he would confirm any lease of the mtged. premises which L. might make; but L. was neither authorised to work the mine himself, nor to make any lease thereof. Subsequently L., without the knowledge of H., authorised E. to explore & work the said mine, with a view to becoming the lessee thereof. On a bill to redeem, & for an account, filed by H. against L. & E.:—*Held*: (1) debts. were liable to account for the value of all coal raised by them, or either of them, & no deduction of any kind was to be allowed; (2) Statute of Limitations formed no bar to pltf.'s claim.—*Hood v. Easton* (1856), 2 Giff. 692; 27 L. T. O. S. 295; 2 Jur. N. S. 729; 4 W. R. 575; 66 E. R. 290; *on appeal*, 2 Jur. N. S. 917, L. JJ.

*Annotation:—*Generally, *Mentd. Elias v. Griffith* (1878), 8 Ch. D. 521.

1005. Redemption by puisne mortgagee—Effect of acknowledgment by mortgagor of more than six years' arrears on first mortgage.]—A mtgee. is not entitled under Real Property Limitation Act, 1833 (c. 27), s. 42, to recover as against a second mtgee. & subsequent incumbrancers, the arrears of interest due on his mtge. for more than six years, by reason of an acknowledgment in writing by the mtgor. of the sum due in respect of interest. The words of Real Property Limitation Act, 1833 (c. 27), s. 42, "by whom the same is payable," denote not merely those who are legally bound by contract to pay the interest, but all against whom payment may be enforced by any action or suit.—*Bolding v. Lane* (1863), 1 De G. J. & Sm. 122; 1 New Rep. 248; 32 L. J. Ch. 219; 7 L. T. 812; 9 Jur. N. S. 506; 11 W. R. 386; 46 E. R. 47, L. C.

*Annotations:—*Expld. & Distd. *Chinnery v. Evans* (1864), 11 H. L. Cas. 116. Consd. *Lewin v. Wilson* (1886), 11 App. Cas. 639; *Astbury v. Astbury*, [1898] 2 Ch. 111. *Reid. Harlock v. Ashberry* (1881), 50 L. J. Ch. 745.

D. Petition for Payment out of Court.

1006. Proceeds of sale in administration action—To satisfy arrears of interest.]—The proceeds of sale of mtged. premises, sold under the power of sale in a mtge. deed by the trustees of the mtgee., were paid into ct. in a suit for the administration of the mtgee.'s estate; & there being nearly twenty years' arrears of interest due on the mtge., exceeding in amount the fund in ct., the trustees petitioned for payment out of the fund to satisfy such arrears, & the assignee of the mtgor. was

PART IV. SECT. 2, SUB-SECT. 4.—C.

*k. What arrears of interest payable.]—*In an action of redemption by a second mtgee. against a first mtgee. the latter is entitled to only six

years' arrears of interest.—*McMicking v. Gibbons* (1897), 24 A. R. 586.—CAN.

PART IV. SECT. 2, SUB-SECT. 4.—D.

1006 i. Proceeds of sale in administration action—To satisfy arrears of

*interest.]—**Levy v. Williams*, [1925] V. L. R. 616; 47 A. L. T. 57; 31 Argus L. R. 447.—AUS.

1. Right of incumbrancer.]—In an incumbrancer's petition matter, an

Sect. 2.—Arrears of rent or interest: Sub-sect. 4, D.; sub-sects. 5, 6 & 7. Part V. Sect. 1.]

served with the petition:—*Held*: the petition was not a suit to recover arrears of interest within Real Property Limitation Act, 1833 (c. 27), s. 42; & the mtgee.'s trustees were entitled to more than six years' arrears of interest, & the fund was ordered to be paid over to them.—*EDMUNDS v. WAUGH* (1866), L. R. 1 Eq. 418; 35 L. J. Ch. 234; 13 L. T. 739; 12 Jur. N. S. 326; 14 W. R. 257.

Annotations:—Expld. & Distd. Re Stead's Mortgaged Estates (1876), 2 Ch. D. 713. *Foll'd. Re Marshfield, N v. Hutchings* (1887), 34 Ch. D. 721; *Dingle v. Coppen, Coppen v. Dingle*, [1899] 1 Ch. 726. *Apprvd. Re Lloyd, Lloyd v. Lloyd*, [1903] 1 Ch. 385. *Refd. Re Thomson's Mortgage Trusts, Thomson v. Bruty*, [1920] 1 Ch. 508.

1007. ———.]—Where a mtgor. applies by summons as against the mtgee., that a fund in ct. in an administration action, being the proceeds of sale of the mtged. property, real & personal estate under a will, may be paid out to him, the mtgor., after payment thereof to the mtgee. of six years' interest only, in addition to the principal, he is in the same position as if he had brought an action for redemption, & therefore cannot recover the fund except upon the usual redemption terms of payment of principal together with the full arrears of interest, Real Property Limitation Act, 1833 (c. 27), s. 42, having no application to the case.

Testator who died in 1862, by his will gave his real & personal estates to trustees upon trust to pay the income to his widow for life, & after her death to sell the same & stand possessed of the proceeds in trust for his children equally. In Jan. 1867, F., one of the children, conveyed his reversionary interest in his share under the will to A., subject to a proviso for redemption on repayment to A. of £500, with interest at five per cent. *per annum*, in July, 1867. The mtge. contained the usual mtgor.'s covenants for payment of the principal, & also of interest at five per cent. *per annum* so long as the principal remained unpaid; & it was agreed that A., his heirs, etc., should, out of any real & personal estate which should be received by him & them under the mtge., pay all moneys owing on the security & pay the surplus, if any, to F. The mtge. contained a power of sale, but there was no power of attorney enabling the mtgee. to sue or give receipts in the absence of the mtgor. In Aug. 1867, F. died intestate. In 1872 an action was brought for the administration of testator's estate, & under orders made in the action his real & personal estates were sold, F.'s share of the proceeds being carried to his separate account in the action. In 1887 A. died, having by will appointed exors. Testator's widow died in 1900, & in 1901 F.'s administrator applied by summons, A.'s exors. being resps., for payment out to him of F.'s fund in ct., after payment thereof to A.'s exors. of the principal due on the mtge., together with not more than six years' arrears of interest:—*Held*: notwithstanding Real Property Limitation Act, 1833 (c. 27), s. 42, A.'s exors. were entitled to receive out of the fund their full arrears of interest before F.'s administrator received anything.

From that time [*Round v. Bell*, No. 997, *ante*] down to the present it has been the uniform practice in foreclosure actions to confine pltf. to six years' arrears of interest (*per cur.*).—*Re LLOYD, LLOYD v. LLOYD*, [1903] 1 Ch. 385; 72 L. J. Ch.

78; 87 L. T. 541; 51 W. R. 177; 19 T. L. R. 101; 47 Sol. Jo. 128, C. A.

Annotations:—Expld. & Distd. Re Hazeldine's Trusts, [1908] 1 Ch. 34. *Refd. Re Thomson's Mortgage Trusts, Thomson v. Bruty*, [1920] 1 Ch. 508.

1008. Purchase-money on compulsory acquisition—Of land subject to equitable mortgage—Petition by mortgagee.]—Money paid into ct. under the Lands Clauses Act, 1845 (c. 18), for purchase of land which was subject to an equitable mtge. by deposit, with a memorandum undertaking to give a legal mtge.; on petition by the mtgee. for payment out:—*Held*: the analogy of Statute of Limitations applied, & only six years' arrears of interest could be charged.—*Re STEAD'S MORTGAGED ESTATES* (1876), 2 Ch. D. 713; 45 L. J. Ch. 634; 35 L. T. 465; *sub nom. Re STEAD'S SETTLEMENT TRUSTS*, 24 W. R. 698.

Annotations:—Refd. Re Marshfield, Marshfield v. Hutchings (1887), 34 Ch. D. 721; *Re Lloyd, Lloyd v. Lloyd*, [1903] 1 Ch. 385; *Re Thomson's Mortgage Trusts, Thomson v. Bruty*, [1920] 1 Ch. 508.

1009. Sum charged on land—Mortgage of reversionary interest in such sum—Unconscionable bargain.]—A married woman & her brothers, persons in a humble position, being entitled in reversion expectant on the death of a tenant for life, to a sum of £1,500 charged on land, purported to mortgage this interest to B. as security for £500 with interest at five per cent. though £250 only was actually advanced. B. subsequently advanced £150 more, for which a further charge for £300 on the same reversionary interest was taken as security. This deed of further charge contained recitals and clauses to the effect that the nature of the transaction was perfectly understood by the borrowers, & that the difference between the sums actually advanced & the sums expressed to be secured was considered reasonable remuneration for the delay that must occur before repayment, on account of the age of the tenant for life. The securities were prepared by B.'s solr., acting for all parties, & the borrowers had no independent advice. Only one year's interest was ever paid. On the death of the tenant for life, the £1,500 was paid into ct., & upon a petition by the reversioners to set aside these securities on the ground of fraud, & for payment out of the fund:—*Held*: the mtge. & further charge could stand as security only for the sums actually advanced, with six years' arrears of interest only.—*Re SLATER'S TRUSTS* (1879), 11 Ch. D. 227; 48 L. J. Ch. 473; 40 L. T. 184; 27 W. R. 448.

Annotations:—Overd. Re Lloyd, Lloyd v. Lloyd, [1903] 1 Ch. 385. *Refd. Re Marshfield, Marshfield v. Hutchings* (1887), 34 Ch. D. 721.

SUB-SECT. 5.—INTEREST ON PURCHASE-MONEY.

1010. Unpaid vendor enforcing lien.]—A contract for the sale of an estate made in Mar. 1811, stipulated that the purchase-money should be paid on May 13, following. The purchase-money was not paid, but the purchaser entered into possession & he & persons claiming under him continued in such possession. In 1834 their agent signed a written acknowledgment of the vendor's title sufficient to take his lien for the principal of the purchase-money out of Real Property Limitation Act, 1833 (c. 27), s. 40. In 1849 the assignees of the vendor filed a bill seeking to enforce the vendor's lien on the estate for the purchase-money:—*Held*: (1) Real Property Limitation Act,

incumbrancer who avails himself of the proceedings is not entitled to receive interest on his incumbrance

which has accrued more than six years next before the filing of the petition for sale, such interest being barred

under the Statute of Limitations.—*LEWIS' ESTATE, Re KIRKE*, [1903] 1 I. R. 348.—IR.

1833 (c. 27), s. 42, did not apply to the arrears of interest but the whole was recoverable from May 13, 1811.

(2) Pltfs. ask for the unpaid purchase-money, which implies that the purchase-money is to be paid, & it could not be paid unless the contract were completed. The right to the principal did not accrue until the time arrived for completion, & the right to receive interest accrued at the same time (TURNER, L.J.).—TOFT v. STEVENSON (OR STEPHENSON) (1854), 5 De G. M. & G. 735; 43 E. R. 1055, L. JJ.; *previous proceedings* (1851), 1 De G. M. & G. 28, L. JJ.

1011. Purchaser recovering deposit & part purchase-money.]—P. in May, 1845, contracted to sell a piece of land to W. for £8,295, of which sum £829 was paid down, the rest to be paid in May, 1848, & meantime the interest to be paid half-yearly. On the making of the contract, P. made material representations as to his dividing his neighbouring property into streets, & erecting a church, which induced W. to purchase. In Aug. 1845, P. mortgaged the property, of which notice was given to W., who continued to make his payments. In Apr. 1848, P. was adjudicated a bkpt., & had not carried out the representations he made on selling the land to W., whereupon W. declined to pay the balance of the purchase-money:—*Held*: notwithstanding the delay, the circumstances not having altered, W. was entitled to recover six years' interest on the deposit money & on the interest he had paid under the contract.—ROSE v. WATSON (1864), 10 H. L. Cas. 672; 3 New Rep. 673; 33 L. J. Ch. 385; 10 L. T. 106; 10 Jur. N. S. 297; 12 W. R. 585; 11 E. R. 1187, H. L.; *affg.* S. C. *sub nom.* WATSON v. ROSE (1862), 6 L. T. 804.

Annotations:—*Consd.* *Re* Stucley, *Stucley v. Kekewich*,

[1906] 1 Ch. 67. *Refd.* *Levy v. Stogdon*, [1898] 1 Ch. 478. *Mentd.* *Aberaman Iron Works v. Wickens* (1868), 4 Ch. App. 101; *McCreight v. Foster* (1870), 5 Ch. App. 604; *Shaw v. Foster* (1872), L. R. 5 H. L. 321; *Torrance v. Bolton* (1872), 41 L. J. Ch. 643; *Lysaght v. Edwards* (1876), 2 Ch. D. 499; *Mycock v. Beatson* (1879), 13 Ch. D. 384; *Beddington v. Atlee* (1887), 35 Ch. D. 317; *Cornwall v. Henson*, [1899] 2 Ch. 710; *Dodson v. Downey*, [1901] 2 Ch. 620; *Fleming v. Loe* (1901), 70 L. J. Ch. 805; *Whitbread v. Watt*, [1902] 1 Ch. 835; *Ridout v. Fowler*, [1904] 1 Ch. 658.

SUB-SECT. 6.—TITHES.

Amount recoverable—Whether interest allowed.]—*See* ECCLESIASTICAL LAW, Vol. XIX., p. 481, Nos. 3401, 3402.

Tithe rentcharge.]—*See* Nos. 947, 948, *ante*.

SUB-SECT. 7.—DOWER.

See Real Property Limitation Act, 1833 (c. 27), s. 41, & *now*, Administration of Estates Act, 1925 (c. 23), ss. 45, 46, sched. 2.

1012. Six years recoverable.]—Defts. in possession denied the title of the widow, alleging that her husband had not been seised of an estate of inheritance in the premises; that allegation being founded on information as to the time of his death, which was believed to be correct, but afterwards found to be erroneous. Decree for dower & arrears for six years before the filing of the bill.—BAMFORD v. BAMFORD (1845), 5 Hare, 203; 67 E. R. 887.

Annotations:—*Refd.* *Williams v. Thomas*, [1909] 1 Ch. 713. *Mentd.* *Morgan v. Morgan* (1865), 11 Jur. N. S. 233; *Stormont v. Thickins* (1865), 13 L. T. 533.

Part V.—Land or Rent.

SECT. 1.—GENERAL EFFECT OF REAL PROPERTY LIMITATION ACTS.

See Real Property Limitation Acts, 1833 (c. 27), 1874 (c. 57).

1013. Property vested in person in possession.]—The question is, whether the lessor of pltf. is by Statute of Limitations, 1623 (c. 16), barred from recovering in this ejectment. . . . An ejectment is a possessory remedy, & only competent where the lessor of pltf. may enter; therefore it is always necessary for pltf. to show that his lessor had a right to enter, by proving a possession within twenty years, or accounting for the want of it, under some of the exceptions allowed by Statute. Twenty years adverse possession is a positive title to deft., it is not a bar to the action or remedy of pltf. only, but takes away his right of possession

(*per* CUR.).—TAYLOR d. ATKYNS v. HORDE (1757), as reported in 1 Burr. 60; 97 E. R. 190; *affd.* (1758), 6 Bro. Parl. Cas. 633, H. L.

Annotations:—*Consd.* *Cholmondeley v. Clinton* (1820), 2 Jac. & W. 1. *Refd.* *Fairclain d. Empson v. Shackleton* (1770), 5 Burr. 2604; *Doe d. Cook v. Danvers* (1806), 3 Smith, K. B. 291. *Mentd.* *Doe d. Atkyns v. Horde* (1777), 2 Cowp. 689; *Peaceable d. Hornblower v. Read* (1801), 1 East, 568; *Jerritt v. Weare* (1817), 3 Price, 575; *Doe d. Maddock v. Lynes* (1824), 3 B. & C. 388; *Cooke v. Yates* (1827), 4 Bing. 90; *Doe d. Teynham v. Tyler* (1830), 4 Moo. & P. 29; *Doe d. Douglas v. Lock* (1835), 2 Ad. & El. 705; *Doe d. Blight v. Pett* (1840), 11 Ad. & El. 842; *Doe d. Hartridge v. Gilbert* (1843), 5 Q. B. 423; *Bevan v. Habgood* (1860), 30 L. J. Ch. 107; *Shrewsbury v. Keightley* (1865), 19 C. B. N. S. 606; *Simpson v. Bathurst, Shepherd v. Bathurst* (1869), 5 Ch. App. 193; *Weller v. Stone* (1885), 54 L. J. Ch. 497; *Boyce v. Edbrooke*, [1903] 1 Ch. 836.

1014. —.]—In an action which raises a question of title to land, the question being one of boundary, long possession & acts of ownership

PART IV. SECT. 2, SUB-SECT. 7.

m. Time for bringing action.]—No action of dower shall be brought but within twenty years from the death of the husband of the demandant.—MCCLELLAND v. MEGGATT (1850), 7 U. C. R. 31.—CAN.

n. —.]—GERMAN v. GROOMS (1850), 6 U. C. R. 414.—CAN.

o. —.]—MCDONALD v. MCINTOSH (1852), 8 U. C. R. 388.—CAN.

p. —.]—BEGLY v. ST. PATRICK'S

LITERARY ASSOCN. OF OTTAWA (1864), 23 U. C. R. 395.—CAN.

q. —.]—On the facts:—*Held*: the right to dower was barred by 38 Vict. c. 16, s. 14 (O), which requires proceedings to be taken to enforce a widow's dower within ten years from the death of her husband.—MCDONALD v. MCRAE (1886), 13 A. R. 121.—CAN.

r. —.]—*Re* MCAFEE (1891), N. B. Dig. 313.—CAN.

t. Commencement of statutory period —From husband's death.]—LEACH

v. DENNIS (1866), 24 U. C. R. 129.—CAN.

a. Agreement for payment of rent to widow—During currency of term.]—The widow & heir had mutually agreed that one-third of the rent should be paid to the widow in each year, which was accordingly done during the currency of the term:—*Held*: this had the effect of preventing the lapse of time being set up as a bar under the statute to the widow's right to dower.—FRASER v. GUNN (1879), 27 Gr. 63.—CAN.

Sect. 1.—General effect of Real Property Limitation Acts. Sect. 2: Sub-sect. 1.]

afford pregnant evidence of title in the party possessed notwithstanding the non-production of his title deeds, & even against some evidence of title in the other party, if such evidence leaves the question in doubt, upon the ground of the acquiescence of the other party in possession & acts of ownership; & this evidence is quite independent of Statute of Limitations, the effect of which is to vest the property in the person in possession, even although until the period of limitation had elapsed it was not his whereas the effect of possession & acts of ownership is evidence to show that the title was originally in that party.—*ST. LEONARDS (LORD) v. ASHBURNER* (1870), 21 L. T. 595.

1015. Applicability of statutes—Inclosure of common forbidden by Act of Parliament.]—In view of the fact that, by 39 & 40 Vict. c. 20, s. 36, a common regulated under the Act is not to be inclosed without the sanction of Parliament, Statute of Limitations does not apply to enable an owner of closes abutting on the common to acquire a title under said Statute.—*COLLIS v. AMPHLETT* (1917), as reported in 62 Sol. Jo. 37; *on appeal*, [1918] 1 Ch. 232, C. A.; [1920] A. C. 271, H. L.

1016. Adverse possession—Real Property Limitation Act, 1833 (c. 27), s. 15.]—The doctrine of non-adverse possession is done away with by above Act, except in cases provided for by sect. 15.—*NEPEAN v. DOE d. KNIGHT* (1837), 2 M. & W. 894; *Murp. & H.* 291; 7 L. J. Ex. 355; 150 E. R. 1021, Ex. Ch.

*Annotations:—*Consd. *Doe d. Angell v. Angell* (1846), 9 Q. B. 328. *Refd.* *Hogan v. Hand* (1861), 14 Moo. P. C. C. 310; *Drummond v. Sant* (1871), L. R. 6 Q. B. 763. *Mentd.* *R. v. St. James, Clerkenwell* (1852), 16 J. P. Jo. 373; *Lambe v. Orton* (1859), 29 L. J. Ch. 286; *Thomas v. Thomas* (1864), 13 W. R. 225; *Re Benham's Trusts* (1867), L. R. 4 Eq. 416; *Re Beasney's Trusts* (1869), L. R. 7 Eq. 498; *R. v. Lumley* (1869), L. R. 1 C. C. R. 196; *Re Phené's Trusts* (1870), 5 Ch. App. 139; *Re Lewes' Trusts* (1871), 6 Ch. App. 356; *Re Corbishley's Trusts* (1880), 49 L. J. Ch. 266; *R. v. Willshire* (1881), 6 Q. B. D. 366; *Re Rhodes, Rhodes v. Rhodes* (1887), 36 Ch. D. 586; *Re Aldersey, Gibson v. Hall*, [1905] 2 Ch. 181.

1017. — Meaning of—Possession incompatible with freehold in another.]—In 1757, W. being seised in fee of certain premises, devised to each of his four daughters one undivided fourth part for life, with remainder to all their sons & daughters & their respective heirs, to take as tenants in common. T., one of the daughters, had issue D., M., & A. In 1799, all the parties then alive, who claimed under the will of W., with the exception of M. & A., the daughters of T., conveyed their interests in the premises to two parties, under whom present deft. claimed. The purchaser, in June, 1839, entered into possession of all the premises, including the two-thirds, which had not been conveyed by M. & A., & for the recovery of which this action was brought. D., the brother of M. & A., outlived both his sisters, & claimed the two undivided thirds of the undivided fourth part, as heir-at-law to them. By his will, dated Jan. 21, 1835, he devised to G. J. all his real estates, & also, as far as he lawfully could, the two undivided thirds in question which he was then seeking to recover from present deft. He died on Feb. 5, 1835,

leaving the lessor of pltf., J. his eldest son & heir-at-law. The ejectment was brought in 1836. No ouster was proved at the trial, or appeared to have been admitted by the consent rule. It was ruled, at the trial, without exception being taken, that the possession of deft. & those through whom he claimed, was not adverse to D. & those through whom he claimed:—*Held*: (1) the lessor of pltf. & deft. being tenants in common, & no ouster having been proved or admitted, their rights would not be barred by Real Property Limitation Act, 1833 (c. 27), s. 2, taken alone; (2) as by sects. 2, 8, & 12, the possession of deft., & those under whom he claimed, was not the possession of the lessor of pltf., & those under whom he claimed the right of entry of the lessor of pltf., or those through whom he claimed, accrued in 1799, & consequently, under these sects., the latter would be barred; (3) by sects. 2, 12, & 15, taken together, the lessor of pltf. was restored to his right to bring his action; for sect. 15, being retrospective, & no adverse possession having been proved, & no exception taken to the ruling of judge that it was not proved, the lessor of pltf. had five years after the commencement of the Act to bring his action, & consequently under those sects. would have been in time.

(4) Neither at common law, nor by the operation of Real Property Limitation Act, 1833 (c. 27), was there such a disseisin or divesting of the freehold, as took from D. the power of devising the land; & as he had devised it before the lessor of pltf.'s title accrued, the latter was barred.—*CULLEY v. DOE d. TAYLERSON* (1840), 11 Ad. & El. 1008; 3 Per. & Dav. 539; 9 L. J. Q. B. 288; 113 E. R. 697.

*Annotations:—*As to (2) *Refd.* *Ley v. Peter* (1858), 3 H. & N. 101. As to (3) *Refd.* *Woodroffe v. Doe d. Daniell* (1846), 15 M. & W. 769. As to (4) *Refd.* *Gresley v. Mousley* (1859), 4 De G. & J. 78. *Generally, Refd.* *Garrard v. Tuck* (1849), 8 C. B. 231.

1018. — What amounts to—Non-payment of rent—Tithes collected as part rent.]—J. demised lands to the rector of D. for forty years at a certain rent; in the lease the rector, after covenanting for payment of the rent, further granted to J. the tithe of oats of the parish of D.; the lease also contained a proviso for re-entry in case the rent should be in arrear, or J., his heirs, etc., should be disturbed by the rector or his assigns in the receipt of the tithe, & concluded with a covenant on the part of J. that the rector should quietly enjoy the lands under the covenants, grants, & agreements contained in the lease. After the expiration of the lease the rectors continued to hold the land, but withheld the rent for more than twenty years, the heirs of J. at the same time continuing to take the tithe of oats, & some confusion existing as to the respective rights of the rector & the heirs of J., the latter being portionists of the tithes of the parish:—*Held*: the possession of the land by the rector was not adverse, so as to let in the operation of Statute of Limitations.—*ROE d. PELLATT v. FERRARS* (1801), 2 Bos. & P. 542; 126 E. R. 1429.

*Annotations:—**Mentd.* *Cobbett v. Grey* (1850), 4 Exch. 729; *Stanton v. Percival* (1855), 5 H. L. Cas. 257.

1019. — Occupation commenced by permission.]—A cottage standing in the corner of a meadow, belonging to the lord of a manor, but

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1016 i. Adverse possession—Real Property Limitation Act, 1833 (c. 27), s. 15.]—*O'SULLIVAN v. M'SWEENEY* (1840), 2 I. L. R. 89.—IR.

1017 i. — Meaning of—Possession incompatible with freehold in another.]—*DES BARRES v. SHEY* (1873), 22 W. R. 273.—CAN.

1017 ii. — — — — —.]—The right & title which by Real Property Limitation Act, 1833, s. 34, is extinguished by possession of the land in another over the statutory period, is the right & title to bring a suit for the recovery of possession, & not the registered owner's right & title to the land.—*SINCLAIR v. (Alta.)*, [1919] 2 W. W. R. 782.—CAN.

1017 iii. — — — — —.]—*BOND v. HOPKINS* (1802), 1 Sch. & Lef. 413.—IR.

b. — Crown grant to person not in possession.]—*DOE d. MCGILLIS v. MCGILLIVRAY* (1852), 9 U. C. R. 9.—CAN.

c. — — — — —.]—*HILL v. MCKINNON* (1858), 16 U. C. R. 216.—CAN.

d. Applicability of statutes — Mort-

separated from it & from a high road by a hedge, had been occupied for above twenty years without any payment of rent. The lord then demanded possession, which was reluctantly given, & the occupier was told that if he were allowed to resume possession it would only be during pleasure. He did resume & keep possession for fifteen years more, & never paid any rent:—*Held*: the possession was not necessarily adverse, but might be presumed to have commenced by permission of the lord.—*DOE d. THOMPSON v. CLARK* (1828), 8 B. & C. 717; 7 L. J. O. S. K. B. 122; 108 E. R. 1209.

Annotation:—*Refd.* *Hodgson v. Hooper* (1860), 3 E. & E. 149.

1020. — Admission of possession as life tenant.—The declarations of a widow in possession of premises, that she held them for her life, & that after her death they would go to the heirs of her husband, are admissible evidence to negative the fact of her having had twenty years' adverse possession.—*DOE d. HUMAN v. PETTETT* (1821), 5 B. & Ald. 223; 106 E. R. 1174.

Annotation:—*Apld.* *Doe d. Pritchard v. Jauncey* (1837), 8 C. & P. 99.

1021. — Payment of interest on unpaid purchase-money.—An estate was contracted to be sold, & the vendee paid part of the purchase-money, & entered into possession without a conveyance, paying interest on the remainder of the purchase-money from time to time:—*Held*: his possession was not adverse, & after twenty years an ejectment might be brought.—*DOE d. MILBURN v. EDGAR* (1836), 2 Bing. N. C. 498; 1 Hodg. 437; 2 Scott, 732; 5 L. J. C. P. 147; 132 E. R. 195.

Annotation:—*Consd.* *Hodgson v. Hooper* (1860), 3 E. & E. 149.

1022. — Purchaser of undivided share occupying whole.—*CULLEY v. DOE d. TAYLERSON*, No. 1017, *ante*.

1023. — Possession of pauper tenement.—The possession of a pauper who has been put into a tenement by parish officers, is the possession of the parish officers, if it be a possession at all, & never can be adverse to them within Real Property Limitation Act, 1833 (c. 27).—*ADAMS v. HARTLEY* (1845), 9 J. P. 407.

1024. — Annual payments otherwise than as rent.—In 1635, six & a half acres of parish land, lying in pieces scattered over estate R., consisting of 550 acres were demised at a yearly rent of £6, & from time to time portions of the estate were sold & conveyed away, the rent of £6 being charged, exclusively upon the part unsold, of which, in 1786, 31 acres remained. These 31 acres were in 1842 purchased by deft.'s father. In all the deeds, from 1786 downwards, the property was described as being subject (*inter alia*) to a rent £6 *per annum*, which deft. & all his predecessors paid to the parish:—*Held*: (1) deft. was not thereby estopped from denying that he held his land of the parish; (2) deft. was entitled to make his own title deeds evidence, not for the purpose of proving facts which they recite, but to show the intention of deft. & his predecessors in making the payment.

In this case, where the character of the payment was disputed, & the parish relied simply on entries in its own books, not calling witnesses to

prove a tenancy, Statute of Limitations is a good defence.

In order to make the payment of this yearly rent of £6 operate as an estoppel, so as to prevent deft. from disputing the fact that the six & a half acres of land in question form part of his estate, it is essential to make out that the payments have been from time to time made by him & his predecessors as for rent due from them for land of which they were tenants—*Quicquid solvitur, solvitur secundum animum solventis*; & if on looking to the facts of this case, it is plain that the payments have been made, *secundum animum solventium*, not for rent, but on another account, the doctrine of estoppel arising from payment of rent has no place (LORD CRANWORTH, C.).—*A.-G. v. STEPHENS* (1855), 6 De G. M. & G. 111; 25 L. J. Ch. 888; 26 L. T. O. S. 189; 20 J. P. 70; 2 Jur. N. S. 51; 4 W. R. 191; 43 E. R. 1172, L. C.

Annotations:—*Generally*, *Mentd.* *Brown v. Wales* (1872), L. R. 15 Eq. 142; *Searle v. Cooke* (1890), 43 Ch. D. 519.

SECT. 2.—DEFINITIONS.

SUB-SECT. 1.—LAND.

See Real Property Limitation Acts, 1833 (c. 27), s. 42, (1874) (c. 57).

1025. Turnpike tolls.—Turnpike tolls are not within Real Property Limitation Act, 1833 (c. 27), & consequently more than six years' arrears of interest may be recovered on a mtge. of turnpike tolls, notwithstanding sect. 42 of that Act.—*MELLISH v. BROOKS* (1840), 3 Beav. 22; 9 L. J. Ch. 362; 4 Jur. 739; 49 E. R. 9.

Turnpike tolls generally, *see* HIGHWAYS, Vol. XXVI., pp. 336 *et seq.*

1026. Substrata of minerals.—The right to a given substratum of coal lying under a certain close, is a right to land, & cannot be claimed by prescription.—*WILKINSON v. PROUD* (1843), 11 M. & W. 33; 12 L. J. Ex. 227; 7 Jur. 284; 152 E. R. 704.

Annotations:—*Refd.* *Carlyon v. Lovering* (1857), 1 H. & N. 784; *Rowbotham v. Wilson* (1857), 8 E. & B. 123.

Tithes.—*See* Real Property Limitation Act, 1833 (c. 27), s. 1.

1027. — Meaning of.—Real Property Limitation Act, 1833 (c. 27), s. 2, enacts, that no person shall bring an action to recover any land which, by sect. 1, includes tithes but within twenty years next after the right to bring such action has accrued to him, or some person through whom he claims:—*Held*: this statute does not operate to prevent the tithe owner from recovering tithes as chattels from the occupier, although none had been set out for twenty years; but it is confined to cases where there are two parties, each claiming an adverse estate in the tithes.—*ELY (DEAN & CHAPTER) v. CASH* (1846), 15 M. & W. 617; 15 L. J. Ex. 341; 8 L. T. O. S. 192; 11 J. P. 187; 153 E. R. 997.

Annotations:—*Consd.* *Esdaile v. Payne* (1885), 52 L. T. 530. *Refd.* *Bunbury v. Fuller* (1853), 17 J. P. 790.

1028. ——*Tithe Act, 1832 (c. 100)*, is unaffected by the provisions of Real Property Limitation Act, 1833 (c. 27), the interpretation clause of the latter Act, although enacting that the word "land" shall in its meaning extend to tithes,

gages.—*SMITH v. NATIONAL TRUST CO.* (1912), 21 W. L. R. 97; 1 W. W. R. 1122; 45 S. C. R. 618; 1 D. L. R. 698.—*CAN.*

o. — *Property vested in third party—Security for payment of bank debt.*—*MASSEY-HARRIS CO., LTD. v.*

v. McDIARMID, [1921] 3 W. W. R. 127. —*CAN.*

PART V. SECT. 2, SUB-SECT. 1.

1. Reservation of profit & prendre—Turbary.—A reservation of turbary is only a reservation of a *profit & prendre*,

& Real Property Limitation Act, 1833, does not apply in such a case.—*BEERE v. FLEMING* (1863), 11 L. T. 49.—*IR.*

g. Tithes—Application of statutes.—3 & 4 Will. 4, c. 27, s. 2, does not

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has reference to an estate in tithes, & not to tithes as a chattel, & sect. 2, therefore, does not embrace the case of a render of tithes as a chattel by the person bound to pay to the tithe owner.—*ELY (DEAN) v. BLISS* (1852), 2 De G. M. & G. 459; 20 L. T. O. S. 35; 42 E. R. 950, L. C.

Annotations:—*Consd.* Irish Land Commission v. Grant (1884), 10 App. Cas. 14; *Esdaille v. Payne* (1885), 52 L. T. 530. *Refd.* Howitt v. Harrington, [1893] 2 Ch. 497. *Mentd.* *Esdaille v. Payne* (1889), 59 L. T. 910.

1029. ———.]—In debt on 2 & 3 Edw. 6, c. 13, for not setting out tithe, it appeared that pltf. was impropriator of, & deft. the occupier of 30 acres of fen land in the parish of M. For twenty years, from 1828 to 1847 inclusive, deft. had either set out or compounded for the tithe of his land; but from 1816 until 1828 he had paid tithe. Out of 16,000 acres of which the parish consisted, 9,700 were fen land, & from lands of that description, other than deft.'s, pltf. had, from the year 1832, continually until the commencement of this suit, received tithe either in kind or a composition:—*Held*: the twenty years' perception of tithes was not conclusive evidence of pltf.'s right to them, Real Property Limitation Act, 1833 (c. 27), having no application to a case like the present.—*BUNBURY v. FULLER* (1853), 9 Exch. 111; 1 C. L. R. 893; 23 L. J. Ex. 29; 23 L. T. O. S. 131; 17 J. P. 790; 156 E. R. 48, Ex. Ch.

Annotations:—*Mentd.* *R. v. Nunneley* (1858), E. B. & E. 852; *Pease v. Chaytor* (1863), 3 B. & S. 620; *Re The Charkieh* (1873), 28 L. T. 190; *Colonial Bank of Australasia v. Willan* (1874), L. R. 5 P. C. 417; *R. v. Sheffield Recorder* (1883), 52 L. J. M. C. 78; *Ex p. Wake* (1883), 11 Q. B. D. 291; *R. v. Woodhouse*, [1906] 2 K. B. 501; *R. v. Bradford*, [1908] 1 K. B. 365; *May v. Mills* (1914), 30 T. L. R. 287; *R. v. Nat Bell Liquors*, [1922] 2 A. C. 128; *R. v. Lincolnshire JJ.*, *Ex p. Brett*, [1926] 2 K. B. 192.

1030. ———.]—37 Hen. 8, c. 12, provided that the inhabitants of the City of London for the time being should yearly for ever pay their tithes in respect of their houses after certain rates. A lay impropriator of the tithes in a parish within the City having brought an action to recover from the inhabitants of certain houses within the parish tithes payable under this statute, it appeared that, so far as was known, no tithes or payments in lieu of tithes had ever been paid in respect of those houses:—*Held*: (1) apart from statute, mere non-payment afforded no defence even against a lay impropriator; (2) the payment imposed by 37 Hen. 8, c. 12, were not a render of tithes in kind within the meaning of the Tithe Act, 1832 (c. 100), s. 1, & that Act afforded no defence; (3) the payments imposed by 37 Hen. 8, c. 12, were "annuities or periodical sums of money charged upon land" within Real Property Limitation Act, 1833 (c. 27), s. 1, & that Statute, as amended by 37 & 38 Vict. c. 57, afforded a defence to the action.—*PAYNE v. ESDAILE* (1888), 13 App. Cas. 613; 58 L. J. Ch. 299; 59 L. T. 568; 53 J. P. 100; 37 W. R. 273; 4 T. L. R. 781, H. L.; *varying S. C. sub nom.* *ESDAILE v. PAYNE* (1885), 52 L. T. 530, C. A.; *ESDAILE v. PAYNE* (1886), 54 L. T. 705, C. A.

Annotations:—*As to* (2) *Refd.* *Esdaille v. City of London Union Assmt. Com.* (1887), 18 Q. B. D. 599. *As to* (3) *Refd.* *Jones v. Withers* (1896), 74 L. T. 572. *Generally, Refd.* *Re Hodgson's S. E.*, *Altamont v. Forsyth* (1912), 106 L. T. 456.

1031. Claim to dower.—(1) A widow's right to sue in equity for dower held to be barred where she had not, for upwards of thirty years, taken any

proceedings, either at law or in equity, to have it assigned to her.

(2) *Semble*: Statute of Limitations is applicable to an action at law for dower.—*MARSHALL v. SMITH* (1864), 5 Giff. 37; 5 New Rep. 161; 34 L. J. Ch. 189; 11 L. T. 443; 29 J. P. 36; 10 Jur. N. S. 1174; 13 W. R. 198; 66 E. R. 913.

Annotations:—*As to* (1) *Consd.* *Williams v. Thomas*, [1909] 1 Ch. 713. *As to* (2) *Overd.* *Williams v. Thomas*, [1909] 1 Ch. 713.

1032. ———.]—(1) The Real Property Limitation Act, 1833 (c. 27), as amended by Real Property Limitation Act, 1874 (c. 57), does not apply to an action for assignment of dower.

(2) A dowress has two separate & independent rights, namely, a right to one-third of the rents & profits from the death of the husband, & a right to have dower assigned to her; & if she claims & enjoys her right to the receipt of the rents & profits she will not be prejudiced by reason of not having, during that period, claimed her right to an assignment.

Semble: if for more than twelve years she does not claim any of her rights, the ct. ought to refuse her relief on the ground of laches.—*WILLIAMS v. THOMAS*, [1909] 1 Ch. 713; 78 L. J. Ch. 473; 100 L. T. 630, C. A.

See, now, Administration of Estates Act, 1925 (c. 23), ss. 45, 56, sched. 2.

1033. Advowson in gross.—Pltfs. sought foreclosure of an equitable mtge. of an advowson in gross. The mtge. was created by deed in 1860, accompanied by deposit of the title deeds. No claim for, or payment of, principal or interest had ever been made, & no acknowledgment ever given. Pltfs. were assigns of the original mtgees., but the express power of sale did not extend to assigns. Deft. had been the incumbent of the living since 1865, & in 1892 had bought the advowson, with notice of the mtge., from the official receiver in bkpcy. of the original mtgor.

An advowson is not "land" within the meaning of that term as used in the Real Property Limitation Act, 1833 (c. 27):—*Held*: the equitable doctrine of staleness of demand applied, & pltfs.' claim failed.—*BROOKS v. MUCKLESTON*, [1909] 2 Ch. 519; 79 L. J. Ch. 12; 101 L. T. 343.

1034. Encroachment on road.—By an inclosure award in 1814 it was awarded that there should be a certain public carriage road & highway of the width of 35 feet in the parish of B., the land adjoining the said road on the south side thereof being allotted to the predecessors in title of S., who were required under the award to fence the land bounding the said road. In or about the year 1883 the predecessor in title of S. erected an iron fence separating his land to the south of the road from the roadway. At some time thereafter the land to the north of the road was fenced & the width of the roadway before the year 1906 had become reduced to between 25 & 27 feet. In 1906 it was alleged that S. removed the fence bounding the land on the south side of the road nearer to the fence on the north side, thus encroaching on the highway. In 1907 the rural district council called on S. to set back his fence so as to restore a width of thirty-five feet to the roadway, & on his refusal, twice took down the fence, which S. on each occasion re-erected in the same position. In an action by the A.-G. & the rural district council for an injunction to restrain deft. S. from inclosing or encroaching upon the highway or

apply to claims for tithe composition, as between the tithe claimant & the owner of the land, but only as

between adverse owners of estates in tithe.—*SHANNON v. HODDER* (1840), 2 I. L. R. 223; *affd.*, 3 I. L. R. 521.—*IR.*

h. Action for declaration of title.—*VANDELEUR v. SLOANE*, [1919] 1 I. R. 116.—*IR.*

from erecting any fence within 35 feet of the northern boundary of the road :—*Held* : there had been no encroachment in 1906 ; in respect of any alleged encroachment in 1883, the lapse of time was sufficient defence to the action by relator plffs., & as to the action by the A.-G. no encroachment upon the highway by the fence complained of having been shown, an injunction must be refused, with costs against relator plffs.—*A.-G. & GODSTONE RURAL DISTRICT COUNCIL v. WARREN SMITH* (1912), 76 J. P. 253.

1035. Proceeds of sale of land—Interest of mortgagor.]—A mtgor.'s interest in the proceeds of sale of land held on trust for sale is an interest in "land" as defined by the Real Property Limitation Act, 1833 (c. 27), s. 1, & therefore, under sect. 34 of the same Act & sect. 8 of the Real Property Limitation Act, 1874 (c. 57), after the lapse of twelve years, in the absence of any payment or acknowledgment, the title of the mtgee. is extinguished.—*Re FOX, BROOKS v. MARSTON*, [1913] 2 Ch. 75 ; 82 L. J. Ch. 393 ; 108 L. T. 948.

Annotations :—*Consd.* *Re Witham, Chadburn v. Winfield*, [1922] 2 Ch. 413. *Refd.* *Gresham Life Assco. Soc. v. Crowther*, [1914] 2 Ch. 219 ; *Re Jauncey, Bird v. Arnold*, [1926] Ch. 471.

SUB-SECT. 2.—RENT.

See Real Property Limitation Acts, 1833 (c. 27), 1874 (c. 57).

1036. Homage & fealty.]—Above Act does not extend to such rent or service which by the common possibility may not happen or become due within sixty years ; as if a seignory consists of homage & fealty only, for the tenant may live above sixty years after they are done ; so if the service be to cover the lord's hall, or to go with him when there shall be war between the King & any of his enemies, such casual services which by common possibility may not happen within sixty years are not within above Act (*per CUR.*).—*BEVIL'S CASE* (1583), 4 Co. Rep. 6 a ; 76 E. R. 860.

Annotations :—*Refd.* *Fawkeners v. Bellingham* (1627), Cro. Car. 80 ; *De Beauvoir v. Owen* (1850), 5 Exch. 166 ; *Abergavenny v. Brace* (1872), L. R. 7 Exch. 145. *Mentd.* *Case of Ayowry* (1588), 9 Co. Rep. 20 a ; *Bucknal's Case* (1600), 9 Co. Rep. 33 a ; *Wynne v. Wynne* (1743), 1 Wils. 42.

1037. Rent reserved on demise.]—Real Property Limitation Act, 1833 (c. 27), s. 2, does not apply to rent reserved on a demise.

The reversioner, by distraining for or otherwise obtaining his rent, within twenty years after the first wrongful receipt of, & by the adverse claimant, effectually prevents his being, by the wrongful act of another, deprived of the estate at the expiration of the term (*ROLFE, B.*).—*GRANT v. ELLIS* (1841), 9 M. & W. 113 ; 11 L. J. Ex. 228 ; 152 E. R. 49.

Annotations :—*Appld.* *Ely, Dean & Chapter v. Cash* (1846), 15 M. & W. 617 ; *Zouche v. Dalbiac* (1875), L. R. 10 Exch. 172. *Consd.* *Irish Land Commission v. Grant* (1884), 10 App. Cas. 14 ; *Howitt v. Harrington*, [1893] 2 Ch. 497. *Refd.* *Doe d. Angell v. Angell* (1846), 9 Q. B. 328 ; *De Beauvoir v. Owen* (1850), 5 Exch. 166 ; *Hicks v. Sallitt* (1854), 3 De G. M. & G. 782 ; *Baines v. Lumley* (1868), 16 W. R. 674 ; *Jones v. Withers* (1896), 74 L. T. 572 ; *Skene v. Cook* (1902), 86 L. T. 319 ; *Shaw v. Crompton*, [1910] 2 K. B. 370.

See, now, Real Property Limitation Act, 1874 (c. 57).

PART V. SECT. 2, SUB-SECT. 2.

1037 i. Rent reserved on demise. The Real Property Limitation Act, 1833, s. 2, does not apply to rent reserved on a demise.—*CROSBIE v. SUGRUE* (1845), 9 I. L. R. 17.—*IR.*

1037 ii. —.]—Rent reserved by an indenture of demise is recoverable in

an action upon the indenture within twenty years ; the period of limitation fixed in that respect by Common Law Procedure Act, 1853, s. 20, being unaffected by Real Property Limitation Act, 1874.—*DONEGAN v. NEILL* (1885), 16 L. R. Ir. 309.—*IR.*

k. Annuity charged on land.]—

1038. Service rent—Keeping up grindstone.]—Where the overseers of a township claimed lands which they had allowed a poor inhabitant to occupy rent free, he keeping up a grindstone upon the land for the convenience of the parish ; the enjoyment of this privilege by the parishioners, for upwards of twenty years, whilst the lands were occupied by persons paying no rent, does not defeat the title of such persons under Real Property Limitation Act, 1833 (c. 27).—*DOE d. ROBINSON v. HINDE* (1843), 2 Mood. & R. 441 ; 1 L. T. O. S. 58. *Annotation* :—*Refd.* *Doe d. Edney v. Benham*, *Doe d. Edney v. Billett* (1845), 7 Q. B. 976.

1039. — Bell ringing.]—Where a tenant holds premises by the service of cleaning the parish church, without any pecuniary render, such service is a "rent" for which "a distress" may be made, within the meaning of Real Property Limitation Act, 1833 (c. 27), ss. 1, 8. So the service, under the like circumstances, of ringing the church bell at stated hours from Michaelmas to Christmas.—*DOE d. EDNEY v. BENHAM*, *DOE d. EDNEY v. BILLETT* (1845), 7 Q. B. 976 ; 14 L. J. Q. B. 342, 343 ; 5 L. T. O. S. 408 ; 10 J. P. 38, 39 ; 9 Jur. 662 ; 115 E. R. 756.

Annotations :—*Mentd.* *Rumball v. Munt* (1846), 10 Jur. 539 ; *St. Nicholas, Deptford v. Sketchley* (1847), 17 L. J. M. C. 17.

1040. — Cleaning church.]—*DOE d. EDNEY v. BENHAM*, *DOE d. EDNEY v. BILLETT*, No. 1039, *ante*.

1041. Heriots.]—H. farm was holden of the manor of S., at an ancient freehold rent 9s. *per annum*, payable at Michaelmas, yearly. All arrears to Michaelmas, 1824, were paid in Jan. 1825. No other payment took place, but, after repeated applications for the rent in several years before Michaelmas, 1844, the lord distrained in May, 1845, for six years' rent due at Michaelmas, 1844 :—*Held* : (1) by the operation of Real Property Limitation Act, 1833 (c. 27), ss. 2, 3, & 34, the rent was extinguished by the lapse of twenty years from the day on which the last payment was made ; (2) the bar thus interposed by that Statute of Limitations need not be specially pleaded, & might be given in evidence on the plea in bar of *non tenuit*.

(3) But as to heriots, probably the answer to this objection may be, that in a case similar to that now before us, the word "rent" would not include heriots—for though by the interpretation clause the word "rent" is made to include heriots, yet that is only when the nature of the provision or the context does not exclude such a construction ; & it may be that the injustice pointed out would afford grounds for holding that in the clause now under consideration the word "rent" does not include heriots (*PARKE, B.*).—*OWEN v. DE BEAUVOIR* (1847), 16 M. & W. 547 ; 9 L. T. O. S. 175 ; 11 Jur. 458 ; 153 E. R. 1307 ; *affd. sub nom.* *DE BEAUVOIR v. OWEN* (1850), 5 Exch. 166, Ex. Ch.

Annotations :—*As to* (1) *Apprvd.* *Irish Land Commission v. Grant* (1884), 10 App. Cas. 14. *Refd.* *Howitt v. Harrington*, [1893] 2 Ch. 497 ; *Jones v. Withers* (1896), 74 L. T. 572. *As to* (3) *Consd.* *Zouche v. Dalbiac* (1875), L. R. 10 Exch. 172. *Refd.* *Chichester v. Hall* (1851), 17 L. T. O. S. 121.

1042. —.]—In trover for a heriot, it was proved by entries in the court rolls of a manor, that down to the year 1804 the land, in respect of

An annuity charged on land by will, comes within the meaning of the word rent in Real Property Limitation Act, 1833, s. 42, & therefore no more than six years' arrears are recoverable.—*FERGUSON v. LIVINGSTONE* (1846), 9 I. Eq. R. 202.—*IR.*

l. Payment of taxes.]—Held : the

Sect. 2.—Definitions: Sub-sects. 2, 3 & 4. Sect. 3: Sub-sect. 1, A.]

which the heriot was claimed, was freehold land, held of the lord by heriot, quit rent, relief, etc. On the death of a tenant in 1804, a heriot was seized. In 1824, the next tenant died; but there was no entry of any seizure of a heriot on that occasion, or of any reason for the omission. In 1826 the present lord came into possession; & in 1847, upon the death of the next tenant, the heriot now claimed was seized. Since 1804, no quit rent or relief appeared to have been demanded or paid, nor any service of any kind rendered to the lord of the manor:—*Held*: the lord's right of action was not barred by Real Property Limitation Act, 1833 (c. 27); & there was no ground for presuming that the tenure of the lands had been changed, or even that the heriot had been released by the lord.

Semble: the right to the quit rent was barred by Statute of Limitations.—**CHICHESTER (EARL) v. HALL** (1851), 17 L. T. O. S. 121.

Annotations:—*Refd.* **Walters v. Webb** (1869), L. R. 9 Eq. 83; **Harrison v. Powell** (1894), 10 T. L. R. 271. *Mentd.* **Warrick v. Queen's College, Oxford** (1871), 6 Ch. App. 716.

1043. —.]—To an action of trespass for seizing & taking a horse, deft. pleaded an immemorial custom for the lord of the manor, upon the death of a free tenant, to seize the best beast of which the tenant died possessed, wherever it could be found, & that in 1873, on the death of a tenant, deft., as lord of the manor, took the horse under this custom. Replication, that more than twenty years before the heriot in question became due, a heriot became due, for which the then lord of the manor, through whom defendant claims, did not seize, though he could have done so; that the then lord, whilst entitled, discontinued the taking of heriots; that no heriot had since been taken until the trespass complained of; that the right to make an entry or distress or bring an action to recover heriots, at the time of such discontinuance then first accrued to the then lord within Real Property Limitation Act, 1833 (c. 27), & that such right so first accrued more than twenty years before the death of the tenant or the trespass complained of. On demurrer:—*Held*: the replication was bad, since the seizure by deft. was not making an entry or distress, nor bringing an action to recover rent, within the meaning of Real Property Limitation Act, 1833 (c. 27), ss. 2, 3, & 34, & deft.'s title to heriots therefore was not barred by the lapse of twenty years. *Qu.*: whether notwithstanding the interpretation of "rent" in sect. 1, heriot service & heriot custom, or either of them, are within the enactments of ss. 2, 3, 34 & 42.—**ZOUCHE (LORD) v. DALBIAC** (1875), L. R. 10 Exch. 172; 44 L. J. Ex. 109; 33 L. T. 221; 39 J. P. 327; 23 W. R. 564.

See, now, Law of Property Act, 1922 (c. 16), s. 130.

1044. Quit rent.—**OWEN v. DE BEAUVOIR**, No. 1041, *ante*.

1045. —.]—**CHICHESTER (EARL) v. HALL**, No. 1042, *ante*.

1046. —.]—A quit rent payable in respect of a copyhold tenement is not, like a rent reserved upon a lease, excepted from the operation of the Statutes of Limitations, Real Property Limitation Acts, 1833 (c. 27), & 1874 (c. 57).

Where, therefore, such a quit rent had remained

unpaid for more than twelve years, & no acknowledgment had been given in respect thereof, the right to recover the same was held to be barred by the operation of those statutes.—**HOWITT v. HARRINGTON (EARL)**, [1893] 2 Ch. 497; 62 L. J. Ch. 571; 68 L. T. 703; 41 W. R. 664; 37 Sol. Jo. 440; 3 R. 568.

Annotation:—*Refd.* **Jones v. Withers** (1896), 74 L. T. 572.

1047. Rentcharge—Collateral covenant for payment.—The limitation prescribed by Real Property Limitation Act, 1833 (c. 27), does not apply to an action on a collateral covenant for payment of a rent charged on land, & the covenantee may recover damages for the breach of that covenant, notwithstanding his right to recover the rentcharge is barred by above statute.—**MANNING v. PHELPS** (1854), 10 Exch. 59; 24 L. J. Ex. 62; 23 L. T. O. S. 162; 156 E. R. 355.

Annotations:—*Consd.* **Shaw v. Crompton** (1910), 80 L. J. K. B. 52. *Refd.* **Mansfield v. Ogle** (1855), 1 Jur. N. S. 414.

1048. —.]—**JONES v. WITHERS**, No. 949, *ante*.

1049. Annuity charged on land abroad.—By will in 1810, B. devised to trustees his estate in J. to hold to the use that H. should, out of the rents & profits, receive for life an annuity payable quarterly for her separate use, with powers of distress & entry & perception of the rents & profits, & after her decease to the use that the trustees should pay the annuity unto her children, as she should appoint, for their lives. Testator gave other annuities out of the rents & profits of the same estate, & gave the estate to the use of his son for life, with remainders over. The last payment on account of H.'s annuity was in 1842. H. died in 1853. She made an appointment & arrears were due to her & her appointees. The estate was for some years a waste, & no rents & profits were received till 1870, & when received they were paid into ct.:—*Held*: Real Property Limitation Act, 1833 (c. 27), did not apply to J., & the legal personal representative of H. was entitled to be paid the arrears due to her.—**PITT v. DACRE (LORD)** (1876), 3 Ch. D. 295; 45 L. J. Ch. 796; 24 W. R. 943.

1050. Composition—Rates & taxes charged on exchanged glebe.—A private Act passed in 1749 provided that all the lands & tenements in a parish, except such part as belonged to the rectory, should be subject to a charge of all such Parliamentary & parochial taxes, rates, & assessments as should from time to time be assessed upon the parsonage house & glebe, or upon the rector & his successors in respect of the same. By deeds of subsequent date the original parsonage house & glebe were exchanged for another house & ground in the parish which were thereafter used as the parsonage house & glebe. The then rector let the new glebe to a tenant who paid the taxes & rates thereon. In 1921, no action or other proceeding to enforce the said charge having then been brought within sixty years, the then rector brought an action against the owner of certain of the said lands & tenements for a declaration that deft.'s lands & tenements were charged with a sum which had been paid by the rector in respect of these taxes & rates & for a declaration that he was entitled to enforce the charge by distress or otherwise:—*Held*: the charge was a "composition" & therefore was not a "rent" within Real Property Limitation Act, 1833 (c. 27), s. 1, & consequently, the right

payment of taxes was not a payment of rent within Real Property Limitation Act, & the tenant, although he had always intended to hold merely as tenant, had acquired title by possession, & could not make himself liable as for rent accruing after he had so acquired possession by giving to the landlord an acknowledgment of indebtedness in respect of rent.—

FINCH v. GILRAY (1889), 16 A. R. 484. —**CAN.**

m. Tenancy at will.—**SULLIVAN v. SWEENEY** (1908), 4 E. L. R. 492.—**CAN.**

of the rector to bring the action was not barred by sect. 29 of that Act.—*HARPER v. HEDGES*, [1923] 2 K. B. 314; 92 L. J. K. B. 568; 129 L. T. 248; 87 J. P. 125; 39 T. L. R. 387; *on appeal*, [1924] 1 K. B. 151, C. A.

SUB-SECT. 3.—TITHES.

See Nos. 1027–1030, *ante*.

SUB-SECT. 4.—PERSONS.

See Real Property Limitation Act, 1833 (c. 27),

s. 1.

1051. Class of persons—Poor of a parish.]—

(1) Real Property Limitation Act, 1833 (c. 27), s. 1, extends the word “person” to a class of persons as well as to individuals. The poor of a parish are a class of persons within that sect.

(2) This sect. [s. 25] means that the remedy of the *cestui que trust* for an abuse of an express trust vested in the trustee continues against him, & those claiming under him, though the estate is conveyed away, & is not barred by the expiration of the statutable period as against him, though as to the purchaser from him, for a valuable consideration, the right to sue begins from the date of the conveyance to the purchaser (LORD WENSLEYDALE).—*ST. MARY MAGDALEN COLLEGE, OXFORD (PRESIDENT, ETC.) v. A.-G.* (1857), 6 H. L. Cas. 189; 26 L. J. Ch. 620; 29 L. T. O. S. 238; 21 J. P. 531; 3 Jur. N. S. 675; 10 E. R. 1267; *sub nom.* *A.-G. v. MAGDALEN COLLEGE, OXFORD*, 5 W. R. 716, H. L.

Annotations:—As to (1) *Consd.* *A.-G. v. Davey* (1859), 4 De G. & J. 136. *Refd.* *A.-G. v. Payne* (1859), 27 Beav. 168. *Generally, Mentd.* *Magdalen Hospital v. Knotts* (1878), 8 Ch. D. 709; *Bobbett v. S. E. Ry.* (1882), 9 Q. B. D. 424.

1052. — Fluctuating body—“Inhabitants.”]

—An action was brought by pltfs. to establish their title to certain waste lands, & that they might be quieted in the possession thereof; & for an injunction to restrain defts. from trespassing on the said lands, & from interfering with pltfs.’ rights or molesting their tenants & agents:—*Held*: pltfs. had established their title, there was not sufficient evidence of a charitable trust which defts. had alleged, & Statutes of Limitation would not in this case protect them, the action was well founded, & the plea that defts. were not actually in possession & were unable to maintain this action could not be maintained.

The inhabitants of a parish cannot claim title. They are not a corpn.; they are a fluctuating body. . . . To gain an adverse title under Statute of Limitations the possession must not be in one man one day, & in another another (CHITTY, J.).—*NORWICH CORPN. v. BROWN* (1883), 48 L. T. 898.

1053. — Vestry of parish.]—The comrs. appointed under the Tetney Inclosure Act, by their award made thereunder, set out a public highway running between allotments made by them. There was no evidence to show to whom the soil of the highway belonged before it was set out by the comrs. From the year 1778 the highway was let by the vestry of the parish every year to persons who paid for the hire of it & depastured it, & until 1891 no one questioned the right of the vestry to let it, or of the tenant to depasture it. The money was paid to the surveyor of highways, & was applied for various parish purposes. In an action by the lord of the manor, who was also the owner of allotments adjoining the highway,

for a declaration that the soil of the highway belonged to him:—*Held*: apart from all presumption of a lost grant & of enrolment under Charitable Uses Act, 1736 (c. 36), s. 3, the parish had gained a title to the highway by Statute of Limitations, subject to the public right of way.—*HAIGH v. WEST*, [1893] 2 Q. B. 19; 62 L. J. Q. B. 532; 69 L. T. 165; 57 J. P. 358; 4 R. 396, C. A.

Annotations:—Consd. *A.-G. & Spalding R. C. v. Garner*, [1907] 2 K. B. 480. *Refd.* *Wimbledon & Putney Commons Conservators v. Nicol* (1894), 10 T. L. R. 247. *Mentd.* *Elliot v. Bristol Corpn.* (1895), 72 L. T. 752; *Reynolds v. Presteign U. D. C.* (1896), 65 L. J. Q. B. 400; *Brown v. Dunstable Corpn.*, [1899] 2 Ch. 378; *Neaverson v. Peterborough R. C.*, [1902] 1 Ch. 557; *Chesterfield v. Harris*, [1908] 2 Ch. 397; *Foley’s Charity Trustees v. Dudley Corpn.* (1909), 8 L. G. R. 320; *C. L. Ry. v. City of London Land Tax Comrs.*, [1911] 2 Ch. 467; *A.-G. v. Horner* (No. 2), [1913] 2 Ch. 140; *White v. Williams*, [1922] 1 K. B. 727.

1054. Person through whom another claims—Appointee under a power.]—At & prior to Lady Day, 1876, a plot of land, then forming part of the D. settled estates was held by S. as tenant from year to year under an agreement dated in 1852. S. continued in possession down to his death in 1889, & after that date his representatives continued in possession. No rent was ever paid in respect of this plot of land after Lady Day, 1876. Under a settlement dated in 1857 the D. estates, including the reversion in the plot of land expectant on the tenancy of S., stood limited in the events which happened to the use of the eleventh Earl of D. for life remainder to the use of the twelfth Earl for life, remainder to such uses as the eleventh Earl should by deed or will appoint. This power was exercised by the eleventh Earl by his will, whereby he appointed the estates to H. & others as trustees. The eleventh Earl died in 1888, & on his death the twelfth Earl succeeded to the possession of the estates & died in 1891 without having recovered the land in question. On the death of the twelfth Earl the remainder limited to H. & his co-trustees fell into possession, & the question was whether their estate was barred by Statutes of Limitations:—*Held*: (1) the case fell within the latter part of Real Property Limitation Act, 1874 (c. 57), s. 2, & the twelfth Earl, being the person last entitled to a particular estate, & not being in possession or receipt of the profits of the land in question when his interest determined by his death in 1891, H. & his co-trustees had a further period of six years from that time to bring their action, & therefore their estate was not barred; (2) the estate of the appointees was not barred by Real Property Limitation Act, 1833 (c. 27), s. 20, a general power of appointment not falling within the words “other estate, right, interest, or possibility.”—*Re DEVON’S (EARL) SETTLED ESTATES, WHITE v. DEVON (EARL), Re STEER, STEER v. DOBELL*, [1896] 2 Ch. 562; 65 L. J. Ch. 810; 75 L. T. 178; 45 W. R. 25; 40 Sol. Jo. 685.

Annotation:—Generally, Mentd. *Re Gordon & Adams’ Contract, Re Pritchard’s S. E.*, [1913] 1 Ch. 561.

SECT. 3.—WHEN TIME BEGINS TO RUN.

SUB-SECT. 1.—DISPOSSESSION OR DISCONTINUANCE OF POSSESSION BY RIGHTFUL OWNER.

A. In General.

See Real Property Limitation Act, 1833 (c. 27), ss. 3–8; Real Property Limitation Act, 1874 (c. 57), s. 2.

1055. Dispossession & discontinuance of possession distinguished.]—Where there has been a discontinuance of possession [of a cellar] by the

Sect. 3.—When time begins to run: Sub-sect. 1, A. & B. (a) i. & ii.]

owner of land for a period of sixty years, the person actually in possession obtains a possessory title under Real Property Limitation Act, 1833 (c. 27), unless there has been concealed fraud on his part, although the original owner was unaware that he was in possession.

In my view the difference between dispossession & the discontinuance of possession might be expressed in this way—the one is where a person comes in & drives out the others from possession, the other case is where the person in possession goes out & is followed into possession by other persons (FRY, J.).—*RAINS v. BUXTON* (1880), 14 Ch. D. 537; 49 L. J. Ch. 473; 43 L. T. 88; 28 W. R. 954.

*Annotations:—*Reid. *Willis v. Howe*, [1893] 2 Ch. 545; *Re Astley & Tyldesley Coal & Salt Co. & Tyldesley Coal Co.* (1899), 68 L. J. Q. B. 252; *Littledale v. Liverpool College*, [1900] 1 Ch. 19.

1056. Onus of proof on person setting up statute.]

—The *onus* is therefore on defts. to show that they have a better title than that of pltf., & the only title they can establish is under Statute of Limitations. What is the fact that they have to prove? It seems to me that it is not sufficient for them to prove mere acts of ownership—that is to say, acts which an owner might do, but they must prove possession on their part & dispossession on the part of the rightful owner—for this reason, if they do not prove dispossession, or discontinuance of the possession, which is the phrase in the statute, on the part of the rightful owner, they do not prove that the right to bring the action to recover the land ever arose. If the right to bring the action never arose, then the statute has not run in their favour (WARRINGTON, J.).—*MARSHALL v. ROBERTSON* (1905), 50 Sol. Jo. 75.

B. Land.

(a) Requisites of Dispossession or Discontinuance of Possession.

i. Dispossession.

1057. Acts inconsistent with enjoyment by owner.]—Acts of user committed upon land, which do not interfere & are consistent with the purpose to which the owner intends to devote it, do not amount to a “dispossession” of him, & are not evidence of “discontinuance of possession” by him within the meaning of Real Property Limitation Act, 1833 (c. 27), s. 3. In 1854 L. conveyed to deft. a plot of land upon the south side of an intended street, upon which deft. built

a factory. In 1857 L. conveyed to certain trustees the plot of land upon the north side of the intended street, which in 1872 vested in deft. Neither of the conveyances granted in express terms the soil of the intended street, but they described the plots of land as bounded by it. It was never dedicated to the public as a highway. From 1854 deft. had placed upon the intended street materials used at his factory, so as to block it up except as against foot passengers, & in 1865 he enclosed an oblong portion of it. In 1872 he fenced in the ends of the intended street. Pltf. was tenant for life of all the land of which L. had died seised, & in 1876 commenced an action to recover the site of the intended street. Within twenty years before action L. had repaired a gate at one end of the intended street:—*Held*: (1) the conveyances executed by L. in 1854 & 1857 did not by presumption of law grant the soil of the intended street; (2) the title of pltf. was not defeated by Real Property Limitation Act, 1833 (c. 27), ss. 2, 3.

Acts of user are not enough to take the soil out of pltf. & her predecessors in title & to vest it in deft.; in order to defeat a title of dispossessing the former owner, acts must be done which are inconsistent with his enjoyment of the soil for the purposes for which he intended to use it (*BRAMWELL, L.J.*).

I am of the opinion that there can be no discontinuance of possession by absence of use & enjoyment where the land is not capable of use & enjoyment (*COTTON, L.J.*).—*LEIGH v. JACK* (1879), 5 Ex. D. 264; 49 L. J. Q. B. 220; 42 L. T. 463; 44 J. P. 488; 28 W. R. 452, C. A.

*Annotations:—*As to (1) *Consd. Micklethwait v. Newlay Bridge Co.* (1886), 33 Ch. D. 133; *City of London Land Tax Comrs. v. C. L. Ry.*, [1913] A. C. 364. *Reid. Re White's Charities, Charity Comrs. v. London Corpn.* (1898), 46 W. R. 479; *Mappin v. Liberty*, [1903] 1 Ch. 118; *White v. Grand Hotel Eastbourne* (1912), 106 L. T. 785. As to (2) *Distd. Marshall v. Taylor*, [1895] 1 Ch. 641. *Reid. Cunliffe v. L. & N. W. Ry.* (1888), 4 T. L. R. 278; *Solling v. Broughton*, [1893] A. C. 556; *Hindson v. Ashby*, [1896] 2 Ch. 1; *Littledale v. Liverpool College*, [1900] 1 Ch. 19; *Marshall v. Robertson* (1905), 50 Sol. Jo. 75; *Philpot v. Bath* (1905), 21 T. L. R. 634; *C. L. Ry. v. City of London Land Tax Comrs.*, [1911] 2 Ch. 467.

1058. —.]—Held: pltf., who was the owner of a several fishery in the river Wye where the tide flowed, was the owner of the bed of the river below high water mark.

The ct. had in such cases first to have regard to the intention with which the alleged occupation was made, & secondly, the nature of the land & whether the occupation made of it excluded the owner (WARRINGTON, J.).—*BEAUFORT (DUKE) v. AIRD (JOHN) & Co.* (1904), 20 T. L. R. 602.

PART V. SECT. 3, SUB-SECT. 1.—A.

1056 i. Onus of proof on person setting up statute.]—*O'NEIL v. HART*, [1905] V. L. R. 107.—*AUS.*

1056 ii. —.]—KENNEDY v. HUSBAND, KENNEDY v. ELLISON (B.C.), [1923] 1 D. L. R. 1069.—*CAN.*

n. Dispossession or discontinuance of possession—Meaning of.]—That dispossession or discontinuance of possession means the abandonment of possession by one entitled to it followed by actual possession by another.—*WILLS v. STEER* (1907), 9 Nfld. L. R. 228.—*NFLD.*

o. Land not under Land Transfer Act.]—Where a person has been in exclusive & undisturbed possession of land not under Land Transfer Act for over twenty years the Statute of Limitations, 1833, applies, & that person obtains a good title thereto.—*SAMPSON v. NEW PLYMOUTH HARBOUR BOARD* (1908), 27 N. Z. L. R. 607.—*N.Z.*

PART V. SECT. 3, SUB-SECT. 1.—B. (a) i.

1057 i. Acts inconsistent with enjoyment by owner.]—Under Statute of Limitations it is enough that a party is in possession, using property as his own, & if he continue to do this for twenty years he acquires title.—*CAHOON v. PARKS* (1892), 25 N. S. R. 1.—*CAN.*

1057 ii. —.]—Held: to render the Statute of Limitations applicable it would be necessary to show, if not an entry & cultivation of some part of the land, at least an entry & actual occupation.—*HUFFMAN v. RUSH* (1904), 24 C. L. T. 217; 7 O. L. R. 346; 3 O. W. R. 43.—*CAN.*

1057 iii. —.]—Re DUFFY'S ESTATE, M'EVROY, PETITIONER, [1897] 1 I. R. 307.—*IR.*

1057 iv. —.]—Re VERNON'S ESTATE, [1901] 1 I. R. 1.—*IR.*

p. Possession must be actual, visible,

& continuous.]—HARTLEY v. MAYCOCK (1897), 28 O. R. 508.—*CAN.*

q. —.]—On the facts:—*Held*: deft. had the open, notorious, exclusive, & adverse possession necessary to acquiring a title by possession.—*DE VAULT v. ROBINSON* (1920), 48 O. L. R. 34; 54 D. L. R. 591; 18 O. W. N. 328.—*CAN.*

r. —.]—Possession of land necessary to bar the title of the true owner must be an actual, constant, visible occupation, by some person or persons, to the exclusion of the true owner for the full statutory period.—*LEDYARD v. CHASE*, [1925] 3 D. L. R. 794; 57 O. L. R. 268.—*CAN.*

t. —.]—In order to constitute a title by adverse possession, the possession relied on must be for the full period of twenty years, actual, open & manifest, exclusive, & continuous.—*MCDONELL v. GIBLIN* (1904), 23 N. Z. L. R. 660.—*N.Z.*

u. Must be without interruption.]

1059. Must be intention to dispossess.]—Defts. were the owners of two fields between which was a strip of land separated from them by hedges. This strip had been conveyed to defts. with the fields, but pltf. had a right of way over it to a field belonging to them. The strip was originally open at both ends, the end farthest from pltf.'s field communicating with a public road. More than twelve years before the commencement of the action pltf. had erected a gate at each end of the strip & had since kept these gates locked, the keys being retained by themselves or their tenants. The gate at the road end of the strip was placed upon the strip; it was not clear whether the other gate was placed on the strip or on pltf.'s own land. The action was brought to restrain defts. from trespassing on the strip. There was no evidence that pltf. had erected the gates with the intention of excluding defts. from the strip:—*Held*: as the act of pltf. in erecting & locking the gates was in its nature equivocal & might have been done merely with the intention of protecting pltf.'s right of way from invasion by the public, defts., had not been dispossessed of the strip of land, & pltf. had not acquired a title to it under Statute of Limitations.—*LITLEDALE v. LIVERPOOL COLLEGE*, [1900] 1 Ch. 19; 69 L. J. Ch. 87; 81 L. T. 564; 48 W. R. 177; 16 T. L. R. 44, C. A.

Annotations:—*Consd.* *Philpot v. Bath* (1905), 21 T. L. R. 634. *Refd.* *Craven v. Pridmore* (1901), 17 T. L. R. 399.

1060. —.]—*BEAUFORT (DUKE) v. AIRD (JOHN) & Co.*, No. 1058, *ante*.

1061. —.]—The predecessor in title of deft., who was the owner of land adjoining the foreshore which had been conveyed by the Crown to pltf. more than twenty years before action brought, placed rocks & piles upon a certain part of the foreshore belonging to pltf. for the purpose of protecting a house upon his land from the encroachment of the sea:—*Held*: the question of dispossession was one of intention; the rocks were placed upon the foreshore by deft.'s predecessor, not in order to assert a title to the ownership of the soil, but as ancillary to the use by deft. of his own property—namely, for its protection from the sea; pltf. had never been dispossessed, & had therefore a right to the land in question, subject to the right of deft. to an easement over the land for the purpose of protecting his house from the sea by means of rocks & piles placed on the land.—*PHILPOT v. BATH* (1905), 21 T. L. R. 634; 49 Sol. Jo. 618, C. A.; *affg.* (1904), 20 T. L. R. 589.

Annotation:—*Refd.* *Beaufort v. Aird* (1904), 20 T. L. R. 602.

1062. Possession by licensee.]—*WIMBLEDON & PUTNEY COMMONS CONSERVATORS v. NICOL* (1894), 10 T. L. R. 247.

1063. No dispossession till right of ownership accrues.]—Pltf., by virtue of an inclosure award made in 1803, were entitled to certain lands described in the award as being of a certain area & bounded on one side by a river which was at that point non-tidal, but navigable. Between the top surface of pltf.'s land & the water there was a bank of about 6 feet high. Deft. was the owner of a several fishery in the river, & as such owner was admitted to be owner of the bed of the river opposite pltf.'s land. In 1840 deft.'s predecessor in title planted trees in the bed of the river near

the foot of the 6 foot bank, & in 1860 deft.'s father cut a small ditch at the foot of the bank. Gradually & by slow degrees chiefly in consequence of the removal in 1878 of a weir lower down the river, the water receded from the foot of pltf.'s bank, & the evidence showed that a strip of land had been formed between the foot of the bank & the water, which in summer was dry but in winter was under water. Upon this strip deft. in 1894 laid down a concrete path for convenience of access to eyots belonging to him in the river. Pltf. claimed, as an accretion to their land, the strip of land on which the path was made; deft. claimed it as part of the bed of the river, & also under Statute of Limitations by virtue of his possession for twelve years before action brought:—*Held*: (1) during the period of transition from bed of the river to land which no longer answered that description Statute of Limitations could not be invoked by deft. against pltf. for the purpose of changing the ownership; (2) upon a true view of the facts of the case, the strip of land in dispute was still bed of the river, & as such belonged to deft.

During the period of transition from bed of the river to land which no longer answers that description, Statute of Limitations cannot be invoked by the owner of the several fishery against the riparian proprietors for the purpose of changing the ownership. The Statute cannot begin to run against them in respect of ownership until the right to the soil accrues to them (*LINDLEY, L.J.*).—*HINDSON v. ASHBY*, [1896] 2 Ch. 1; 65 L. J. Ch. 515; 74 L. T. 327; 60 J. P. 484; 45 W. R. 252; 12 T. L. R. 314; 40 Sol. Jo. 417, C. A.

Annotations:—*As to* (2) *Refd.* *Pearce v. Bunting, R. v. Wedd, Ex p. Pearce*, [1896] 2 Q. B. 360; *Ecroyd v. Coulthard*, [1897] 2 Ch. 554; *River Thames Conservators v. Smeed, Dean*, [1897] 2 Q. B. 334; *Barwick v. S. E. & C. Ry.*, [1921] 1 K. B. 187. *Generally*, *Mentd.* *Hanbury v. Jenkins*, [1901] 2 Ch. 401.

ii. Discontinuance of Possession.

1064. General rule—Necessity for absence of possession of owner—Possession of party claiming title.]—Real Property Limitation Act, 1833 (c. 27), s. 3, does not apply to the mere want of actual possession by the owner, but to cases where the owner has been out of possession, & some other person has been in possession. Therefore, where in 1725 the owner in fee of a close, with a stratum of coal & other minerals under it, conveyed the surface to A., under whom pltf. claimed, reserving the minerals & a right of entry to get them to B., under whom deft. claimed, & the right of entry had not been exercised for more than forty years, but no other person had worked or been in possession of the mines:—*Held*: the title of the grantees of the mines was not barred by Real Property Limitation Act, 1833 (c. 27).—*SMITH v. LLOYD* (1854), 9 Exch. 562; 2 C. L. R. 1007; 23 L. J. Ex. 194; 22 L. T. O. S. 289; 2 W. R. 271; 156 E. R. 240.

Annotations:—*Consd.* *Trustees, Exors. & Agency Co. v. Short* (1888), 13 App. Cas. 793. *Refd.* *Thew v. Wingate* (1862), 10 B. & S. 714; *Smith v. Stocks* (1869), 10 B. & S. 701; *Howlin v. Sheppard* (1870), 19 W. R. 253; *Dartmouth v. Spittle* (1871), 24 L. T. 67; *Low Moor Co. v. Stanley Coal Co.* (1875), 33 L. T. 436.

1065. —.]—Real Property Limitation Act, 1833 (c. 27), adopted by New South

—*SHIELDS v. LONDON & WESTERN TRUSTS CO.*, [1924] 1 D. L. R. 163; [1924] S. C. R. 25; *affg.*, 24 O. W. N. 63.—CAN.

PART V. SECT. 3, SUB-SECT. 1.— B. (a) ii.

**1064 i. General rule—Necessity for absence of possession of owner—Pos-
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session of party claiming title.]—To enable the statute to operate in bar of the true title, there must be an actual occupation, to the exclusion of the real owner.—*DOE d. McDONELL v. RATTRAY* (1850), 7 U. C. R. 321.—CAN.

1064 ii. —.]—To bar a pltf. in ejectment under the Statute of Limitations he must not only have

been out of possession for twenty years, but there must have been actual possession by another.—*LLOYD v. HENDERSON* (1875), 25 C. P. 253.—CAN.

x. Discontinuance of constructive possession.]—Discontinuance may be of a constructive as well as of an actual

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(a) ii., & (b)

Wales Act, No. 3 of 1837, does not continue to run against the rightful owner of land after an intruder has relinquished possession without acquiring title under the Act. Possession so abandoned leaves the rightful owner in the same position in all respects as he was before the intrusion took place. The Act applies not to want of possession by pltf., but to cases where he has been out of & another in possession for the prescribed time.—**TRUSTEES, EXECUTORS & AGENCY CO., LTD. v. SHORT** (1888), 13 App. Cas. 793; 58 L. J. P. C. 4; 59 L. T. 677; 53 J. P. 132; 37 W. R. 433; 4 T. L. R. 736, P. C.

*Annotations:—***Consd.** *Willis v. Howe*, [1893] 2 Ch. 545; *Secretary of State for India in Council v. Krishnamoni Gupta* (1902), 18 T. L. R. 540. **Expld.** *Johnson v. Brock*, [1907] 2 Ch. 533.

1066. ———.]—**MARSHALL v. ROBERTSON**, No. 1056, *ante*.

1067. ———.]—Pltfs. & deft. were adjoining owners of land physically divided by a dry ditch or channel of an ancient watercourse. In 1894 pltfs. built on their own side of the ditch an inclosing wall. In an action between the parties at that date it was judicially determined that the true boundary was the middle line of the ditch. The erection of the wall left unenclosed a narrow strip of land belonging to pltfs., the real boundary, though known to both parties remaining unmarked.

In 1910 pltfs. brought an action to restrain deft. from trespassing on the strip by tipping earth & rubbish upon it & against the wall; deft. contended that by the erection of the wall pltfs. had abandoned the strip & that deft. had acquired exclusive possession & retained it for more than the period required to establish a possessory title under Statute of Limitations. The only evidence of such possession by deft. was that cattle belonging to his tenants had been allowed to graze such herbage as grew in the ditch & on the strip between it & the wall:—**Held**: there had been no abandonment or discontinuance of possession by pltfs., & they were entitled to judgment.—**KYNOCHE, LTD. v. ROWLANDS**, [1912] 1 Ch. 527; 81 L. J. Ch. 340; 106 L. T. 316, C. A.; *affg.*, 55 Sol. Jo. 617.

1068. Discontinuance must be by person entitled to possession.—**Formedon in the descender.** The count stated that A., being seised in fee of certain lands, devised them to his son B., the father of demandant, & the heirs of B.'s body; that B. died within twenty years of suing out the writ, leaving demandant his heir. Pleas, that A. did not devise *modo et formâ*, & that the right, title & cause of action did not first descend & accrue within twenty years before suing out the writ. Issue was joined on these pleas. A. third plea stated that more than twenty years before the suit, to wit, in Jan. 1798, B. discontinued the possession of the tenements & the receipt of profits therefrom. Replication, that in Jan. 1798 B. enfeoffed R. in fee of the tenements & never afterwards was possessed of the tenements or received the profits. Demurrer. A., by his will, devised real & personal property to his exors. & their heirs, to sell by auction to pay debts, etc., & stated that in case it should happen that upon

sale of this property the same should be insufficient for the payment of his debts, then he gave & devised all his other lands to the same exors. & their heirs, to be by them sold until the debts should be paid, & the residue he directed to be divided equally among all his children; & he added a proviso, that in case the first devised property should be sufficient to pay all his debts as aforesaid, then he gave & devised to his son B. his dwelling house, etc., for his natural life, & after his death to the issue of his body lawfully begotten, if more than one, equally among them. A. died in 1797. B. took possession of the house, etc., & in 1798 enfeoffed R. in fee of the premises & died in Apr. 1831. The writ of formedon was sued out in Mar. 1853:—**Held**: the action was not barred by Real Property Limitation Act, 1833 (c. 27), as the time of limitation ran only from the death of B. & not from 1798, when B. ceased to receive the profits, as B.'s right to enter & receive them had not been barred by a neglect to enter, but because he could not enter against his own feoffment.—**RIMINGTON v. CANNON** (1853), 12 C. B. 18; 22 L. J. C. P. 153; 1 W. R. 291; 138 E. R. 806, Ex. Ch.

*Annotations:—***Consd.** *Abergavenny v. Brace* (1872), L. R. 7 Exch. 145. **Refd.** *Austin v. Llewellyn* (1853), 9 Exch. 276.

1069. ———.]—**ABERGAVENNY (EARL) v. BRACE**, No. 1295, *post*.

1070. Adverse possession must be exclusive.—In 1846, H. the rector of the parish of C., purchased, under the provisions of an Inclosure Act, a number of plots of waste land adjoining the glebe, removed the old boundaries, & occupied the ancient glebe & the new inclosures indiscriminately. H. died in 1850, & was succeeded by P. as rector. P. died in 1855, & was succeeded by B. Both P. & B. occupied the whole land, as H. had done previously. In 1862, B. built & laid out a school, cottage & garden on one of the plots of land so purchased by H. & the school was placed under the management of a committee. On Nov. 12, 1883, deft., who was the grandson & had succeeded to the real estate of H. granted a lease of the school, cottage & garden to B. & the churchwardens, & their successors, for a term of ninety-nine years at a rent of 5s. a year, with a proviso that if a school board should be constituted in the parish, the rent should be increased to £200 a year. On Nov. 14, B. resigned the benefice, & was succeeded by pltf., who had no notice of the lease till he had been in possession for three months. In Apr. 1886, deft. distrained for two years' rent:—**Held**: B. had not, as rector, acquired a title to the school, cottage & garden by Statute of Limitations; & consequently, there was no want of title in deft. so as to prevent him from dealing with the property by way of lease.—**GIBSON v. WISE** (1887), 35 W. R. 409, D. C.

1071. Land must be capable of use & enjoyment.—**LEIGH v. JACK**, No. 1057, *ante*.

1072. Knowledge of owner of adverse possession immaterial—In absence of fraud.—**RAINS v. BUXTON**, No. 1055, *ante*.

1073. Adverse possession abandoned before title acquired—Owner unaffected.—**TRUSTEES, EXECUTORS & AGENCY CO., LTD. v. SHORT**, No. 1065, *ante*.

possession.—**PRINGLE v. ALLAN & HYLAND** (1859), 18 U. C. R. 575.—**CAN.**

y. *Abandonment by owner—Actual possession by another.*—Dispossession or discontinuance of possession means the abandonment of possession by one entitled to it followed by actual possession by another.—**WILLS v.**

STEER (1907), 9 Nfld. L. R. 228.—**NFLD.**

z. *Adverse possession with authority of owner—Implied in will.*—**WHITMAN v. HILTZ** (1906), 39 N. S. R. 230.—**CAN.**

a. *Absence of owner from province.*—Absence from the province & the want of actual occupation for more than twenty years by the owner, is

not a discontinuance of possession, within 4 Will. IV., c. 1, s. 17.—**DOE d. CUTHBERTSON v. MCGILLIS** (1852), 2 C. P. 124.—**CAN.**

b. *Acts amounting to abandonment by owner—Removal of doors & windows from house—Acquiescence in cultivation of land.*—**SEALE v. JOHNSTON** (1886), 13 A. R. 349.—**CAN.**

(b) *What Acts do or do not Amount to Dispossession.*i. *Cultivation.*

1074. Acts inconsistent with possession by owner—Cultivation of strip of land outside hedge.]—A field adjoining a public road was separated from it only by a hedge & bank. It was held, as the result of evidence, that the trustees, who, under an Act of Parliament, constructed the road upwards of fifty years before the commencement of the suit, made the hedge & bank, & also made on the field side of the fence a ditch of three feet in breadth. This ditch had become filled up & obliterated, & had never been reopened by the trustees; but a ditch about a foot wide had been subsequently made by the occupier of the field, & that also had become obliterated. The owners of the land had always included the hedge in their leases, & the tenants had held & used the strip within the hedge as part of their field for much more than twenty years, & had at their own expense trimmed the hedge on both sides. During the same time the trustees had not interfered in any way with the site of the ditch:—*Held*: these circumstances were not sufficient to constitute adverse possession, & give the owners of the land a title under Statute of Limitations to the site of the three-foot ditch.—*SEARBY v. TOTTENHAM RY. Co.* (1868), L. R. 5 Eq. 409.

Annotation:—*Consd.* *Craven v. Pridmore* (1901), 17 T. L. R. 399.

1075. ———.]—A railway co. in 1838 bought part of a field under the powers of their Act, & erected a post & rail fence on the boundary. They then made a ditch within the fence, & threw up a bank on which they planted a quickset hedge at the distance of 4 feet 6 inches from the fence. As the hedge grew up the fence was allowed to fall into decay, & about the year 1846 it was removed. From the year 1854 up to the commencement of this action in 1875, the strip of land between the quickset hedge & the site of the fence was occupied & cultivated with the remainder of the field, partly as an arable field & partly as garden-ground, the railway co. in no way interfering with it except that their workmen went over it to trim the hedge:—*Held*: the circumstances conclusively showed the strip between the hedge & the line of the post & rail fence to be superfluous land within the meaning of Lands Clauses Consolidation Act, 1845 (c. 18), s. 127, & it had therefore vested in the owner of the rest of the field, & moreover the owner of the rest of the field had had such a possession of the strip in question as was sufficient to extinguish the title of the co. under Statute of Limitations.—*NORTON v. LONDON & NORTH WESTERN RY. Co.* (1879), 13 Ch. D. 268; 41 L. T. 429; 28 W. R. 173, C. A.

Annotations:—*Consd.* *Marshall v. Taylor*, [1895] 1 Ch. 641. *Reid.* *Bobbett v. S. E. Ry.* (1882), 9 Q. B. D. 424; *Littledale v. Liverpool College*, [1900] 1 Ch. 19; *Mid. Ry. v. Wright*, [1901] 1 Ch. 738; *Kynoch v. Rowlands*, [1912] 1 Ch. 527. *Mentd.* *Bonner v. G. W. Ry.* (1883), 24 Ch. D. 1; *Bayley v. G. W. Ry.* (1884), 26 Ch. D. 434; *Bird v. Eggleton* (1885), 29 Ch. D. 1012; *Foster v. L. C. & D. Ry.*, [1895] 1 Q. B. 711.

1076. ——— Filling up gravel pit.]—A gravel pit & a road to it were allotted by comrs. under an

Inclosure Act, to the surveyors of highways of a hamlet for the repair of its roads & ways. From 1837 to 1863 the surveyors ceased to take gravel from the pit or to use the road, & took no steps to assert their right to the pit or road, but got gravel for the repair of the highways from another pit two miles off, which they purchased from time to time from pltf.'s father & from pltf. The land allotted for the road & gravel pit was entirely surrounded by old enclosures belonging to land allotted to pltf.'s predecessors in title. In 1837 the tenant of the greater part of the land in which the pit was situated filled up part of the pit, & from that time cultivated the surface as arable land, together with the adjacent parts of the field. In 1839 another tenant ploughed up the remaining portion of the pit, which abutted upon land in his occupation, & also the allotted road, which passed through other land in his occupation; & both continued to be cultivated by pltf.'s tenants as arable land from that time till 1863. In 1844 the tenant of pltf., who was in occupation of the surface of the greater part of the pit, was elected one of the surveyors of the highways, & held that office for one year. On a special case giving the ct. power to draw inferences of fact:—*Held*: (1) actual possession of the gravel pit & road was taken by the tenants of the adjoining lands in 1837 & 1839, & therefore the title of the surveyors of highways to the gravel pit & road had, by the operation of Real Property Limitation Act, 1833 (c. 27), ss. 2, 3, 34, become extinguished.

(2) The circumstance of the tenant occupying part of the pit being elected surveyor of highways after possession had been taken of it, did not interrupt the running of the period of limitation, as the character of his possession as tenant under pltf. was not altered during his year of office.—*SMITH v. STOCKS* (1869), 10 B. & S. 701; 38 L. J. Q. B. 306; 20 L. T. 740; 34 J. P. 181; 17 W. R. 1135.

1077. ——— Land originally dedicated as roads—Roads never laid out.]—In 1830 A. projected the formation of a seaside town, to be built on his lands, & a plan was prepared which showed the sites of various streets, roads, & squares, proposed to be made & formed on such lands. In June, 1833, a private Act of Parliament was obtained by which the lands described on the plan were made a distinct parish for the purposes of the Act, & by which comrs. were appointed in whom were vested all roads, streets, & ways, then made & used by the public, or thereafter to be made & adopted by the comrs. as public ways under the Act. The Act also conferred plenary powers on the comrs. with regard to the paving, lighting, draining, & repairing, of such streets, roads, & ways.

In Feb. 1833, A. had sold & conveyed to B., who was one of the principal promoters of the Act, & one of the first comrs. appointed thereunder, several of the plots of land described on the plan & on which were delineated the sites of certain of the proposed roads, streets, & squares. Previously & subsequently to the Act numerous houses had been built, & some of the roads, streets, & ways shown on the plan had been wholly or partially formed, & had been adopted by the comrs.,

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B. (b) i.

c. *Acts inconsistent with possession by owner.]—*The acts relied on in support of a claim to title by possession were that claimant had sold the timber off the land in question; had afterwards cleared it, & had sowed & harvested one crop of wheat; had then for some years taken hay from it;

& had then used it as pasture land. The land was not wholly enclosed, one end being bounded by a marsh, & through this marsh cattle could & did stray into it:—*Held*: there had not been such possession as is necessary to bar the right of the true owner.—*MCINTYRE v. THOMPSON* (1901), 21 C. L. T. 109; 1 O. L. R. 163.—*CAN.*

d. ——— *Crown grantee—Cutting & cultivation on woodland.]—*Where the land claimed by a prior & later Crown grant is woodland, occasional acts of cutting & cultivation by one of the parties will not suffice to give a statutory title to no more than a mere *possessio pedis*.—*MCINNES v. STEWART* (1911), 45 N. S. R. 435.—*CAN.*

e. *Clearing land—Where no claim*

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but no houses were at any time erected on the lands conveyed to B., & the same, including such parts as comprised the sites of the proposed roads, streets, & squares, were from 1833 to 1867 uninterruptedly held & enjoyed & cultivated as arable & pasture lands by B. & his lessees.

In 1868 the comrs. gave B.'s devisees notice of their intention to take possession of the sites of the proposed streets, roads, & squares shown on the plan, & in 1871 they proceeded to mark, grip up, & stamp out such sites on the ground that the same had been dedicated to the purposes of the Act by the promoters of the Act, & that they were acting within their statutory powers. On bill being filed to restrain the comrs. from so doing:—*Held*: although there might have been a dedication of their lands by the promoters of the Act, such dedication was not complete until the intended streets & roads had been used & adopted by the public; & there having been no such use & adoption for upwards of forty years, the proposed sites were not within the statutory powers of the comrs., & an injunction granted accordingly.—*MACKETT v. HERNE BAY COMRS.* (1876), 35 L. T. 202; *on appeal* (1877), 37 L. T. 812, C. A.

1078. — Ploughing up part of footway.]—Deft., who shared with others a right of way over a piece of land, the property in which was in the lord of the manor, used a portion of the same, amounting to about three quarters of the whole, in all respects as if it were properly part of his farm, ploughing it up from time to time & raising produce thereon. Such user was uninterrupted, & was continued for twenty years & more. As to the remaining quarter, which was not in any way fenced off from the above, it remained in its original condition, & was used for the purposes & in the manner that the whole was originally intended to be used:—*Held*: a good title, as against the lord of the manor, to the soil & minerals underlying the soil of three-quarters of the said strip of land had been thus acquired; but nothing had been done to disturb the original rights in the soil, & minerals underlying the soil of the remaining one-quarter of the said piece of land.—*SEDDON v. SMITH* (1877), 36 L. T. 168, C. A.

Annotation:—*Refd.* *Littledale v. Liverpool College*, [1900] 1 Ch. 19.

1079. — Entry upon land to clip hedge.]—The evidence as to possession by pltf. showed that during thirty years pltf. had mown the grass & ploughed the land. There was also evidence that defts. had discontinued possession. The land had at one time been a ditch & a part of the quickset fence, & there was evidence that they had allowed the ditch to fill up so as to be no longer a ditch. Therefore the use to which it had been originally put was given up. The acts of going on the land to clip the hedge, which were most relied upon, were equivocal acts, & might be done by a man who was not the owner of the land. It was for the jury to say what those acts amounted to. There was *prima facie* evidence upon which the jury could find that the land vested in pltf. under Statute of Limitations (*LORD ESHER, M.R.*).

The land was formerly used by defts. as a ditch, & there was evidence that the acts of pltf. were inconsistent with the use of the land as a

ditch (*LOPES, L.J.*).—*CUNLIFFE v. LONDON & NORTH WESTERN RY. CO.* (1888), 4 T. L. R. 278, C. A.

1080. — Cultivation of filled up ditch.]—Two properties belonging to pltf. & deft. were separated by a hedge & ditch. The hedge was on pltf.'s side of the ditch, & both were the property of pltf.'s predecessor in title, who in 1868 had made certain use of the ditch, covered over the ditch, putting in drain-pipes & allowing the drainage of both houses to pass thereby. Thenceforward deft. used the surface of the ditch as part of his garden, while pltf. cut the hedge from deft.'s side when necessary, & on two or three occasions opened the ditch to clean out the drain:—*Held*: assuming pltf. had originally owned the ditch, deft.'s acts were sufficient to dispossess pltf. within Real Property Limitation Act, 1833 (c. 27), s. 3, & pltf.'s rights were now statute-barred.—*MARSHALL v. TAYLOR*, [1895] 1 Ch. 641; 64 L. J. Ch. 416; 72 L. T. 670; 12 R. 310, C. A.

Annotations:—*Refd.* *A.-G. v. Waring* (1899), 63 J. P. 789; *Mid. Ry. v. Wright*, [1901] 1 Ch. 738; *Marshall v. Robertson* (1905), 50 Sol. Jo. 75; *Kynoch v. Rowlands*, [1912] 1 Ch. 527; *Collis v. Amplett*, [1918] 1 Ch. 232.

ii. Depasturage.

1081. Lease of pasturage on highway—By parish council.]—*HAIGH v. WEST*, No. 1053, *ante*.

1082. Depasturage by cattle straying over known boundary.]—*KYNOCH, LTD. v. ROWLANDS*, No. 1067, *ante*.

iii. Foreshore, etc.

See, generally, *WATERS & WATERCOURSES*.

1083. Acts of ownership over bed & soil of river—Extending to acts over foreshore.]—*SPENCER (LORD) v. THAMES CONSERVATORS* (1872), 36 J. P. Jo. 53.

1084. Acts of ownership over parts of foreshore—Proving ownership over whole—Knowledge of parties interested to resist claim.]—Parties holding barony titles to lands situated on both sides of C., a navigable tidal river, claimed, as against the Crown & the Clyde Navigation trustees, that the foreshores *ex adverso* their lands belonged in property to them, subject to such rights of navigation or other rights which the public & the Clyde trustees might have over the same. The barony titles contained no express grant of foreshore, nor did they contain any specific boundaries which could be held to include the foreshore. The parties rested their claim on the grounds (a) that the barony titles alone gave them the property; (b) that coupled with their titles they had exercised from time immemorial acts of possession over the foreshore:—*Held*: the acts of possession for the prescriptive period having been proved, & following on barony titles to lands so situated, they constituted a right of property in the foreshore.

Every act shown to have been done on any part of that tract by the barons or their agents which was not lawful unless the barons were owners of that spot on which it was done is evidence that they were in possession as owners of that spot on which it was done. No one such act is conclusive, & the weight of each act as evidence depends on the circumstances; one very important circumstance as to the weight being, whether the act was such & so done that those who were interested in disputing the ownership would be

of right.—To prove title by possession pltf. showed that a person under whom he claimed had at an early date cleared part of the lot in question; but there being no evidence that he did so under

any claim of right:—*Held*: such clearing was not constructively a possession of the rest of the lot.—*MCMASTER v. MORRISON* (1867), 14 Gr. 138.—*CAN.*

PART V. SECT. 3, SUB-SECT. 1.—B. (b) iii.

1. Erection of timber boom on foreshore.]—*R. v. TWEEDIE* (1915), 52 S. C. R. 197.—*CAN.*

aware of it. All that tends to prove possession as owners of parts of the tract tends to prove ownership of the whole tract; provided there is such a common character of locality as would raise a reasonable inference that if the barons possessed one part as owners they possessed the whole, the weight depending on the nature of the tract, what kind of possession could be had of it, & what the kind of possession proved was (LORD BLACKBURN).—LORD ADVOCATE *v.* BLANTYRE (LORD) (1879), 4 App. Cas. 770, H. L.

Annotations:—*Refd.* Lord Advocate *v.* Lovat (1880), 5 App. Cas. 273; River Lee Navigation Conservators *v.* Button (1881), 6 App. Cas. 685; Lord Advocate *v.* Wemyss, [1900] A. C. 48. *Mentd.* Blantyre *v.* Clyde Navigation Trustees (1881), 6 App. Cas. 273.

1085. ———.]—Pursuer brought an action to establish his title as against defenders & the Crown to the foreshore of the sea *ex adverso* land of which he was the proprietor. He claimed under a grant of *feu* made to his ancestor in 1804, which described the property granted as land bounded by the sea, but he did not endeavour to show that the grantor had an express title from the Crown. He, however, endeavoured to establish his right to the foreshore by prescriptive possession following on his own title, & (*inter alia*), adduced evidence to show that his predecessor in 1827 built a retaining wall upon a portion of the foreshore; that he & his predecessors had taken stone & sand from the shore; & that they & their tenants had exclusively carted away the drift sea-ware. The Crown on the other hand adduced evidence to show that stones & sand were taken from the shore to build a harbour, & that the villagers had carried away in creels drift sea-ware:—*Held*: notwithstanding the absence of an express title in the superior, pursuer had given sufficient proof that he & his predecessors had been in possession of the foreshore in question for the prescriptive period specified in the Scottish Act of 1617 (c. 12), & Conveyancing Act, 1874 (c. 94), by virtue of their heritable infeftments, & he had consequently a valid right of property in the *solum* of the foreshore as against the Crown.

It is, in my opinion, practically impossible to lay down any precise rule in regard to the character & amount of possession necessary in order to give a riparian proprietor a prescriptive right to foreshore. Each case must depend upon its own circumstances. The beneficial enjoyment of which the foreshore admits, consistently with the rights of navigators & of the general public, is an exceedingly variable quantity. I think it may be safely affirmed, that in cases where the seashore admits of an appreciable & reasonable amount of beneficial possession, consistently with these rights, the riparian proprietor must be held to have had possession, within the meaning of the Act, 1617 (c. 12), if he has had all the beneficial uses of the foreshore which would naturally have been enjoyed by the direct grantee of the Crown. In estimating the character & extent of his possession it must always be kept in view that possession of the foreshore, in its natural state, can never be, in the strict sense of the term, exclusive. The proprietor cannot exclude the public from it at any time; & it is practically impossible to prevent occasional encroachments on his right, because the cost of preventive measures would be altogether disproportionate to the value of the subject (LORD WATSON).—LORD ADVOCATE *v.* YOUNG, NORTH BRITISH RY. CO. *v.* YOUNG (1887), 12 App. Cas. 544, H. L.

Annotations:—*Refd.* Brinckman *v.* Matley, [1904] 2 Ch. 313; Foster *v.* Warblington U. C., [1906] 1 K. B. 648.

1086. Rocks & piles placed on foreshore to pro-

tect adjoining land—No intention to exclude owner.]—PHILPOT *v.* BATH, No. 1061, *ante*.

1087. User of oyster ponds—Inclosed by boards or concrete.]—Oyster ponds or “layings” had existed as far back as living memory went upon the foreshore of an arm of the sea. The purpose for which these ponds were used was the storage of oysters, which were brought from elsewhere & laid down in the ponds in order to be fattened for the market. Certain ponds of this kind, which were enclosed by boards or concrete, were, & for more than twenty years had been, used in the manner above mentioned by pltf., who had purchased them in 1879 from others who had for a period of between twenty & thirty years previously so used them. There was some evidence that the foreshore had formed part of the waste of a manor, the lord of which had a several fishery thereon.

Defts. were an urban district council which had been constituted in 1894, their district being carved out of that of a previously existing rural sanitary authority. A sewer had been made in the district by the rural sanitary authority, from which an inconsiderable quantity of sewage had been discharged into the sea near the oyster ponds. Defts. made certain new sewers, & connected them with the first-mentioned sewer, & the quantity of sewage discharged from that sewer was thereby greatly increased. The sewage so discharged caused a nuisance to pltf.’s oyster ponds through pollution of the same with sewage to an extent which rendered them unfit for use. In an action by pltf. against defts. in respect of the nuisance so caused:—*Held*: irrespectively of the question of title to the soil or to a several fishery, pltf., as occupier of the oyster ponds, was entitled to maintain an action for trespass to the same by wrongdoers; defts., not having any right to discharge sewage into the sea so as to cause a nuisance, & having by their acts of commission caused such a discharge of sewage, were wrongdoers; & therefore the action was maintainable.

Under the circumstances a legal origin ought to be presumed for the existence & user by pltf. of the oyster ponds (FLETCHER-MOULTON, L.J.).—FOSTER *v.* WARBLINGTON URBAN COUNCIL, [1906] 1 K. B. 648; 75 L. J. K. B. 514; 94 L. T. 876; 70 J. P. 233; 54 W. R. 575; 22 T. L. R. 421; 4 L. G. R. 735, C. A.

Annotations:—*Apld.* Owen *v.* Faversham Corpn. (1908), 73 J. P. 33. *Refd.* Jones *v.* Llanrwst U. C., [1911] 1 Ch. 393.

1088. Acts of ownership over sand hills formed above high water mark—By owner of adjoining land.]—Sand hills formed by the forces of nature above high-water mark, adjoining the shore at M., which served as a protection against the inroads of the sea, were subject to the jurisdiction of the Comrs. of Sewers, who, from time to time, repaired same & on which they refused to allow the erection of any permanent structure without their licence. The Comrs., however, made no claim to the ownership of the sand hills except in places where they had erected toolsheds & where they had executed works of a permanent character. Pltfs. as the owners of adjoining inlands, claimed to be the owners of the sand hills. The conveyance to them of the adjoining inlands made no mention of the sand hills, but they had exercised certain acts of ownership thereon:—*Held*: (1) although the sand hills were under the “view, cognisance, or management” of the Comrs. of Sewers within the meaning of that expression in Sewers Act, 1833 (c. 22), s. 47, that sect. did not vest the property in the sand hills in the Comrs.; (2) the grant to pltfs. of the adjoining inlands did not pass

Sect. 3.—When time begins to run: Sub-sect. 1, B. (b) iii., iv. & v.]

the property in the sand hills; (3) pl'tfs. had acquired a title by possession to the sand hills by exercising acts of ownership thereon, notwithstanding the fact that the Comrs. of Sewers had refused to allow them or their lessees to erect permanent structures thereon without licence.—*NESBITT v. MABLETHORPE URBAN COUNCIL*, [1918] 2 K. B. 1; 87 L. J. K. B. 705; 118 L. T. 805; 82 J. P. 161; 16 L. G. R. 313, C. A.

iv. Land of Corporations.

1089. Adverse title may be acquired—Land acquired for public undertaking.]—*NORTON v. LONDON & NORTH WESTERN RY. CO.*, No. 1075, *ante*.

1090. ——— Prohibition in local Act against alienation.]—In the year 1850, an Act was passed to enable comrs., appointed by a former Act, for managing the affairs of B. to purchase the Pavilion Estate. By sect. 19 of the Act, the comrs. were expressly prohibited from letting or selling any part of the property to be so acquired by them without the consent of the vestry. In 1854, the town of B. was incorporated, & in 1855 the powers & property of the comrs. under the Act were transferred to the corpn. Down to the year 1853 the guardians of the poor of B. had had the use of offices in the Town Hall. On Mar. 7 in that year they removed, by arrangement with the comrs., to buildings which formed part of the Pavilion Estate, in the adaptation of which to their purposes they expended a considerable sum of money; & they continued in the exclusive occupation of their new offices without payment of rent or any acknowledgment of title in the comrs. or the corpn., down to Nov. 19, 1879, when an action was brought by the latter to recover possession:—*Held*: inasmuch as the guardians had had the exclusive possession of the offices for more than twelve years, assuming their relation to the corpn. to have been that of tenants at will, the claim of the corpn. was barred by Statute of Limitations, notwithstanding the prohibition against letting or selling without the consent of the vestry, contained in the local Act.—*BRIGHTON CORPN. v. BRIGHTON GUARDIANS* (1880), 5 C. P. D. 368; 49 L. J. Q. B. 648; 44 J. P. 683.

Annotations:—*Consd.* *Bobbett v. S. E. Ry.* (1882), 9 Q. B. D. 424. *Ap'd.* *Wimbledon & Putney Commons Conservators v. Nicol* (1894), 10 T. L. R. 247.

1091. ——— Land not superfluous.]—The mere fact that the land of a railway co. is required for the purposes of their undertaking, & is not superfluous land, does not prevent an occupier who has exclusive adverse possession for twelve years becoming thereby entitled to the land under Statutes of Limitations.—*BOBBETT v. SOUTH EASTERN RY. CO.* (1882), 9 Q. B. D. 424; 51 L. J. Q. B. 161; 46 L. T. 31; 46 J. P. 823; *on appeal*, [1882] W. N. 92, C. A.

Annotation:—*Ap'd.* *Mid. Ry. v. Wright*, [1901] 1 Ch. 738.

1092. ——— Surface land over tunnel.]—*MIDLAND RY. CO. v. WRIGHT*, No. 1482, *post*.

Superfluous land.]—*See* COMPULSORY PURCHASE, Vol. XI., pp. 282 *et seq.*

v. Mines.

See, generally, MINES.

1093. Mines in different ownership from surface.]—In ejectment for mines the possession of the manor is no evidence to avoid Statute of Limitations.—*RICH d. CULLEN (LORD) v. JOHNSON* (1740), 2 Stra. 1142; 93 E. R. 1088.

1094. Non-user not abandonment.]—Trespass for breaking & entering close & digging coals. Plea, that close was part of fee-farm lands of R., that in 1613 the mines under those lands were granted, etc., & derives title under the grant & justifies. Replication that no right of entry accrued within twenty years of the trespass. Issue thereon. Evidence that the grantees had dug, within twenty years under other fee-farm lands in R.; but no evidence of digging under pl'tf.'s. Evidence also that pl'tf. or his predecessors had not dug:—*Held*: defts. were not barred.—*HODGKINSON v. FLETCHER* (1781), 3 Doug. K. B. 31; 99 E. R. 523.

1095. ———.]—The Inference of abandonment of a right from non-user not applicable to the case of mines.—*SEAMAN v. VAWDREY* (1810), 16 Ves. 390; 33 E. R. 1032.

Annotations:—*Ap'd.* *Low Moor Co. v. Stanley Coal Co.* (1875), 33 L. T. 436. *Ment'd.* *Ramsden v. Hirst* (1858), 4 Jur. N. S. 200.

1096. ———.]—Trespass for breaking & entering pl'tf. closes & digging minerals therein. Pleas, first, not possessed; & secondly, a plea justifying the trespasses by deft. as assignee of a lease of the minerals, & of the right to work them for ninety-nine years granted by the owner of the fee in 1821. Replication that the right to make an entry did not first accrue to deft. or those through whom he claimed within twenty years next before the entry by deft., & that deft.'s right was, therefore, barred by Real Property Limitation Act, 1833 (c. 27). Issue was taken on this replication. It appeared that in 1821, while B. was in possession, as tenant from year to year, of a farm, including the close in question, the owner of the fee by indenture demised the coal lying beneath the farm to B. & P. for ninety-nine years with liberty to work the same. The interest of B. & P. under this demise became vested by various mesne assignments in deft. who in 1847, during the term, worked the coal. Up to 1847 no coal had ever been worked under the demise:—*Held*: the second plea, confessing that pl'tf. was *de facto*, in possession when the trespasses were committed, would be satisfied by a dispossession of the lessees within twenty years before deft. entered to commit the trespasses in question; & deft. might rely on the right of entry which accrued on such dispossession & not upon a right of entry accruing as upon a grant of an *interesse termini* in 1821.—*KEYSE v. POWELL* (1853), 2 E. & B. 132; 1 C. L. R. 598; 22 L. J. Q. B. 305; 21 L. T. O. S. 126; 17 Jur. 1052; 118 E. R. 718.

Annotations:—*Ref'd.* *Randall v. Stevens* (1853), 2 E. & B. 641. *Ment'd.* *Bowser v. Maclean* (1860), 2 De G. F. & J. 415; *Eardley v. Granville* (1876), 3 Ch. D. 826; *Lewis v. Baker*, [1905] 1 Ch. 46.

1097. ———.]—*SMITH v. LLOYD*, No. 1064, *ante*.

1098. ———.]—D. & H. agreed between themselves, in writing to purchase lands then in the market. By this agreement D. was to have the surface at three-fourths, & H. the minerals at one-fourth of the whole purchase-money. H. afterwards entered into a contract with the owner of the lands to purchase them from him. The lands were duly conveyed to D. by the owner thereof, H. being a party to the purchase deed, & executing a release of all his interest in the lands to D. Afterwards, by an indenture of July 12, 1834, D. granted, bargained, & sold to H. his exors., administrators & assigns, all the minerals lying under the said lands, upon terms substantially the same as those contained in the previous agreement between D. & H. The indenture of July 12, 1834, was not enrolled as a bargain & sale, & there was no livery of seisin to make it operate as a feoffment.

There were seven seams of coals & minerals lying under the said lands, & soon after the execution of the last mentioned deed, H. began to work & get the coal under the lands, & continued so to do between the years 1834 & 1844. He did not, however, go below the two first seams of coal, & on his ceasing to work in 1844, H. left tramways, implements, etc., in the tunnels & levels he had made.

In 1855, H. by deed, conveyed the minerals, except the two first or upper seams, with power to dig for & get the coal, etc., to pl'tfs., who shortly afterwards entered, & bored down below the two first seams, in order to try for, but they did not work the coal. D. died in 1848, & in 1857 his devise & heir-at-law, by deed, granted the said lands, except the coal thereunder theretofore sold & conveyed to H., to S., "subject as to the beds, etc., of coal under same to the said indenture of July 12, 1834." In 1872, S. granted a lease of the coal under the said lands to defts., & they entered & worked, & got coal under the said lease in 1872. On Jan. 1, 1873, the surviving trustee for sale of D. granted & confirmed unto S., deft. lessor, & his heirs, all the seams & beds of coal lying under the lands, "subject to such right or interest as legally passed to H., his exors., administrators, or assigns, under the indenture of July 12, 1834." H. died in 1861:—*Held*: pl'tfs., through H., had sufficient possession of all the seams of coal, etc., to entitle them to maintain trespass against defts., who were mere wrongdoers, for intruding upon pl'tfs.' mines.

There being a tenancy at will, Statute of Limitations began to run from the first year of the tenancy, & had given a good title to Low Moor co. [pl'tfs.] when the trespasses were done (LORD CAIRNS, C.).—LOW MOOR CO. v. STANLEY COAL CO., LTD. (1876), 34 L. T. 186, C. A.

1099. Mine dissevered from surface—Working part of mine—No right to whole of mine.—Pl'tfs. were the owners of underground mines of coal & ironstone, with a right of entry on the surface lands to search for, dig, & raise the coal & ironstone. Deft. was the owner of the surface lands. There were five strata or seams of coal & ironstone lying beneath the surface. About 1844 deft. commenced working one of the seams of coal. He continued, & carried on his workings up to 1864, having in 1860 extended them to another seam. In 1867 pl'tfs. commenced an action against deft. for breaking & entering their coal mine & carrying away the coal:—*Held*: the deft. had acquired no right to the possession of the mine, but only to the coal actually got, for that his acts did not amount to such a taking possession of the coalfield as would, under Real Property Limitation Act, 1833 (c. 27), bar the owner's right of entry or action after the lapse of twenty years.—DARTMOUTH (EARL) v. SPITTLE (1871), 24 L. T. 67; 19 W. R. 444.

Annotation:—*Consd.* Glyn v. Howell, [1909] 1 Ch. 666.

1100. ———.—Pl'tfs. were seized in fee of lands to which their predecessors derived title under a conveyance in the reign of Queen Elizabeth, wherein the grantor reserved to himself & his heirs male a rentcharge of 7s. 8d. & which contained a proviso that the grantee & his heirs should not dig or get any coal upon the lands for sale but only such as should be burned or employed thereon. Deft. claiming title under a demise from a descendant of same grantor, had for more than twenty years worked from mines of his own under adjacent lands, into, & had taken coals from, the mines under pl'tfs.' lands:—*Held*: (1) the proviso in the original conveyance was a covenant & not

a repugnant condition, & it did not affect the amount of damages which pl'tfs. were entitled to claim as under it, the grantee was still entitled to get all the coal for his own use though not to sell it; (2) deft. had not acquired any title to the mine by possession under Statute of Limitations & pl'tfs. were entitled to an injunction with an account for six years.—ASHTON v. STOCK (1877), 6 Ch. D. 719; 25 W. R. 862.

Annotations:—*As to* (2) *Apld.* Thompson v. Hickman, [1907] 1 Ch. 550. *Refd.* Trotter v. Maclean (1879), 13 Ch. D. 574.

1101. ———.—The presumption that, where a highway is a boundary the subsoil of the highway *ad medium filum viæ* passes to the grantee of the land adjoining the highway, does not apply to a railway that is a boundary. Under a grant therefore, of the land & minerals lying on each side of & adjoining a railway the minerals underlying the railway which had not been acquired by the railway co. will not pass to the grantee.

In 1875 A. by a written agreement gave B. a six months' option to purchase land & minerals on each side of & adjoining a railway. The option was duly exercised & the land & minerals as described in the option agreement were conveyed to B. In 1884 B. had become the owner of collieries adjoining the land so acquired from A., & from that time worked parts of the minerals underlying the railway in the honest belief that he had a title thereto. In 1906 A. brought an action against B. claiming the minerals under the railway. B. counter-claimed for rectification of the conveyance & option agreement so as to include these minerals, alleging mutual mistake & tendered evidence to show that the parties at the date when the option was exercised intended to include these minerals in the purchase:—*Held*: B. had not by possession or otherwise acquired a title to the minerals underlying the railway, & Statute of Limitations afforded him no defence to the action.—THOMPSON v. HICKMAN, [1907] 1 Ch. 550; 76 L. J. Ch. 254; 96 L. T. 454; 23 T. L. R. 311.

Annotations:—*Consd.* Glyn v. Howell, [1909] 1 Ch. 666. *Mentd.* Fowler v. Sugden (1916), 85 L. J. K. B. 1090; Craddock v. Hunt, [1923] 2 Ch. 136.

1102. ———.—Where title is founded on an adverse possession the title will be limited to that area of which actual possession has been enjoyed & as a general rule constructive possession of a wider area will only be inferred from actual possession of the limited area, if the inference of such wider possession is necessary to give effect to contracted obligations, or to preserve the good faith & honesty of a bargain.

Pl'tfs., who were together entitled to one undivided one-sixth part of the mines under a mountain of 92 acres, brought an action against deft., who was admittedly entitled to another undivided one-sixth part of the same mines, & asked for an account of the coal worked by him. It was proved in evidence that more than twelve years before the commencement of the action the predecessors in title of deft., under licences from the owners of the other four-sixths of the mines, but without the licence of pl'tfs. had commenced to work out the coal under the mountain from an area of 2 acres, & had remained in possession of that worked-out area, or cavity, ever since. Deft. claimed that possession of part of the mine entitled him to constructive possession of the whole area of the mine horizontally & vertically under the mountain:—*Held*: (1) deft., having been in adverse possession of the pl'tfs.' one-sixth part, which must be treated as a separate tenement, for more than the required statutory period, had acquired a good title under Statute of Limitations to the

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2 acre area of which his predecessors had been in actual possession, & no more; (2) therefore, plffs. were entitled to an account of the coal, except that taken from the 2 acre area, such account to be limited to six years before action brought.—**GLYN v. HOWELL**, [1909] 1 Ch. 666; 78 L. J. Ch. 391; 100 L. T. 324; 53 Sol. Jo. 269.

1103. Mines not dissevered from surface—Minerals pass with surface.]—SEDDON v. SMITH, No. 1078, *ante*.

vi. Possession under Void Lease.

1104. Time runs from date of entry—Unless rent paid.]—DOE d. PENNINGTON v. BARRETT (1846), 8 L. T. O. S. 338.

1105. ———.]—The governors of Magdalen Hospital, created a corp., for certain charitable purposes, by 9 Geo. 3, c. 31, made, in 1783, a lease of certain land of the hospital for ninety-nine years, at the rent of "one peppercorn, if lawfully demanded." The only covenants, on the part of the lessee, were to indemnify the governors from all taxes, etc., during the term, & to surrender the premises at its end; & on the part of the governors, for quiet enjoyment. No act had been done until now to avoid the lease, or to interfere with the persons holding the land. In July, 1876, the governors brought an action in Ch. to recover possession of the land thus leased:—**Held**: the lease was absolutely void within the provisions of 13 Eliz. c. 10. Consequently the right of the governors to re-enter on the land existed from the moment of the execution of the lease, & right not having been sought to be enforced till now, was barred by Real Property Limitation Act, 1833 (c. 27).

If any rent had been reserved & received, however small, the legal relation of a tenancy from year to year would have been created, & Statute of Limitations could not have run (**LORD SELBORNE**).—**MAGDALEN HOSPITAL (PRESIDENT & GOVERNORS) v. KNOTTS** (1879), 4 App. Cas. 324; 48 L. J. Ch. 579; 40 L. T. 466; 43 J. P. 460; 27 W. R. 602, H. L.

Annotations:—Apld. Webster v. Southey (1887), 36 Ch. D. 9. **Consd.** Churcher v. Martin (1889), 42 Ch. D. 312. **Distd.** Canterbury Corp. v. Cooper (1908), 99 L. T. 612. **Refd.** *Re* Devon's S. E., White v. Devon, *Re* Steer, Steer v. Dobell, [1896] 2 Ch. 562; *Mid. Ry. v. Wright* (1901), 70 L. J. Ch. 411. **Mentd.** Bangor (Bp.) v. Parry, [1891] 2 Q. B. 277; Kingston Race Stand v. Kingston Corp., [1897] A. C. 509; Rickard v. Graham, [1910] 1 Ch. 722; *Re* Suarez, Suarez v. Suarez, [1918] 1 Ch. 176.

1106. ——— Rent paid after statute run.]—By a lease to six persons described as trustees, a building used as a dissenting chapel, though not so described, & reserving to the lessors a right of access to their pews therein, was demised for ninety-nine years, with a covenant for renewal, at the yearly rent of 1s. The lease was not enrolled. New trustees of the chapel had been appointed under Trustee Appointment Act, 1850 (c. 28). Shortly before the expiration of the term the trustees served the reversioner with a notice for renewal. At that time no rent had been paid for above twenty years, but some of the arrears were then paid to & accepted by the reversioner. The reversioner refused to renew the lease. Five years afterwards he brought an action against the trustees to recover possession of the building:—**Held**: pltf.'s right of action was not extinguished under Real Property Limitation Act, 1833 (c. 27),

s. 34.—**BUNTING v. SARGENT** (1879), 13 Ch. D. 330; 49 L. J. Ch. 109; 41 L. T. 643; 28 W. R. 123.

Annotation:—Dtd. Nicholson v. England, [1926] 2 K. B. 93.

1107. ———.]—By a lease dated 1747, after reciting that the inhabitants of the parish of G. had resolved to build a workhouse for the better reception & employment of the poor of the parish, & had applied to the lessor for a lease of the land demised, & that the lessor, "in order to encourage so good a work," had consented to grant the lease, a piece of land was demised for a term of one hundred & fifty years, to commence from a day fifteen days later than the date of the lease, at the yearly rent of 1s., to several persons, one of whom was the vicar of G., in trust that the lessees might build a workhouse upon the land "for the better reception & employment, & for the lodging & entertainment only of all the poor people of the parish of G., for the time being during the said term, in such manner as they, or the major part of them, shall think fit, at the proper costs & charges of the inhabitants of the said parish of G., or otherwise, & not to be let, mortgaged for money, or assigned, to any other use, intent or purpose whatsoever." It was agreed that, if the inhabitants should discontinue the prescribed use of the building so to be erected, & should be willing to deliver it to the landlord, it should be lawful for them to do so, he paying to the churchwardens or overseers of the parish the then value of the building. The deed was not enrolled under Charitable Uses Act, 1736 (c. 36). A workhouse was duly erected on the demised land pursuant to the lease. In 1862 the workhouse being no longer required, was pulled down, & no rent having been paid under the lease since 1776, the site was conveyed to a purchaser in fee under Union & Parish Property Act, 1835 (c. 69), enabling parish authorities to sell the sites of disused workhouses. An action having been brought by a person claiming to be the reversioner against persons, as alleged assigns of the lease claiming under the purchase of 1862, to cover the arrears of rent:—**Held**: the lease was a lease for "charitable uses"; it failed to comply with the requirements of Charitable Uses Act in that, besides non-enrolment, it did not take effect in possession, & contained reservations in favour of the grantor in the shape of rent & something in the nature of a right of pre-emption: these defects were not cured by Poor Law Amendment Act, 1844 (c. 101), s. 73, that Act curing only one defect, namely, want of enrolment: & the lease was accordingly void *ab initio*, & Statute of Limitations began to run against the grantor, if not from the execution of the lease, at all events from the time the rent ceased to be paid.—**WEBSTER v. SOUTHEY** (1887), 36 Ch. D. 9; 56 L. J. Ch. 785; 56 L. T. 879; 52 J. P. 36; 35 W. R. 622; 3 T. L. R. 628.

Annotations:—Mentd. Haigh & Baxter v. West (1893), 68 L. T. 531; *Re* Verrall, National Trust for Places of Historic Interest or Natural Beauty v. A.-G., [1916] 1 Ch. 100.

vii. Receipt of Profits of Land.

See Real Property Limitation Act, 1833 (c. 27), s. 35.

1108. Payment of rent reserved by lease to third party.]—J. seized in fee, leased for sixty-one years, for a term expiring in 1837, within five years after the passing of Real Property Limitation Act, 1833 (c. 27). From J.'s death, which happened more than twenty years before the passing of the

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g. Land believed sold—Mistakenly

occupied by purchaser of adjoining land
—No rent demanded.]—DOE d. TAYLOR
v. PROUDFOOT (1852), 9 U. C. R. 503.

—CAN.

h. Receipt of rent by self-appointed receiver—False representation.]—M'VEA

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Act, B. received the rent reserved on the lease, down to its expiration; & he then entered into possession: & afterwards W. within five years after the passing of the Act, brought ejectment against B., claiming to be entitled, as J.'s devisee, immediately on J.'s death:—*Held*: under sect. 9, the action would have been barred by B.'s receipt of the rent; but it was preserved by sect. 15 for five years after the passing of the Act.—*DOE* d. *ANGELL* v. *ANGELL* (1840), 9 Q. B. 328; 15 L. J. Q. B. 193; 6 L. T. O. S. 520; 10 Jur. 705; 115 E. R. 1299.

Annotations:—*Reid*. *Baines* v. *Lumley* (1868), 16 W. R. 674. *Mentd*. *Lightfoot* v. *Maybery*, [1914] A. C. 782; *Silcocks* v. *Silcocks*, [1916] 2 Ch. 161.

1109. Receipt of rent by agent of owner.—A solr. who pays off a mtge. debt due from his client, must be taken to act as the agent of the client, & not on his own behalf; & if he receives the rent of the mtged. property the possession is that of the client, & the solr. cannot be charged with wilful default; nor will the statute run against the client.—*WARD* v. *CARTTAR* (1865), L. R. 1 Eq. 29; 35 Beav. 171; 55 E. R. 860.

Annotations:—*Reid*. *Rochevoucauld* v. *Boustead*, [1897] 1 Ch. 196. *Mentd*. *The Lady Clermont* (1870), 23 L. T. 283.

1110. —.]—So long as an agent is in receipt of the rent of land, Statute of Limitations will not run against his employer; & if a person commence to receive rents as the agent for another, & afterwards continue to receive such rents, without paying them over, he must be presumed to receive as agent till the contrary is shown.—*SMITH* v. *BENNETT* (1874), 30 L. T. 100.

1111. Severance of reversion—No notice to lessee—Payment of whole rent to one reversioner.—Where a lease is granted & there is afterwards a severance of the reversion without the rent being apportioned & no notice of the severance is given to the lessee, payment of the whole rent to one of the reversioners is not a payment to a person wrongfully claiming it within Real Property Limitation Act, 1833 (c. 27), s. 9, so as to bar the claim of the other reversioner.—*MITCHELL* v. *MOSLEY*, [1914] 1 Ch. 438; 83 L. J. Ch. 135; 109 L. T. 648; 30 T. L. R. 29; 58 Sol. Jo. 118, C. A.

viii. River Bed and Banks.

1112. Acts of ownership by owner of bed—Watering cattle.—*WARWICK* v. *GONVILLE & CAIUS COLLEGE* (1890), 6 T. L. R. 447, C. A.

1113. — **Planting trees—Digging ditch.**—*HINDSON* v. *ASHBY*, No. 1063, *ante*.

1114. User of sluice for irrigation purposes—Tacit permission of owners of river & banks.—*CREYKE* v. *HATFIELD CHASE LEVEL CORPN.* (1896), 12 T. L. R. 383; 40 Sol. Jo. 531.

ix. Road.

Roads generally, see *HIGHWAYS*, Vol. XXVI., pp. 260 *et seq.*

1115. Placing obstructions on road intended to be dedicated to public.—*LEIGH* v. *JACK*, No. 1057, *ante*.

1116. Repairing railings separating intended street from highway.—*LEIGH* v. *JACK*, No. 1057, *ante*.

1117. Erecting gates at each end of road over which a right of way.—*LITLEDAL* v. *LIVERPOOL COLLEGE*, No. 1059, *ante*.

x. Subsoil.

1118. Adverse title may be acquired—Owner unaware of user—User of cellar.—*RAINS* v. *BUXTON*, No. 1055, *ante*.

1119. — **User of tunnel.**—By a deed of July 12, 1871, the trustees of a highway, in exercise of rights & powers given to them under Acts of Geo. 3 & Geo. 4 & for valuable consideration, granted a licence to the predecessor in title of deft. co. to excavate, construct, & use a tunnel under the highway. The rights & powers of the trustees came to an end on Nov. 1, 1871, when 33 & 34 Vict. c. 73, was passed. The tunnel in question was completed in 1872, & remained without any substantial alteration, in the exclusive possession & occupation of deft. co., or their predecessors in title, until the commencement of the action in Aug. 1891. The tunnel was many feet beneath the surface; it was bricked at either end, & was used to carry chalk & soil from one part of deft.'s property to another. Pltf. was owner of the land abutting on the highway on one side, & at one place, on both sides; & he alleged that he was owner of the soil under the highway. By his action he claimed an injunction to restrain the trespass upon his land:—*Held*: even assuming that pltf. had a sufficient title to the soil under the highway, apart from Statute of Limitations, the action was barred by that statute, inasmuch as deft. co. had enjoyed no mere easement, but the exclusive occupation & possession of the tunnel for more than the required twelve years.—*BEVAN* v. *LONDON PORTLAND CEMENT CO., LTD.* (1892), 67 L. T. 615; 9 T. L. R. 12; 3 R. 47.

xi. Wall.

1120. Wall containing inscription of ownership—Occupation of property without acknowledgment.

—The purchaser of a house having taken various objections to the title, the vendor filed a bill for specific performance, & obtained the usual reference as to title. All the above objections were overruled; but before the certificate had been signed the purchaser discovered in a long blank wall, which formed one side of the house & fronted on a street, a stone with an inscription, dated in 1776, stating that the wall had been built by & belonged to the East India co., who had thrown the adjoining ground into the street. It turned out that the wall had been rebuilt in 1831, by the tenant of the house, & the stone set up again; but under what circumstances did not appear. No rent had from that time been paid to the co., nor any acknowledgment of their title given; but their successors in title, on being applied to, claimed the wall as theirs, & the vendor obtained a release from them:—*Held*: the vendor had not a good title when the bill was filed, for that there was no ground for holding a title to have been gained by possession adverse to the East India co.—*PHILLIPSON* v. *GIBBON* (1871), 6 Ch. App. 428; 40 L. J. Ch. 406; 24 L. T. 602; 35 J. P. 676; 19 W. R. 661, L. JJ.

Annotation:—*Mentd*. *Union Lighterage Co. v. London Graving Dock Co.*, [1902] 2 Ch. 557.

1121. Wall erected on wall of another—User amounting to easement.—Pltf. & deft. were in possession of adjoining houses, both of which were ancient messuages. Pltf.'s house was considerably higher than deft.'s house, & was built up against the western wall of deft.'s house, to the height to

v. *PASQUAN* (1882), 8 V. L. R. (L.) 347. —*AUS*

k. *Receipt of rent by person other than reversioner—Claim adverse to that of reversioner.*—*SHAW* v. *KEIGHRON*

(1869), 3 I. R. Eq. 574.—*IR.*

l. *Receipt by third party—Payer believing receiver representing owner.*—*M'AUILLIFFE* v. *FITZSIMONS* (1889), 26 L. R. Ir. 29.—*IR.*

PART V. SECT. 3, SUB-SECT. 1.—B. (b) xi.

m. *Fence deviating from original survey line.*—*BELL* v. *HOWARD* (1857), 6 C. P. 292.—*CAN.*

Sect. 3.—When time begins to run: Sub-sect. 1, B. (b) xi., xii. & xiii., & C.]

which such western wall extended. Up to this height there was no other wall between the two houses, but pltf. alleged that on the top of the western wall, & above the roof of deft.'s house, an external wall was erected at the time of the building of pltf.'s house, forming part thereof, & supporting the roof thereof. The western wall, on the top of which the external wall had been erected, was admitted by pltf. to be the property of deft., subject to all rights & easements over the same in favour of pltf.'s house. The external wall erected on the top of deft.'s western wall was, pltf. alleged, his property. Deft. being desirous of adding to the height of his house, removed some of the stones comprising the external wall, & inserted in the holes thereby made certain beams, for the purpose of supporting a new roof to his house at a greater height than his old roof. Pltf. claimed an injunction to restrain such acts, on the ground that deft. was a trespasser. Deft. alleged that the wall was his, but admitted that pltf. had certain right in respect to the wall which he, deft., had not in any way interfered with:—*Held*: pltf. had been in enjoyment of an easement but not in possession; & nothing had occurred to displace deft.'s original title to the wall, therefore, the action failed.—*WADDINGTON v. NAYLOR* (1889), 60 L. T. 480.

xii. Waste Lands.

See, generally, COMMONS, Vol. XI., p. 55, Nos. 825–831.

1122. Inclosure of waste by side of highway—Payment of rent to adjoining owner after thirty years—Inclosure by permission.]—Deft. inclosed a small piece of waste land by the side of a public highway, & occupied it for thirty years without paying any rent; at the expiration of that time, the owner of the adjoining land demanded 6d. rent, which deft. paid on three several occasions. In ejectment:—*Held*: this, in the absence of other evidence, was conclusive to show that the occupation of deft. began by permission, & entitled pltf. to a verdict.—*DOE d. JACKSON v. WILKINSON* (1824), 3 B. & C. 413; 5 Dow. & Ry. K. B. 273; 107 E. R. 787.

Annotations:—Refd. Doe d. Thompson v. Clark (1828), 8 B. & C. 717; *Hodgson v. Hooper* (1860), 3 E. & E. 149.

1123. — Subsequent acceptance of inclosure award by tenant for life.]—In 1818 R. inclosed a piece of land of 11 perches lying by the side of a lane which was a highway in the manor of W. At that time G. was the owner in fee of the adjoining freehold land. In 1820 G. died, having devised his estates to H. W. G. for life with remainders over. In 1836 a private Act was passed by which comrs. were empowered to inclose & allot the wastes of the manor including encroachments made within twenty years of the passing of the Act & pieces of waste land lying by the sides of any public roads or lanes. In 1837 R. died & W. F. R., his heir, took possession of the 11 perches. In 1838 the comrs. made & published their award by which they awarded to H. W. G. two allotments, one of 24 perches which included the 11 perches & another of 29 perches, similarly situate. H. W. G. took possession of the second allotment; but W. F. R. remained in possession of the piece

of 11 perches till he sold it in 1859 to deft. In 1874 H. W. G. died & pltf. succeeded to the estate under the will of G. He then brought ejectment against deft. to recover the 11 perches:—*Held*: the admission of H. W. G. against his interest by accepting the allotment under the award, was strong evidence that the land was waste of the manor, & rebutted the presumption arising from the situation of the slips of land that they belonged to him as owner of the adjoining land. Consequently pltf.'s right of entry commenced from the time of the award, when there was a tenancy for life, & not from 1818; & therefore Statute of Limitations had not run against pltf. & he was entitled to recover.—*GERY v. REDMAN* (1875), 1 Q. B. D. 161; 45 L. J. Q. B. 267; 24 W. R. 270, D. C.

1124. Inclosure by tenant—Presumed to be for benefit of landlord.]—*Primâ facie*, the lord of the manor is entitled to all waste lands within the manor; & it is not essential that the lord should show acts of ownership of such lands; & evidence that the public have been used to throw rubbish on waste lands is rather evidence that it belongs to the lord than to any private individual.

If a person within twenty years inclose a portion of the lord's waste by the licence of the lord, such person cannot be turned out of the possession of it by the lord without some act being done, from which a legal revocation of the licence can be inferred.

Primâ facie, every inclosure made by a tenant adjoining the demised premises is presumed to be made by him for the benefit of the landlord; but this presumption may be rebutted by evidence. If a lessee inclose land which is near the demised premises, as being part of the premises comprised in his lease, this is not an adverse possession against his landlord; & a twenty years' possession by him will not enable him to retain possession of the inclosed land against his landlord.—*DOE d. DUNRAVEN v. WILLIAMS* (1836), 7 C. & P. 332.

Annotation:—Mentd. Andrews v. Hailes (1853), 21 L. T. O. S. 151.

1125. — Unless landlord's title disclaimed.]—Where a tenant incloses land, whether adjacent to, or distant from, the demised premises, & whether the land be part of a waste, or belong to the landlord or a third person, it is a presumption of fact, that the inclosure is part of the holding, unless the tenant, during the term, does some act disclaiming his landlord's title.

Certain premises, were demised by the description of "all that cottage or tenement with the garden thereto adjoining & belonging, situate, etc.; & also a piece or parcel of land lying near to the said cottage or tenement, containing by estimation three quarters of an acre (more or less), lately used as garden ground":—*Held*: under such description, an adjoining piece of waste land would not pass, unless it had been theretofore used as an outlet of the garden.—*KINGSMILL v. MILLARD* (1855), 11 Exch. 313; 3 C. L. R. 1022; 25 L. T. O. S. 203; 19 J. P. 661; 156 E. R. 849.

Annotations:—Refd. Lisburne v. Davies (1866), L. R. 1 C. P. 259; *A.-G. v. Tomline* (1880), 15 Ch. D. 150.

1126. — Though not contiguous.]—To raise the presumption that an encroachment on waste land by a tenant was made for the benefit of his landlord, it is not necessary that the land encroached should be contiguous or adjoining to,

PART V. SECT. 3, SUB-SECT. 1.—
B. (b) xii.

n. "Residing upon or cultivating."]
—*STOVELL v. GREGORY* (1894), 21 A. R.

137.—CAN. -

o. *Inclosure.*]—Title by possession to wild land can be made out otherwise than by actual inclosure.—*STEEERS*

v. *SHAW* (1882), 1 O. R. 26.—CAN.

p. — *Cutting & carrying away trees insufficient.*]—*DOE d. DESBARRES v. WHITE* (1842), 1 Kerr, 595.—CAN.

in the sense of conterminous with, the land held by him as tenant; it is enough if it be so near thereto that it may be presumed that his position as tenant enabled him to approve.

Nor does the circumstance of the intervention of a small river & a fence & a narrow strip of waste between the holding & the encroachment rebut the *prima facie* presumption, though there be no direct access between the two across the stream.

About forty years ago A., a labourer, in the course of three years completed the inclosure of 4 acres of waste land of the manor of P., separated only by a small river & a narrow strip of the waste from a farm held by B. under the lord; & when the inclosure was completed, B. paid A. £4 10s. & took possession of the 4 acres, & occupied them with the farm. At the expiration of his term, B. claimed to be entitled to the fee simple of the 4 acres; & in ejectment by the lord, who claimed them as an encroachment by his tenant for his benefit, a verdict was taken for pltf., the whole matter being reserved for the consideration of the ct., who were to draw inferences of fact. The ct. drew the inference that the encroachment was made by A. as the servant of B.; & held that there was nothing in the relative position of the inclosure & the farm to rebut the presumption that B. held the inclosure as part of the farm.—*LISBURN (EARL) v. DAVIES* (1866), L. R. 1 C. P. 259; Har. & Ruth. 172; 35 L. J. C. P. 193; 13 L. T. 795; 12 Jur. N. S. 340; 14 W. R. 333.

Annotations :—*Refd.* Whitmore v. Humphries (1871), L. R. 7 C. P. 1; A.-G. v. Tomline (1877), 5 Ch. D. 750. *Mentd.* Nesbitt v. Mablethorpe U. C., [1918] 2 K. B. 1.

1127. ——— Occupation before tenancy.]—

The presumption of law that a tenant of a close occupying waste lands contiguous to his close does so for the benefit of his landlord, does not apply where the tenant is in occupation of the waste land before entering upon his tenancy.—*DIXON v. BATY* (1866), L. R. 1 Exch. 259; 12 Jur. N. S. 1024; 14 W. R. 836.

1128. Inclosure by tenant for life—Presumed to be for benefit of inheritance.]—By an indenture, reciting that the parties of the first part had encroached upon a common, & were respectively in possession of their several encroachments, & that they had agreed to relinquish, release, & convey all & singular their several & respective estates & interests therein to the parties of the third part; it was witnessed, that, in consideration of 10s. to each of them paid by the parties of the third part, they & each & every of them granted, bargained, sold, etc., & each of them did grant, etc., to the parties of the third part, the several premises, describing them. The deed contained a proviso that each of them the parties of the first part, & their wives, should have the liberty & privilege of holding their respective messuages, etc., during their respective lives. After the date of the conveyance, & whilst in possession under the proviso, one of the grantors inclosed other land from the waste adjoining :—*Held* : in the absence of clear evidence that he intended the encroachment for himself at the time he made it, it must be assumed to be part of the holding at the termination of the life interest.—*DOE d. CROFT v. TIDBURY* (1854), 14 C. B. 304; 2 C. L. R. 347; 23 L. J. C. P. 57; 18 Jur. 468; 139 E. R. 124.

Annotations :—*Refd.* Berney v. Bickmore (1863), 8 L. T. 353; A.-G. v. Tomline (1880), 15 Ch. D. 150.

1129. Exercise of rights of common.]—*ECCLESIASTICAL COMRS. v. GRIFFITHS* (1876), 40 J. P. Jo. 84.

xiii. Other Cases.

See cases, *infra*.

C. Discontinuance of Receipt of Rent.

See Real Property Limitation Act, 1833 (c. 27), s. 3.

1130. Time runs from last payment of rent—

PART V. SECT. 3, SUB-SECT. 1.— B. (b) xiii.

q. Possession of part of lot—Where constructive possession of whole.]—The constructive possession which a grantee in possession of a part under a registered deed describing a lot of land by metes & bounds has of the whole lot, is not sufficient to give him the title to any portion against one who has had for a lengthened period the active & continuous possession.—*DOE d. VAN BUSKIRK v. CARNEY* (1874), 15 N. B. R. (2 Pug.) 233.—CAN.

r. ———.]—The possession of a part of land claimed under colour of title is constructive possession of the whole which may ripen into an indefeasible title if open, exclusive & continuous for the whole statutory period.—*WOOD v. LEBLANC* (1904), 34 S. C. R. 627.—CAN.

t. Enclosure of adjoining lot—Erroneous boundary line—Constructive possession of part not actually enclosed.]—*DOE d. BECKITT v. NIGHTINGALE* (1849), 5 U. C. R. 518.—CAN.

a. ———.]—*FERRIER v. MOODIE* (1855), 12 U. C. R. 379.—CAN.

b. Possession through mistaken boundary.]—*DOE d. DUNLOP v. SERVOS* (1849), 5 U. C. R. 284.—CAN.

c. ———.]—A possession inadvertently held under an erroneous impression as to boundary, with no intention of claiming the land otherwise than as it was supposed to form part of a certain lot covered by the party's deed, would by mere lapse of

time ripen into a title.—*DOE d. TAYLOR v. SEXTON* (1851), 8 U. C. R. 264.—CAN.

d. Strip of land adjoining house—User for banking up cellar—Possession uncertain & insufficient.]—*HALL v. EVANS* (1877), 42 U. C. R. 190.—CAN.

e. Side lines between lots—Deviation from lines intended—Error disregarded for twenty years.]—*DENNISON v. CHEW* (1836), 5 O. S. 161.—CAN.

f. Squatter's right as against patentee.]—*DONNELLY v. AMES* (1896), 27 O. R. 271.—CAN.

g. Land compulsorily acquired by railway company—No entry made—Transfer of company's rights—Occasional entry but no actual possession by transferee.]—*WALTON v. WOODSTOCK GAS CO.* (1882), 1 O. R. 630.—CAN.

h. Occupation of land as caretaker—Land used by owner for grazing.]—*RENNIE v. FRAME* (1896), 29 O. R. 586.—CAN.

k. ———.]—*M'CRACKEN v. WOODS* (1878), 4 V. L. R. (L.) 222.—AUS.

l. Payment of taxes, fencing, cutting & removing timber.]—*MCLEOD v. MCRAE* (1918), 43 O. L. R. 34; 43 D. L. R. 350.—CAN.

m. Payment of taxes.]—*DOE d. McDONELL v. RATTRAY* (1850), 7 U. C. R. 321.—CAN.

n. Cutting trees.]—*ALLISON v. REDNOR* (1857), 14 U. C. R. 459.—CAN.

o. Interruption of possession by tax sale—Possession complete before expiry of redemption period.]—*Held* : the running of the Statute of Limitations in favour of an occupant who

claimed title by prescription was not interrupted by a tax sale where the full period of 20 years' possession was complete before the expiration of the period allowed for redemption.—*MCINTYRE v. HAYNES*, [1925] 2 D. L. R. 546; [1925] 1 W. W. R. 881; 35 B. C. R. 40.—CAN.

p. Control of lands for lumber operations.]—*MASON v. LEWIS MILLER & CO.*, [1925] 2 D. L. R. 209; 51 N. S. R. 6.—CAN.

aa. Waste land allotted by father to son—Mortgage by father to third party.]—*KEFFER v. KEFFER* (1877), 27 C. P. 257.—CAN.

bb. Possession under conveyance by lunatic.]—*DOE d. SILVERTHORN v. TEAL* (1850), 7 U. C. R. 370.—CAN.

cc. Possession under mistake in deeds.]—*MCFATRIDGE v. GRIFFIN* (1895), 2 N. S. R. 421.—CAN.

dd. Occupation by schoolmaster for purposes of school.]—*MOORE'S LESSER v. DOHERTY* (1843), 5 I. L. R. 449.—IR.

ee. Land vested in aboriginal native—Adverse possession of European.]—Where a European has been in exclusive adverse possession of land owned by an aboriginal native for over twenty years by virtue of Statute of Limitations 1833, he obtains a good title to the land as against the native, just as he would if the native were a European.—*MATTHEWS v. BOX* (1909), 28 N. Z. L. R. 402.—N.Z.

PART V. SECT. 3, SUB-SECT. 1.—(

ff. Non-payment with permission (lessor.)—Where, in the case of a lease for twenty years, the lessor permits the

Sect. 3.—When time begins to run: Sub-sect. 1, C.; sub-sects. 2 & 3, A.]

Not from date payment becomes due.]—DE BEAUVOIR v. OWEN, No. 1284, post.

1131. What amounts to discontinuance of receipt—Payment by part owner of land subject to rentcharge—Distress levied on other part.]—Where an old rentcharge had been received from the occupier of one part of the premises charged down to the present time, & then, for the first time, had been levied by distress on the occupier of another part, which, for more than twenty years had been in a separate ownership, & the owner or occupier of which had never paid the rent before:—*Held*: the right to distrain for the rent on that portion of the premises charged was not barred by Real Property Limitation Act, 1833 (c. 27).—WOODCOCK v. TITTERTON (1864), 12 W. R. 865.

1132. — No application for payment—Or omission to enforce remedy with knowledge of non-payment.]—Certain lands which were subject to a fee farm rent were in 1812 conveyed upon a sale by the then owner to pltf.'s predecessor in title. From 1812 down to 1872 the rent was paid by the vendor & his successors in title, notwithstanding the fact that they had ceased to have any interest in the lands. The persons who, during that period, claimed to be entitled to & so received the rent, were ignorant of the conveyance of the lands to pltf.'s predecessors in title. In 1872 the successor in title of the vendor refused to continue the payments of rent & debt. as the owner of the rent, thereupon demanded payment of the rent from pltf., & on her refusal to pay it, distrained upon the land for the arrears. Pltf. thereupon replevied claiming that debt.'s title to the rent was barred by discontinuance of the receipt of the rent under Real Property Limitation Act, 1833 (c. 27), ss. 2, 3, on the ground that the payments of rent since 1812 not being by the terre tenant there had been no receipt of the rent within that Act during such period:—*Held*: there was no discontinuance of receipt of the rent, because the provisions of the statute only apply where there has been an omission by the party entitled to the rent to enforce his remedies for the payment with knowledge that the rent has not been paid, which was not the case with regard to debt. or his predecessors in title; & because under the circumstances, it must be presumed that on the conveyance of the lands before mentioned there was some arrangement that the vendor should indemnify the purchaser against the rent & the payments of rent from 1812 to 1872 were therefore made on behalf of pltf. & her predecessors in title; & debt.'s title was therefore not barred.—ADNAM v. SANDWICH (EARL) (1877), 2 Q. B. D. 485; 46 L. J. Q. B. 612; *sub nom.* ADAM v. SANDWICH (EARL), 41 J. P. 773.

Annotations:—Consd. Newbould v. Smith (1885), 29 Ch. D. 882. Rejd. Re Astley & Tyldesley Coal & Salt Co. & Tyldesley Coal Co. (1899), 68 L. J. Q. B. 252. Mentd. A.-G. v. Simpson, [1901] 2 Ch. 671.

lessee to continue during the term without payment of rent, the statute does not begin to run against the lessor & those claiming under him until the determination of the lease, & they may recover in ejectment at any time within twenty years thereafter.—LINEY v. ROSE (1866), 17 C. P. 186.—CAN.

d. Payment of municipal taxes only—Acknowledgment of indebtedness for rent—After eighteen years expired.]—A tenant agreed to pay rent & taxes, & for some eighteen years remained in possession, paying the taxes to the municipality & nothing else. After

the expiration of this period he gave to his landlord an acknowledgment of indebtedness for rent for the whole period:—*Held*: the tenant had acquired title by possession.—FINCH v. GILRAY (1889), 16 A. R. 484.—CAN.

PART V. SECT. 3, SUB-SECT. 2.

e. Time runs from death of owner.]—Re CHERRY (1906), 2 Tas. L. R. 68.—AUS.

f. —.]—CURRY v. CURRY (1878), 4 A. R. 63.—CAN.

g. —.]—MCGREGOR v. MCGREGOR (1880), 27 Gr. 470.—CAN.

1133. — Payment by vendor of land charged.]—ADNAM v. SANDWICH (EARL), No. 1132, ante.

SUB-SECT. 2.—DEATH OF, OR ALIENATION BY, RIGHTFUL OWNER.

See Real Property Limitation Act, 1833 (c. 27), s. 3; Real Property Limitation Act, 1874 (c. 57), s. 1.

1134. Annuity—Time runs from date of first payment.]—(1) An annuitant under a will since the passing of Real Property Limitation Act, 1833 (c. 27), must have recourse to distress or action within twenty years from the date when the first payment became due, or the annuity will be barred.

(2) The limitation affecting a right to recover a rentcharge granted by will is twenty years from the death of testator under Real Property Limitation Act, 1833 (c. 27), s. 2.

(3) [Real Property Limitation Act, 1833 (c. 27), s. 3], which provides for cases of claims, in respect of estates in reversion or remainder, "or other future estates or interests," is large enough to comprehend, & would comprehend all executory devises (TINDAL, C.J.).—JAMES v. SALTER (1837), 3 Bing. N. C. 544; 5 Dowl. 496; 3 Hodg. 70; 4 Scott, 168; 6 L. J. C. P. 171; 1 Jur. 135; 132 E. R. 520; *previous proceedings* (1836), 2 Bing. N. C. 505.

Annotations:—As to (1) Consd. Irish Land Commission v. Grant (1884), 10 App. Cas. 14; Howitt v. Harrington, [1893] 2 Ch. 497; Jones v. Withers (1896), 74 L. T. 572. Rejd. Grant v. Ellis (1841), 9 M. & W. 113; Cannon v. Rimington (1852), 12 C. B. 1; Langton v. Langton (1854), 18 Jur. 928; Re Devon's S. E., White v. Devon, Re Steer, Steer v. Dobell, [1896] 2 Ch. 562. As to (2) Consd. Jones v. Withers (1896), 74 L. T. 572. Rejd. Owen v. De Beauvoir (1847), 16 M. & W. 547; Cannon v. Rimington (1852), 12 C. B. 1; Langton v. Langton (1854), 18 Jur. 928; Magdalen Hospital v. Knotts (1878), 8 Ch. D. 709; Irish Land Commission v. Grant (1884), 10 App. Cas. 14. As to (3) Consd. Howitt v. Harrington, [1893] 2 Ch. 497. Rejd. Magdalen Hospital v. Knotts (1878), 8 Ch. D. 709; Irish Land Commission v. Grant (1884), 10 App. Cas. 14.

1135. — —.]—Testator bequeathed certain annuities to his eight children by name, & directed that when any of them should die an additional annuity of £50 should be divided among the survivors & survivor of them. S., one of the eight children living at the date of the will, afterwards died in the lifetime of testator; & testator died in 1801. The other children were now all deceased but two. On the death of each child who survived testator an additional annuity of £50 had been invested, but no addition was made in consequence of the death of S. No account of the arrears was prayed:—*Held*: it was now too late to seek to have the annuity purchased.—LANGTON v. LANGTON (1854), 18 Jur. 928.

1136. Death of owner intestate—Agent receiving rents—Ratification by heir within reasonable time.]—LYELL v. KENNEDY, KENNEDY v. LYELL, No. 1647, post.

h. —.]—A son has no right of entry in land of which his mother died seised during the lifetime of his father, who has the right to possession as tenant by the courtesy, & the Statute of Limitations will not run against him until his father's death.—DOE d. BRIDEAUX v. BUDREAU (1883), 22 N. B. R. 559.—CAN.

k. —.]—OLIVER v. JOHNSTON (1886), 3 O. R. 26.—CAN.

l. —.]—LAL CHAND MARWAHI v. RAMRUP GIR (1925), 53 L. R. Ind. App. 24.—IND.

SUB-SECT. 3.—FUTURE ESTATES.

A. In General.

See Real Property Limitation Act, 1833 (c. 27), s. 3; Real Property Limitation Act, 1874 (c. 57), s. 2.

1137. What are "future estates or interests"—Executory devise.]—JAMES v. SALTER, No. 1134, *ante*.

1138. — Estate of assignee of bankrupt.]—Copyhold lands were surrendered, in 1798, to husband & wife, for their joint lives, with remainder to the heirs of the husband. In 1805 the husband absconded, & went abroad, & was never heard of afterwards. In 1807, a commission of bkpcy. issued against him, & the usual assignment of his estate was made by the comrs. to his assignee. The wife occupied the copyhold estate until her death in 1841, whereupon the assignee was admitted:—*Held*: an ejectment by the assignee, brought after her death, was in time, for that the husband's reversion in fee was a future estate, within Real Property Limitation Act, 1833 (c. 27), s. 3.—DOE d. JOHNSON v. LIVERSEDGE (1843), 11 M. & W. 517; 13 L. J. Ex. 61; 1 L. T. O. S. 81; 152 E. R. 910.

Annotation:—**Mentd.** Doe d. Langley v. King (1849), 12 L. T. O. S. 348.

1139. — Reversion expectant on determination of particular estate.]—(1) Real Property Limitation Act, 1833 (c. 27), s. 3, which relates to estates in reversion, expectant on the determination of a particular estate, applies only to cases where another person than the reversioner is entitled to the particular estate.

(2) In 1784, premises were leased to H. for three lives. H. by his will devised all his estate & interest in the premises to his wife A., her heirs & assigns. A. in 1793 conveyed the estate so devised to her, to her son R., & the heirs of his body, with a proviso that if he should have no child living at his death, the limitation thereby made should cease, & the estate should revert to A., her heirs & assigns. In 1811, R. purchased the reversion in fee in the premises, expectant on the lease for lives, which was duly conveyed to him, & at the same time an old satisfied term of five thousand years affecting the premises was assigned to a trustee for him, to attend the inheritance. R. died in 1812, without issue, leaving his nephew J. his heir-at-law, & the heir-at-law of A. The lease for lives determined in 1835. For upwards of twenty years from the death of R. the premises were held adversely to J.:—*Held*: his right of entry was barred thereby, & he had not a new right of entry on the determination of the lease for lives in 1835.—DOE d. HALL v. MOULSDALE (1847), 16 M. & W. 689; 16 L. J. Ex. 169; 9 L. T. O. S. 129; 153 E. R. 1367.

Annotations:—*As to* (2) **Refd.** Clarke v. Arden (1855), 16 C. B. 227. **Generally, Mentd.** Doe d. Cadwalader v. Price (1847), 16 L. J. Ex. 159; Doe d. Clay v. Jones (1849), 18 L. J. Q. B. 260; Cottrell v. Hughes (1855), 3 C. L. R. 496.

1140. — —.]—(1) Where a trespasser on land let on lease has as against the lessee acquired a title under Statutes of Limitations & the lessee subsequently surrenders the lease to the lessor,

the lessor has no right of re-entry, & the period of limitation does not begin to run until the expiration of the term for which the lease was granted.

(2) A reversion in fee simple expectant on the determination of a lease for years or lives is not a "future estate or interest" expectant on a particular estate within Real Property Limitation Act, 1874 (c. 57), s. 2.—WALTER v. YALDEN, [1902] 2 K. B. 304; 71 L. J. K. B. 693; 87 L. T. 97; 51 W. R. 46; 18 T. L. R. 668, D. C.

1141. What is "estate or interest in possession"—Reversion on lease for years—Grant of second lease during existence of first.]—During the continuance of a lease for years the reversioner in fee granted a new lease of the premises for years to his tenant:—*Held*: although the first lease became surrendered by operation of law on the granting of the second, the reversioner's estate did not thereby become an "estate in possession" within Real Property Limitation Act, 1833 (c. 27), ss. 3, 5, & therefore time did not begin to run against him under the Act.—CORPUS CHRISTI COLLEGE, OXFORD (PRESIDENT, ETC.) v. ROGERS (1879), 49 L. J. Q. B. 4; 44 J. P. 216, C. A.

Annotations:—**Consd.** England & Wales Eccl. Comrs. v. Rowe (1880), 5 App. Cas. 736; Eccl. Comrs. for England v. Tremer, [1893] 1 Ch. 166. **Refd.** East Stonehouse U. C. v. Willoughby, [1902] 2 K. B. 318.

1142. Who is "person last entitled to particular estate"—Assignment of particular estate.]—Where a person entitled to a particular estate in respect of which land is held or the profits thereof or rent received, & upon which a future estate is expectant, conveys away his estate, he is not, when the particular estate determines "the person last entitled to the particular estate upon which the future estate was expectant," & consequently the proviso in Real Property Limitation Act, 1874 (c. 57), s. 2, does not apply to limit the time within which the person who on the determination of the particular estate becomes entitled to an estate in possession may take an entry or distress or bring an action to recover such land or rent.

A testator devised certain lands to his sons successively for life, beginning with the youngest, & after their death "to be for ever enjoyed by the oldest surviving heir of his oldest surviving son for their life or lives for ever." The oldest surviving son being in possession executed, more than six years before his death, a conveyance in fee to deft. He left one son, who more than six but within twelve years after his father's death brought this action to recover possession of the land, claiming as devisee under the will of testator:—*Held*: the claim was not barred, as pltf.'s father, having conveyed away his life estate was not "the person last entitled to the particular estate" on which pltf.'s estate in remainder was expectant within the meaning of the proviso in the Real Property Limitation Act, 1874 (c. 57), s. 2.—PEDDER v. HUNT (1887), 18 Q. B. D. 565; 56 L. J. Q. B. 212; 56 L. T. 687; 35 W. R. 371; 3 T. L. R. 399, C. A.

1143. — —.]—*Re* DEVON'S (EARL) SETTLED ESTATES, WHITE v. DEVON (EARL), *Re* STEER, STEER v. DOBELL, No. 1054, *ante*.

PART V. SECT. 3, SUB-SECT. 3.—A.

m. From determination of the prior particular estate.]—Where a tenant for life & the reversioner in fee convey property in fee simple by one deed of bargain & sale to one person, the life estate does not merge in the reversion, & the Statute of Limitations does not run against the remainderman till the death of the tenant for life.—SLADDEN v. SMITH

(1857), 7 C. P. 74.—CAN.

n. — —.]—DOE d. WILLIAMS v. DRISCOLL (1858), 4 All. 176.—CAN.

o. — —.]—DODS v. McDONALD (1905), 36 S. C. R. 231.—CAN

p. — —.]—When an exor. takes, under his testator's will, a life interest in a term, the legatee of a reversionary interest, commencing on the determination of that life interest, may upon its determination, & on assent having

been given, sue to recover the land, even though the exor. might himself have been barred by the Statute of Limitations.—QUINTON v. FRITH (1868), 2 I. R. Eq. 396.—IR.

q. — —.]—*Re* BELLEW, O'REILLY v. BELLEW, [1924] 1 I. R. 1.—IR.

r. From execution of power of appointment.]—THURESSON v. THURESSON (1899), 30 O. R. 504.—CAN.

t. Estate contingent on a particular

Sect. 3.—When time begins to run: Sub-sect. 3, A., B. & C.]

1144. Other estate, right, interest or possibility—Whether appointee included.]—*Re DEVON'S (EARL) SETTLED ESTATES, WHITE v. DEVON (EARL), Re STEER, STEER v. DOBELL, No. 1054, ante.*

B. Estates Tail.

See Real Property Limitation Act, 1833 (c. 27), ss. 21, 22.

1145. Time runs from accrual of title to first in tail.]—The twenty years within which a formedon in the descender ought to be commenced under the Statute of Limitations, 1623 (c. 16), begin to run when the title descends to the first heir in tail unless he lie under a disability.—*TOLSON v. KAYE* (1822), 3 Brod. & Bing. 217; 6 Moore, C. P. 542; 129 E. R. 1267.

Annotations:—Expld. Abergavenny v. Brace (1872), L. R. 7 Exch. 145. *Refd. Doe d. Daniell v. Woodroffe* (1842), 12 L. J. Ex. 147.

1146. Conveyance by tenant in tail in possession—Time runs from death of tenant in tail—Against issue in tail.]—Where lands were settled on the grandfather of the lessor of pltf., for life, remainder in tail; & it appeared that pltf.'s father, the first tenant in tail, after the death of the grandfather, thirty-seven years ago, entered & was possessed; but that, for upwards of twenty years, deft. had been in the receipt of the rents & profits, & in the peaceable possession of the premises:—*Held*: the father having entered, this was not a case within Statute of Limitations, 1623 (c. 16), so as to bar the lessor of pltf.; & as the father could have conveyed an estate for his life, which would have been good against himself, but not against his heir, the possession of deft. must be taken to have been by the permission of, & not adverse to, the tenant in tail.—*DOE d. SMITH v. PIKE* (1832), 3 B. & Ad. 738; 1 Nev. & M. K. B. 385; 1 L. J. K. B. 105; 110 E. R. 270.

Annotations:—Expld. Austin v. Llewellyn (1853), 9 Exch. 276. *Refd. Tolson v. Kaye* (1843), 6 Man. & G. 536.

1147. ———.]—On May 16, 1778, J. H., tenant for life, & Jane, the wife of James B., tenant in tail of copyhold premises remainder to J. H. in fee, surrendered for the purpose of suffering a recovery, which was suffered, & the premises surrendered to the use of J. H. for life, remainder to Jane B. for life, remainder to the heirs of the survivor. The same day J. H., James & Jane B. surrendered a moiety to the use of the trustees of the marriage settlement of James & Jane B., their heirs & assigns, in trust for James, for life; remainder to Jane, for life; remainder to their eldest son, & four others, by name, as James & Jane should appoint; in default of appointment to Thomas, the eldest, in tail; remainder to James, the second, in tail; remainder to the third & fourth & other sons; remainder to the daughters in tail; remainder to the heirs of Jane for ever, with a power to the trustees, at the request of James & Jane B., to sell the moiety, & invest the proceeds in other estates, to be settled to the same uses, & with power to J. H., James B., & the trustees, unanimously to alter or make void all the uses, & to create new & other uses. On July 6, 1778, J. H., James & Jane B., surrendered one moiety; & the trustees, at the request of James & Jane B., testified by their joining in the surrender, surrendered the other moiety in fee to a *bonâ fide* purchaser, for an adequate consideration.

In 1802, J. H. died, & in 1835, Jane B. died. On ejectment brought by the heir of Jane B., against a claimant under the purchaser:—*Held*: the life interest of Jane B. passed to deft., & therefore Statute of Limitations did not apply, since the lessor of pltf. had no right of entry till her death.—*DOE d. BAVERSTOCK v. ROLFE* (1838), 8 Ad. & El. 650; 3 Nev. & P. K. B. 648; 1 Will. Woll. & H. 400; 1 D. J. & D. 201.

Annotations:—Refd. Scott v. Scott (1854), 23 L. T. O. S. 27. *Mentd. Davenport v. Bishopp* (1843), 2 Y. & C. Ch. Cas. 451; *Tarleton v. Iddell* (1851), 17 Q. B. 390; *Ford v. Stuart* (1852), 15 Beav. 493.

1148. ———.]—An estate being limited to the use of A. & his wife, & the heirs of their bodies, with remainder to A. in fee, & A. having died, leaving his widow, & G., an only son, & L. & H., only daughters, the widow, in 1735, by deed-poll, in consideration of an annuity granted to her by G., & of natural affection, granted, surrendered, & yielded up the estate to him in fee; & he afterwards, during her life, suffered a recovery. She died in 1767. G. died, without issue, in 1779, having devised the estate to trustees, to secure an annuity to B., only son of his sister L., then dead, & subject thereto, to W., eldest son of B., for his life, with remainder to B.'s second son. In 1790, W., on his father's death, entered into possession of the whole estate, claiming under the will of G., & subsequently did various acts in the character of devisee for life. In 1814 he suffered a recovery of one moiety of the estate, & in 1816 conveyed the entirety to mtgees. in fee. In 1818, M., the descendant of H., the other coparcener, suffered a recovery of the other moiety, which, it was declared, should enure, subject to the trusts of a term, to the use of W.'s mtgees.:—*Held*: although G., being estopped by the recovery suffered by him, was not remitted to the estate tail, no right of entry accrued to any one until his death, & therefore the period of twenty years, for the operation of Statute of Limitations against the issue in tail, was to be calculated from his death, & not from the death of his mother, & consequently W.'s entry, in 1790, was not barred by lapse of time.—*DOE d. DANIEL v. WOODROFFE* (1849), 2 H. L. Cas. 811; 13 Jur. 1013; 9 E. R. 1301, H. L.; *affg. S. C. sub nom. WOODROFFE v. DOE d. DANIELL* (1846), 15 M. & W. 769, Ex. Ch.

Annotations:—Mentd. Tarte v. Darby (1846), 15 L. J. Ex. 326; *Spotswood v. Barrow* (1850), 5 Exch. 110; *Cowan v. Milbourn* (1867), L. R. 2 Exch. 230.

1149. ———.]—An estate tail having been discontinued by a feoffment made by the tenant in tail more than twenty years before his death:—*Held*: the issue in tail might bring his writ of formedon at any time within twenty years next after such death, the period of limitation prescribed by Real Property Limitation Act, 1833 (c. 27), not running against him during the life of the tenant in tail.—*CANNON v. RIMINGTON* (1852), 12 C. B. 1; 21 L. J. C. P. 137; 138 E. R. 799; *subsequent proceedings, sub nom. RIMINGTON v. CANNON* (1853), 12 C. B. 18, Ex. Ch.

Annotations:—Consd. Abergavenny v. Brace (1872), L. R. 7 Exch. 145. *Refd. Austin v. Llewellyn* (1853), 9 Exch. 276.

1150. ———.]—*RIMINGTON v. CANNON*, No. 1068, *ante*.

1151. ———.]—More than twenty years before the filing of the bill, & after the death of the settlor, X., under a mistake as to his rights, executed a conveyance of the estate to a deft.,

event—From happening of the event.—*STACKPOOLE v. STACKPOOLE* (1843), 6 I. Eq. R. 18; 2 Con. & Law. 489.—*IR.*

PART V. SECT. 3, SUB-SECT. 3.—B.
1146 1. Conveyance by tenant in tail in possession—Time runs from death

of tenant in tail—Against issue in tail.]—Re SHAVER (1871), 3 Ch. Ch. 379.—*CAN.*

who immediately entered into possession. This deed was not enrolled. The only son of X. filed this bill eight years after the death of X., & one year after attaining twenty-one:—*Held*: his claim was not barred by Real Property Limitation Act, 1833 (c. 27), s. 23, & he was entitled to have the property delivered up to him, with an account of rents from the filing of the bill.—*MORGAN v. MORGAN* (1870), L. R. 10 Eq. 99; 39 L. J. Ch. 493; 22 L. T. 595; 18 W. R. 744.

Annotations:—*Reid*. *Mills v. Capel* (1875), L. R. 20 Eq. 692. *Mentd.* *Olivant v. Wright* (1878), 9 Ch. D. 646.

1152. Conveyance by tenant in tail in remainder—Time runs from accrual of right of entry.]—

A testator who was entitled to the equity of redemption in certain freehold premises subject to a mtge. in fee devised the premises to J. & another as trustees, on trust in the first place out of the rents to pay off the mtge., & he then gave £10 a year out of the rents in the events which happened to E. & the remainder of the rents to J. & T. equally, & after the death of E. he devised certain parts of the premises to J. & the heirs of his body: T. died in the lifetime of E.; J. then joined in suffering a recovery for the purpose of barring the estate tail, but neither E. nor the next of kin of T. joined in making the tenant to the *præcipe*. The title of pltf., against which in this case the recovery was set up, accrued in 1837: pltf. brought an ejectment in 1852, but was forced to abandon it & to proceed in equity; he filed his bill in 1855:—*Held*: he was not barred of his title to relief by lapse of time, & in particular Real Property Limitation Act, 1833 (c. 27), s. 23, did not apply to the case.—*PENNY v. ALLEN* (1857), 7 De G. M. & G. 409; 29 L. T. O. S. 41; 3 Jur. N. S. 273; 5 W. R. 303; 44 E. R. 160, L. C.

Annotation:—*Reid*. *Morgan v. Morgan* (1870), L. R. 10 Eq. 99.

1153. ———.]—A. was tenant by the curtesy, with remainder to his eldest son B. in tail, with remainder to C. B. sold & conveyed the property to A., & levied a fine, in which A. was conusee:—*Held*: there was no discontinuance, the remainder was not barred, & the title was bad.

The eldest son was tenant in tail, & if he had been rightfully in possession as tenant in tail, the effect of the fine would have been to work a discontinuance, & as real actions are now abolished, it would have been impossible for the remainderman to make a claim against the estate. But he was not in possession, because his father was tenant by the curtesy, *i.e.* tenant for life in possession, & subject thereto, the eldest son was tenant in tail. The consequence is clear that there was no discontinuance, & whether the eldest son was in receipt of the rents or not does not matter (*ROMILLY, M.R.*).—*ANDERSON v. ANDERSON* (1861), 30 Beav. 209; 4 L. T. 198; 7 Jur. N. S. 1067; 9 W. R. 492; 54 E. R. 868.

1154. Conveyance by tenant for life—Tenant for life continuing in possession—Time runs from death of tenant for life.]—By voluntary settlement, dated in 1778, lands were limited, after life estates to husband & wife successively, to trustees & their heirs to preserve, & then to the use of another trustee for one hundred years to raise portions, & then to the use of T. for life, remainder to trustees to preserve, remainder to the first & other sons of T. in tail, & in default of such issue remainder over. A leasing power for twenty-one years, or three lives, was given to every tenant in possession of the freehold & inheritance. In 1793, T. being in possession under this settlement, covenanted for good consideration to suffer a recovery by which the lands in question were

settled on himself for life, with remainder over, under which deft. claimed. In 1853 T. died. Pltf. claimed as the issue in tail under the estate tail limited in 1773 to the first & other sons of T. Deft. contended that T. took under that settlement an implied estate tail, which was barred, & with it all other limitations in the premises, by the assurances of 1793:—*Held*: where a tenant for life executes a tortious conveyance, committing a forfeiture, under which, however, he takes equally a life estate & continues in possession, the remainderman entitled to claim on the forfeiture may, if he choose, treat the possession of the wrong-doing tenant for life as possession under the first settlement, & not under his own unlawful conveyance.—*LEWIS v. REES* (1856), 3 K. & J. 132; 26 L. J. Ch. 101; 28 L. T. O. S. 229; 3 Jur. N. S. 12; 5 W. R. 96; 69 E. R. 1052.

Annotation:—*Mentd.* *Cooper v. Kynock* (1872), 7 Ch. App. 398.

1155. Conveyance by tenant for life with estate tail in remainder—Time runs from estate tail falling into possession.]—Lands limited in equity to T., F., & F.'s wife E. successively for life, with remainder to the first & other sons of F. & E. successively in tail male, with remainder to F. in tail general, with remainders over, were in the year 1835, without the consent of T. the protector of the settlement, by deed enrolled, reciting, contrary to the fact, the seisin in fee simple of F., conveyed by F., E. joining to transfer or bar her dower to a purchaser in fee simple; & the purchaser then entered into possession. T. died in 1848, F. died without issue in 1859, & E. died in 1873:—*Held*: until 1873 the possession of the purchaser was a possession by virtue of the subsisting life estate, & not of the estate tail in remainder of F., & consequently, was not a possession the continuance of which for the period of twenty years would, under Real Property Limitation Act, 1833 (c. 27), s. 23, bar the remainders over.—*MILLS v. CAPEL* (1875), L. R. 20 Eq. 692; 44 L. J. Ch. 674; 33 L. T. 158.

1156. Resettlement by tenant for life & remainderman—Estate carved out of estate of tenant in tail—Time runs from falling into possession of estate tail.]—*DOE d. CURZON v. EDMONDS*, No. 1254, *post*.

C. Reversions on Leases.

1157. Time runs from determination of lease.]—Where A. was in possession of premises under a lease for ninety-nine years, determinable on lives, subject to a rent of £1 10s. *per annum* to the reversioner, which rent had not been paid to him for more than twenty years before the commencement of the action, but of which there had not been an adverse receipt by any other person:—*Held*: the right of the reversioner to the premises accrued on the determination of the lease, & not on the non-payment of the rent.—*DOE d. DAVY v. OXENHAM* (1840), 7 M. & W. 131; 10 L. J. Ex. 6; 4 Jur. 1016; 151 E. R. 708; *sub nom.* *DOE d. DAVEY v. OCKENDEN*, H. & W. 4.

Annotations:—*Reid*. *Doe d. Newman v. Goddill* (1840), 5 Jur. 170; *Owen v. De Beauvoir* (1847), 16 M. & W. 547.

1158. ———.]—*DOE d. ROBERTON v. GARDINER* (1852), 12 C. B. 319; 21 L. J. C. P. 222; 19 L. T. O. S. 168, 204; 138 E. R. 927.

Annotation:—*Mentd.* *Hardon v. Hesketh* (1859), 4 H. & N. 175.

1159. ———.]—The master of a charity having made a lease of charity lands to a trustee for himself, & died in 1823:—*Held*: the Statute ran against the charity from that time.—*A.-G. v.*

Sect. 3.—When time begins to run: Sub-sect. 3, C., D., E. & F.; sub-sect. 4.]

PAYNE (1859), 27 Beav. 168; 7 W. R. 604; 54 E. R. 651.

*Annotation:—*Reid. Magdalen Hospital v. Knotts (1878), 8 Ch. D. 709.

1160. Surrender & renewal of lease—Whether time runs from date of renewal.]—CORPUS CHRISTI COLLEGE, OXFORD (PRESIDENT, ETC.) v. ROGERS, No. 1141, ante.

1161. ———.]—ECCLESIASTICAL COMRS. OF ENGLAND & WALES v. ROWE, No. 1457, post.

1162. ———.]—In 1805, R., then Chancellor of the Cathedral Church of St. Paul, London, & parson of the parish church of Ealing, granted a lease for three lives of the glebe lands & hereditaments, of which he was seised in fee.

In 1807, the tenants under the lease of 1805 granted a sub-lease of part of the property for ninety-nine years, determinable on the dropping of the same lives as in the principal lease. The last of such lives dropped in 1874.

On Aug. 24, 1832, the persons then entitled to the lease of 1805 surrendered such lease to R., & on the following day R. granted a fresh lease for three lives. The last of such lives dropped in 1891. Pltfs., who claimed through R., had ever since the death of R., in 1839, received the rent reserved by the lease of 1832. Defts., claiming through the sub-lessee, had been since 1874 in actual possession of the lands without title. Pltfs. claimed recovery of possession & mesne profits, on the ground that their title first accrued in 1891.

Defts. claimed to be entitled in fee, on the ground that pltfs.' title first accrued in 1874, & they claimed the benefit of the Statute of Limitations. —*Held*: by the lease of Aug. 1832, an immediate estate passed to the lessees therein named, & not a mere right in the nature of an *interesse termini* to a future estate, to come into existence on the determination of the sub-lease; &, moreover, such lease was by virtue of the statute 4 Geo. 2, c. 28, s. 6, a valid lease, & was a lease which, passing an estate to the new lessees, prevented the grantor & those claiming under him, from seeking to recover the lands till that lease had expired; &, therefore, pltfs.' title did not accrue till 1891 when the last life dropped.—ECCLESIASTICAL COMRS. FOR ENGLAND v. TREEMER, [1893] 1 Ch. 166; 62 L. J. Ch. 119; 68 L. T. 11; 41 W. R. 166; 9 T. L. R. 78; 37 Sol. Jo. 66; 3 R. 136.

1163. ———.]—Two adjoining pieces of land, herein referred to as the foundry & the stable, were in 1819 & 1831 respectively demised by the same lessor to the same lessee for ninety-nine years or three lives. The leases contained a covenant by the lessor to renew in certain events. In 1846 both pieces & certain other lands of the lessee were assigned by him to trustees to hold in trust for the lessee for life & thereafter as to the foundry upon one set of trusts, & as to the residue upon another set of trusts. From some date prior to 1843, & down to the death of the lessee in 1848, two portions of the stable property were occupied by the lessee as part of & in connection with the business carried on by him on the foundry property. After his death these two portions continued to be so occupied by the *cestuis que trust* of the foundry, & defts., their successors, without any acknowledgment, down to the date of this action. In Mar. 1856, the foundry lease, & in Aug. 1856, the stable lease, were renewed, new leases on the same terms for ninety-nine years or three lives being granted to the trustees of the

settlement. In July, 1890, a new lease of the foundry was granted to the then *cestui que trust* occupying the foundry & the two portions of the stable property. This lease was subsequently sold to defts. In 1894 a new lease of the stable was granted to the trustees, which was again renewed in 1898. This renewed lease was in 1901 sold to pltfs., who on July 18, 1901, commenced this action, claiming to recover from defts. the two portions of the stable property which had been occupied as part of the foundry property:—*Held*: (1) pltf.'s claim was not barred; at the date of the stable lease of Aug. 1856, the possession in law of the disputed portions was in the trustees so as to enable them to surrender them to the lessor & to obtain a regrant from him, & Statute of Limitations did not begin to run against the lessor in 1856, but only in 1894, on the determination of the stable lease of Aug. 1856; the occupiers of the disputed portions were persons claiming through a trustee within Real Property Limitation Act, 1833 (c. 27), s. 25, & the Statute therefore, did not run in their favour; (2) assuming Statute began to run in 1856 against the lessor, the disputed portions became an accretion to the property comprised in the foundry lease, & on the determination & surrender of that lease in July, 1890, i.e. within twelve years of the commencement of the action, the lessor acquired a new right of possession, there being nothing to rebut the presumption that the encroachment enured for the benefit of the lessor.—EAST STONEHOUSE URBAN COUNCIL v. WILLOUGHBY BROTHERS, LTD., [1902] 2 K. B. 318; 71 L. J. K. B. 873; 87 L. T. 366; 50 W. R. 698.

1164. ——— Renewed lease invalid.]—Deft. was in possession of certain premises, of which a lease for three hundred years was granted in 1599 by pltfs., the corpn. of Canterbury, & which would expire in 1899. In 1892 an arrangement was entered into between the parties, by the terms of which, in consideration of the surrender by deft. of the old lease, pltfs. agreed to grant her a lease for her life free of rent. Deft. duly handed over the old lease, & received in exchange a lease for her life, which was in fact invalid by reason of not complying with Municipal Corporations Act, 1882 (c. 50), s. 108. In 1908 an action was brought by pltfs. to recover possession of the property. Deft. set up that as she had surrendered the old lease in 1892, & the lease granted to her was invalid, Statute of Limitations began to run from that date, & that, as she had been in possession for more than twelve years since 1892, defts. were not entitled to recover possession of the premises:—*Held*: the lease of 1892, being an invalid one, there was no effectual surrender of the lease of 1599 which was given in exchange for it, & Statute of Limitations did not commence to run until the expiration of the old lease in 1899.—CANTERBURY CORPN. v. COOPER (1909), 100 L. T. 597; 73 J. P. 225; 53 Sol. Jo. 301; 7 L. G. R. 908, L. J.J.

1165. Adverse title acquired against lessee—Surrender of lease to lessor—Time does not run till end of term.]—WALTER v. YALDEN, No. 1140, ante.

D. Copyholds.

1166. Grant to two for joint lives—When right of reversioner accrues.]—Copyhold lands were granted to A. for the lives of herself & B., & in reversion to C. for other lives. A. died, having devised to B., who entered, & kept possession for more than twenty years. On his death C. brought ejectment:—*Held*: the action was barred by

Statute of Limitations, for that C.'s right of possession accrued on the death of A., inasmuch as there cannot be a general occupant of copyhold land.—*DOE d. FOSTER v. SCOTT* (1825), 4 B. & C. 706; 7 Dow. & Ry. K. B. 190; 4 L. J. O. S. K. B. 39; 107 E. R. 1223.

1167. ———.]—*DOE d. JOHNSON v. LIVERSEDGE*, No. 1138, *ante*.

1168. Allotment of common in respect of copyholds—Time runs from death of tenant for life.]—An Act of Parliament was passed for inclosing the waste lands within the manor of W. The comrs., by their award, which was made in 1800, allotted unto T. & the dean & chapter of W., according to their respective rights & interests, for & in respect of the ancient *auster* tenement, certain portions of the waste:—*Held*: J. was not barred from bringing an ejectment by Statute of Limitations, he having had no right of entry until the death of T. in 1826; nor by the clause in the Inclosure Act, whereby the award of the comrs. was declared to be final, inasmuch as the claim made by T. must be considered as having been made on behalf of all the parties interested in the copyhold tenement.—*DOE d. SWEETING v. HELLARD* (1829), 9 B. & C. 789; 4 Man. & Ry. K. B. 736; 8 L. J. O. S. K. B. 79; 109 E. R. 293.

Annotations:—*Mentd.* *Doe d. Harris v. Saunder* (1836), 5 Ad. & El. 664; *Bateman v. Boynton* (1866), 14 W. R.

E. Husband and Wife.

See, now, Married Women's Property Act, 1882 (c. 75), s. 1.

1169. Husband entitled in right of wife—Husband continuing in possession after death of wife tenant for life—Time runs from death of wife.]—A wrongful continuation of possession for twenty years after the expiration of a title, under which the tenant lawfully entered, constitutes such an adverse possession as will, under Statute of Limitations, create a bar to an entry or to an action of ejectment. As, where husband of tenant for life holds over twenty years after her decease.—*DOE d. PARKER v. GREGORY* (1834), 2 Ad. & El. 14; 4 Nev. & M. K. B. 308; 4 L. J. K. B. 19; 111 E. R. 6.

Annotations:—*Expld.* *Nepean v. Doe d. Knight* (1837), *Murp. & H.* 291. *Mentd.* *Doe d. Leeming v. Skirrow* (1837), *Will. Woll. & Dav.* 517.

1170. ——— Discontinuance of possession by husband & wife—Time runs from discontinuance.]—A *feme sole*, seised in fee, married, & she & her husband ceased to be in possession or enjoyment of the land, & went to reside at a distance from it. They both died at times which were not shown to be within forty years from their ceasing to occupy. The wife's heir-at-law brought ejectment against the person in possession, within twenty years of the husband's death, & within five years of the passing of Real Property Limitation Act, 1833 (c. 27), but more than forty years after the husband & wife ceased to occupy:—*Held*: the heir-at-law was barred by Real Property Limitation Act,

1833 (c. 27), s. 17, though it did not appear when or how deft. came into possession, & though proof was offered that the wife had levied no fine.—*DOE d. CORBYN v. BRAMSTON* (1835), 3 Ad. & El. 63; 1 Har. & W. 162; 4 Nev. & M. K. B. 664; 4 L. J. K. B. 166; 111 E. R. 336.

Annotation:—*Distd.* *Jumpson v. Pitchers* (1843), 13 Sim. 327.

1171. ——— Conveyance by husband without concurrence of wife—Time runs from death of husband.]—If husband & wife, being seised in fee in right of the wife, convey to a purchaser by deed without fine; the wife, if she survives, & if not, her heir, may, on the husband's death, recover the land, notwithstanding the purchaser may have been in possession for more than forty years.—*JUMPSON v. PITCHERS* (1843), 13 Sim. 327; 60 E. R. 127; *subsequent proceedings* (1844), 1 Coll. 13.

1172. Tenancy by the curtesy—Possession by wife during coverture—Time runs from death of wife.]—The possession of the *cestui que trust*, under the trusts of a settlement, is the possession of the trustee, & gives the trustee a seisin of the estate, which is not interrupted by the death of the *cestui que trust*, but immediately enures for the benefit of the person next entitled to the equitable interest; & notwithstanding the adverse possession of another party soon afterwards commenced, the ct. cannot presume such adverse possession to have commenced so instantaneously on the death of the first *cestui que trust*, as wholly to exclude the equitable seisin of the parties next entitled to the beneficial interest.—*PARKER v. CARTER* (1845), 4 Hare, 400; 67 E. R. 704.

Annotations:—*Mentd.* *Wilkinson v. Fowkes* (1851), 9 Hare, 193; *Doe d. Newman v. Rusham* (1852), 17 Q. B. 723; *Doe d. Richards v. Lewis* (1852), 11 C. B. 1035; *Crofts v. Middleton* (1855), 2 K. & J. 194.

——.]—*See* Administration of Estates Act, 1925 (c. 23), s. 45 (1) (b).

F. Ownership by One Party of Particular and Future Estates.

See Real Property Limitation Act, 1833 (c. 27), s. 20.

1173. Particular estate barred—Possession by person entitled to subsequent particular estate—Future estate not barred.]—*DOE d. JOHNSON v. LIVERSEDGE*, No. 1138, *ante*.

1174. ——— Reversion barred.]—*DOE d. HALL v. MOULSDALE*, No. 1139, *ante*.

1175. ——— Life interest & power of appointment in remainder—Power of appointment not barred.]—*Re DEVON'S (EARL) SETTLED ESTATES*, *WHITE v. DEVON (EARL)*, *Re STEER*, *STEER v. DOBELL*, No. 1054, *ante*.

SUB-SECT. 4.—FORFEITURE AND BREACH OF CONDITION.

See Real Property Limitation Act, 1833 (c. 27), ss. 3, 4.

1176. Non-payment of rent—Time runs from determination of lease.]—The freehold of an estate,

PART V. SECT. 3, SUB-SECT. 3.—E.

1170 i. Husband entitled in right of wife—Discontinuance of possession by husband & wife—Time runs from discontinuance.]—Laud was granted by the Crown in 1838 to pltf.'s mother, who was then a married woman, & who had by her husband issue born alive & capable of inheriting the estate. The patentee died in 1856, her husband lived till 1883. Neither of them, nor any of their heirs-at-law, were ever in possession. Deft. claimed by possession, which began in 1853, & had

continued thenceforward without interruption:—*Held*: the patentee having been dispossessed within the terms of R. S. O., 1877, c. 108, s. 5, in 1853, more than twenty years before this suit was commenced, the action was barred by sect. 44 of that Act, notwithstanding the continuation until 1883 of the estate by the curtesy of pltf.'s father.—*HICKS v. WILLIAMS* (1887), 15 O. R. 228.—*CAN.*

a. Tenancy by the curtesy—Wife never in possession—Time runs from death of wife.]—*FARQUHARSON v. MORROW* (1861), 12 C. P. 311.—*CAN.*

PART V. SECT. 3, SUB-SECT. 3.—F.

b. Time runs from termination of particular estate.]—Where a tenant for life & the reversioner in fee convey property in fee simple by one deed of bargain & sale to one person, the life estate does not merge in the reversion, & Statute of Limitations does not run against the remainderman till the death of the tenant for life.—*SLADDEN v. SMITH* (1857), 7 C. P. 74.—*CAN.*

c. ———.]—*ADAMSON v.* (1886), 12 S. C. R. 563.—*CAN.*

. 3.—*When time begins to run: Sub-sects. 4, 5 & 6, A.]*

parcel of a manor, & demisable only by the licence of the lord, passing by surrender & admittance, to which the tenant was admitted by the description of a customary tenement, *habendum* to her & her heirs, *tenendum* of the lord by the rod, according to the custom of the manor, by the accustomed rent, suit of ct., customs & other services, is in the lord & not in the tenant, though not holden *ad voluntatem domini*. But such an estate, whether strictly copyhold or not to all purposes, may well pass under the description of copyhold in a will; the intention to pass it under that description being apparent. Such estates pass, not by the will alone, but by the will & surrender taken together; & the entry of the devisee, after twenty years from the death of testatrix in 1780, but within twenty years after the determination of a lease in 1800, before granted by her, rendering rent, with a proviso for re-entry in case of non-payment, was not barred by Statute of Limitations, 1623 (c. 16), having been made within twenty years after the old lease expired; the devisee not being bound to enter before, as for a condition broken, by the non-payment to her of rent.—*DOE d. COOK v. DANVERS* (1806), 7 East, 299; 3 Smith, K. B. 201; 103 E. R. 115.

Annotations:—Consd. Cholmondeley v. Clinton (1823), Turn. & R. 107. *Mentd. Hume v. Rundell* (1822), 6 Madd. 331; *Bingham v. Woodgate* (1829), 1 Russ. & M. 32; *Thompson v. Hardinge* (1845), 1 C. B. 940; *Delacherois v. Delacherois* (1864), 4 New Rep. 501; *Portland v. Hill* (1866), 12 Jur. N. S. 286.

1177. Forfeiture of life estate—Time runs from determination of life estate.]—A. was tenant for life, with a power of appointment by will, attested by three credible witnesses. By will, attested by three witnesses, he appointed the lands to B. for life, & after her death to C. in fee. B. was one of the witnesses to the will, & the appointment to her was therefore void. On the death of testator, the husband of B. entered, & held the land till his death, which was three years after the death of B.:—*Held: Statute of Limitations did not begin to run against C. till the death of B.*

It is analogous to the case of a remainderman, where there has been a forfeiture of the life estate; he is not bound to insist on the forfeiture, but may wait the regular expiration of the particular estate; & Statute of Limitations does not begin to run till that time (*TAUNTON, J.*).—*DOE d. ALLEN v. BLAKEWAY* (1833), 5 C. & P. 563.

1178. ———.]—The terms "forfeiture" & "breach of condition" used in Real Property Limitation Act, 1833 (c. 27), ss. 3, 4, are to be read in the largest sense, & extend to forfeitures which operate to accelerate an estate under a conditional limitation, as well as to forfeitures of which the heir-at-law only can take advantage. Ignorance of a condition annexed to a gift by will does not protect the devisee or legatee from the consequences of, not complying with the condition.

An estate was devised in strict settlement, subject to a clause directing that every person who should become entitled in possession under the will should, on becoming so entitled, assume testator's name & arms; & it was provided, that in case any such person should fail or neglect so to do for twelve calendar months, after he should become so entitled in possession, his estate

& interest should cease & the estate should go to the person who should be next in remainder & then *in esse*, as if the person so failing or neglecting were then dead. A tenant in tail, who did not comply with the clause, remained in possession of the estate for more than twenty years. At his death the next remainderman was in India, & being ignorant of his rights under the will, did not comply with the clause:—*Held: the tenant in tail had not acquired a title by adverse possession, but on his death, by virtue of Real Property Limitation Act, 1833 (c. 27), s. 4, the remainderman became entitled to the estate.*—*ASTLEY v. ESSEX (EARL)* (1874), L. R. 18 Eq. 290; 43 L. J. Ch. 817; 30 L. T. 485; 22 W. R. 620.

Annotations:—Refd. Re Quintin Dick, Cloncurry v. Fenton, [1926] Ch. 992. *Mentd. Partridge v. Partridge* (1893), 70 L. T. 261.

1179. Forfeiture of copyholds.]—The lord of the manor is barred by the Statute of Limitations from entering for a forfeiture after twenty years.—*WHITTON v. PEACOCK* (1834), 3 My. & K. 325; 40 E. R. 124.

Annotation:—Refd. Re Lidiard & Jackson's & Broadley's Contract (1889), 42 Ch. D. 254.

1180. Fresh cause of forfeiture—Time runs from original forfeiture.]—*Re ORCHARD STREET SCHOOLS (TRUSTEES)*, [1878] W. N. 211.

SUB-SECT. 5.—ADMINISTRATION.

See Real Property Limitation Act, 1833 (c. 27), s. 6.

1181. Time runs from date of death—Not from grant of administration.]—Under Real Property Limitation Act, 1833 (c. 27), s. 6, time begins to run as against an administrator claiming a chattel interest in land from the date of the death of the intestate, & not from the date of the grant of administration.—*Re WILLIAMS, DAVIES v. WILLIAMS* (1886), 34 Ch. D. 558; 56 L. J. Ch. 123; 55 L. T. 633; 35 W. R. 182; 3 T. L. R. 99.

1182. ———.]—On the sale by auction by mtgee. of a leasehold house, one of the conditions of sale provided that the purchaser should be furnished with an abstract of the lease, of the assignment of the lease; & of the subsequent title, & should not make any objection in respect of the "immediate title" between the lease & the assignment, "notwithstanding any recital of or reference to such title contained in the assignment or any subsequent document of title, but shall assume that the said assignment vested in the assignees a good title for the residue of the term." Subsequently to the sale the vendor's solr. communicated to the purchaser information obtained from mtgor. prior to the sale as to the intermediate title, & tending to throw suspicion on the vendor's title to sell at all, thereupon the purchaser took out a summons under the Vendor & Purchaser Act, 1874 (c. 78), to have it declared that the title was not such as he ought to be compelled to accept.

Time would begin to run, under Real Property Limitation Act, 1833 (c. 27), s. 6, from the death of [the underlessee] in 1873; so that there was ample time for the acquisition of a good title by the vendor & the persons through whom she claims, & it does not appear after all the inquiries that have been made that the vendor has not a

PART V. SECT. 3, SUB-SECT. 4.

344.—IR.

1177 i. Forfeiture of life estate—Time runs from determination of life estate.]—*CONNOLLY v. LEAHY*, [1899] 2 I. R.

PART V. SECT. 3, SUB-SECT. 5.

1181 i. Time runs from date of death—Not from grant of administration.]—

JENKINS v. JENKINS (1882), 3 N. S. W. L. R. (Law) 35.—AUS.

1181 ii. ———.]—*HUGHES v. HUGHES* (1881), 6 A. R. 373.—CAN.

good title (LINDLEY, L.J.).—*Re* SCOTT & ALVAREZ'S CONTRACT, SCOTT *v.* ALVAREZ, as reported in, [1895] 1 Ch. 596; 64 L. J. Ch. 376, n.; 12 R. 474, C. A.; *subsequent proceedings*, [1895] 2 Ch. 603, C. A.

Annotations:—*Mentd.* *Re* Calcott & Elvin's Contract (1898), 67 L. J. Ch. 327; *Re* Wallis & Barnard's Contract, [1899] 2 Ch. 515.

SUB-SECT. 6.—TENANCIES AT WILL.

A. When Lessor's Right Accrues.

See Real Property Limitation Act, 1833 (c. 27), s. 7, & generally, LANDLORD & TENANT, Vol. XXXI., pp. 36 *et seq.*

1183. At expiration of one year from commencement of tenancy—Or prior determination of tenancy.]—Where A., in 1817, let B. into possession of lands as tenant at will; & in 1827 A. entered upon the land without B.'s consent, & cut & carried away stone therefrom:—*Held*: this entry amounted to a determination of the estate at will; & B. thenceforth became tenant at sufferance, until, by agreement express or implied, a new tenancy was created between the parties; & therefore, unless the fact of such new tenancy were found by the jury, an ejectment brought by A. in 1839 was too late, inasmuch as, by Real Property Limitation Act, 1833 (c. 27), s. 7, his right of action first accrued at the expiration of one year after the commencement of the original tenancy at will, *i.e.* in the year 1818.—DOE *d.* BENNETT *v.* TURNER (1840), 7 M. & W. 226; 10 L. J. Ex. 213; 151 E. R. 749; *subsequent proceedings, sub nom.* TURNER *v.* DOE *d.* BENNETT (1842), 9 M. & W. 643, Ex. Ch.

Annotations:—*Refd.* Doe *d.* Dayman *v.* Moore (1846), 15 L. J. Q. B. 324; Doe *d.* Goody *v.* Carter (1847), 9 Q. B. 863; Doe *d.* Baker *v.* Coombes (1850), 9 C. B. 714; Randall *v.* Stevens (1853), 2 E. & B. 641; Ley *v.* Peter (1858), 3 H. & N. 101; Hodgson *v.* Hooper (1860), 3 E. & E. 149; Lynes *v.* Snaith, [1892] 1 Q. B. 486. *Mentd.* Pinhorn *v.* Souster (1853), 21 L. T. O. S. 92.

1184. ———.]—Under Real Property Limitation Act, 1833 (c. 27), s. 7, the right of the person entitled, subject to a tenancy at will, to make an entry or bring an action to recover the land accrues ultimately at the end of a year from the commencement of the tenancy at will, though it may accrue sooner by the actual determination of the tenancy.

In May, 1842, a father let his son into possession of certain land. The son continued to occupy the land as tenant at will until 1864. In 1852 the son, with the knowledge of his father, let portions of the land on weekly & yearly tenancies, & received rent for the same:—*Held*: the right of entry under the statute accrued at the end of the first year from the creation of the tenancy, & the right of entry in the father was barred by the uninterrupted occupation by the son for twenty years.—DAY *v.* DAY (1871), L. R. 3 P. C. 751; 8 Moo. P. C. C. N. S. 152; 40 L. J. P. C. 35; 24 L. T. 856; 36 J. P. 118; 19 W. R. 1017; 17 E. R. 270, P. C.

Annotations:—*Refd.* Bobbett *v.* S. E. Ry. (1882), 9 Q. B. D. 424; Wimbledon & Putney Commons Conservators *v.* Nicol (1894), 10 T. L. R. 247; Jarman *v.* Hale, [1899] 1 Q. B. 994.

.]—In 1801, D. being seised of land in fee, permitted his daughter J. & her husband

M. to occupy as tenants at will. D. died in 1837, after the passing (July 24, 1833) of Real Property Limitation Act, 1833 (c. 27), but before the expiration of the five years allowed by sect. 15 of the Act. He devised the land to J. for life, remainder to W. in fee. He also devised to J. an annuity charged on other land. J. & M. occupied from 1801, to J.'s death in 1843, no rent being paid. After J.'s death, M. continued in occupation. On ejectment brought, in 1844, by W., the remainderman, against M.:—*Held*: W. was not entitled to insist that J. & M. had held under the devise to J.; but that M., although he had received the annuity on behalf of his wife, might rest his defence upon the occupation under the tenancy at will. Sect. 15 was inapplicable, no step having been taken within the five years. The action was barred, under sects. 2 & 7, by the lapse of twenty years from the end of one year after the commencement of the tenancy at will.—DOE *d.* DAYMAN *v.* MOORE (1846), 9 Q. B. 555; 15 L. J. Q. B. 324; 8 L. T. O. S. 211; 10 Jur. 815; 115 E. R. 1387.

Annotations:—*Refd.* Doe *d.* Jacobs *v.* Phillips (1847), 11 Jur. 692; Randall *v.* Stevens (1853), 18 Jur. 128; Hodgson *v.* Hooper (1860), 29 L. J. Q. B. 222.

1186. ———.]—In 1781, the lord of the manor, with the consent of the tenants of the manor, granted to five persons licence to inclose three acres of the waste, & that they & their heirs & all persons claiming under them should & might lawfully hold the same so inclosed, in trust for the purpose of building a workhouse for the poor of the parish of M., rendering to the then lord & all other lords the yearly rent of 5s. for the same in every year for ever. The overseers & churchwardens of M. took possession of the land, & built a workhouse, which was used as such up to the year 1836. It appeared from the accounts of a deceased steward of the manor that the yearly rent of 5s. was paid from 1781 to 1791, & from the parish books that it was paid from 1825 to 1836. In 1835, the five trustees having all died before 1817, & the heir of the survivor not coming in after due proclamations, the parish, in vestry, pursuant to a notice from the steward, in order to save a forfeiture, nominated seven persons, who were then admitted, on the payment by the parish of a fine, the entry on the roll being that the lord granted the land to them & their heirs, to hold by copy of court-roll & at the will of the lord according to the custom of the manor, with a similar trust to that in the grant of 1781, yielding & paying the rent of 5s. a year, etc. In 1840, there being no further use for the workhouse, the parish officers & trustees, under a resolution of the vestry, surrendered the premises to the then lord, who took possession, & had by himself or persons claiming under him held possession ever since. In 1859 the overseers & churchwardens of M. brought an action to recover the premises against defts., who were in possession, & claimed through the lord of 1840:—*Held*: on a case stating the above facts, the ct. being at liberty to draw inferences of fact, pl'ts. had not established that the holding by the parish officers had become adverse in 1833, the time of the passing of Real Property Limitation Act, 1833 (c. 27), & the lord had, therefore,

when deft. became a tenant at sufferance. The effect of Real Property Limitation Act is that it is for the purposes of the statute only that the tenancy at will is to be deemed determined at the expiration of a year & time begins to run from date.—McCOWAN *v.* ARMSTRONG (1902), 22 C. L. T. 55; 3 O. L. R. 100.—CAN.

PART V. SECT. 3, SUB-SECT. 6.—A.

1185 i. At expiration of one year from commencement of tenancy.]—JONES *v.* CLEAVELAND (1858), 16 U. C. R. 9.—CAN.

1185 ii. ———.]—AMEY *v.* CARD, MILLIGAN & CLEMENT (1867), 25 U. C. R. ———.—CAN.

1185 iii. ———.]—WILLIAMS *v.* McDONALD (1874), 33 U. C. R. 423.—CAN.

1185 iv. ———.]—COPE *v.* CRICHTON (1899), 30 O. R. 603.—CAN.

1185 v. ———.]—Where deft. becomes upon his entry a tenant at will, & that tenancy never has in fact been determined, the lessor's right of entry first accrues at the expiration of one year,

Sect. 3.—When time begins to run: Sub-sect. 6, A., B. & C.]

five years after the passing of the Act during which he might have entered & resumed possession; before the lapse of the five years a fresh tenancy at will was created by what took place in 1835, & that estate was put an end to in 1840, before the lapse of twenty-one years from the commencement of the tenancy; & pltf., therefore, had failed to make out any title.—*HODGSON v. HOOPER* (1860), 3 E. & E. 149; 29 L. J. Q. B. 222; 3 L. T. 149; 24 J. P. 435; 6 Jur. N. S. 911; 8 W. R. 637; 121 E. R. 398.

1187. Effect of creation of new tenancy—Time runs from expiration of one year from commencement of new tenancy.]—The lessor of pltf. being the owner in fee of certain land, let it in 1817 to deft. as tenant at will. In 1820 he permitted certain persons, against the will of the deft., to cut a drain through the land. In 1823, 1825, & 1827, stones were dug on the land by his order, & trees planted at different times. In 1829, deft., being a land-tax assessor, signed an assessment, in which he was named as occupier of the land, the lessor of pltf. as proprietor. Deft. continued in possession of the land without paying rent up to the year 1840, when the present ejectment was brought. The judge having directed the jury that the acts of the lessor of pltf. amounted to a determination of the tenancy at will, & that if a new tenancy at will had been subsequently created by the parties, the lessor of pltf. was entitled to recover:—*Held*: that any act done by a landlord, with whatever intent, upon the premises of his tenant at will, for which he would otherwise be liable to an action of trespass at the suit of the tenant amounts to determination of the tenancy. The assessment was evidence of the creation of a new tenancy at will in 1820 & therefore, as the right of entry under Real Property Limitation Act, 1833 (c. 27), s. 7, accrued in 1821, the direction of the judge was right, & the ejectment was brought in time.—*TURNER v. DOE d. BENNETT* (1842), 9 M. & W. 643; 11 L. J. Ex. 453; 152 E. R. 271, Ex. Ch.; *previous proceedings, sub nom. DOE d. BENNETT v. TURNER* (1840), 7 M. & W. 226.

Annotations:—*Refd.* *Doe d. Goody v. Carter* (1847), 9 Q. B. 863; *Ley v. Peter* (1858), 3 H. & N. 101; *Jarman v. Hale* (1899), 68 L. J. Q. B. 681; *Lynes v. Snaith*, [1899] 1 Q. B. 486. **Mentd.** *Pinhorn v. Souster* (1853), 21 L. T. O. S. 92.

1188. ———.]—The proviso as to *cestuis que trust* contained in Real Property Limitation Act, 1833 (c. 27), s. 7, applies only to cases of declared & express trusts, & not to the case of a person holding under an agreement to purchase.

If a person who has agreed to purchase real property be let into possession, he is a tenant at will, & such tenancy at will is determinable by his death; & if after his death his widow, who is also devisee of his real estate, continue in possession,

this is not a continuance of his tenancy at will, so as to prevent the operation of that statute. Therefore in such a case, where the person thus let into possession died more than twenty years before ejectment brought by the representatives of the intended vendor:—*Held*: it was too late, unless a new tenancy could be shown in the widow, the first year of whose tenancy was within twenty years before the ejectment; & if such new tenancy were shown, no demand of possession would be necessary, as such new tenancy would be determined by the death of the widow, which occurred before the ejectment.—*DOE d. STANWAY v. ROCK* (1842), Car. & M. 549; 4 Man. & G. 30; 11 L. J. C. P. 194; 6 Jur. 266; 134 E. R. 13.

Annotations:—*Refd.* *Drummond v. Sant* (1871), L. R. 6 Q. B. 763; *Sands v. Thompson* (1883), 22 Ch. D. 614.

1189. ———.]—When a tenant at will is warned to quit, & afterwards has leave given him to remain on part of the property, this permission commences a new tenancy, from the date of which Statute of Limitations runs.—*LOCKE (OR LOCH) v. MATTHEWS* (1863), 13 C. B. N. S. 753; 1 New Rep. 322; 32 L. J. C. P. 98; 7 L. T. 824; 9 Jur. N. S. 875; 11 W. R. 343; 143 E. R. 298.

Annotations:—*Consd.* *Thorp v. Facey* (1866), Har. & Ruth. 678. *Refd.* *Day v. Day* (1871), L. R. 3 P. C. 751; *Jarman v. Hale*, [1899] 1 Q. B. 994.

1190. ———.]—A tenancy at will is determined by a legal mtge. of the premises by the owner, & knowledge of the mtge. by the tenant at will. After the mtge. a new tenancy at will may be created between the parties so as to cause Real Property Limitation Act, 1833 (c. 27), to begin to run.—*JARMAN v. HALE*, [1899] 1 Q. B. 994; 68 L. J. Q. B. 681.

B. What Amounts to Determination of Tenancy.

See *LANDLORD & TENANT*, Vol. XXXI., pp. 41, 46.

C. Occupation by cestui que trust.

See Real Property Limitation Act, 1833 (c. 27), s. 7.

1191. General rule—Time does not run against trustee.]—(1) The object of Real Property Limitation Act, 1833 (c. 27), was, to settle the rights of persons adversely litigating with each other; not to deal with cases of trustee & *cestui que trust*, where there is but one single interest, viz., that of the person beneficially entitled.

(2) A *cestui que trust* who enters into possession of land, becomes, at law, tenant at will to the trustee; where, therefore, the equitable owner of an estate, a term in which has been assigned to attend the inheritance, is in possession, the right of entry under Real Property Limitation Act, 1833 (c. 27), accrues only upon the determination of the tenancy at will resulting from such possession.

(3) Real Property Limitation Act, 1833 (c. 27), s. 3, does not apply to the case of a *cestui que*

1187 i. Effect of creation of new tenancy—Time runs from expiration of one year from commencement of new tenancy.]—*DOE d. SHEPHERD v. BAYLEY* (1853), 10 U. C. R. 310.—*CAN.*

1187 ii. ———.]—*DOE d. PETERS v. MCGLOYN* (1858), 4 All. 189.—*CAN.*

1187 iii. ———.]—*COOPER v. HAMILTON* (1881), 45 U. C. R. 502.—*CAN.*

d. ———.]—Whenever a new tenancy at will is created, this forms a fresh starting point for the running of Statute of Limitations.—*Re DEFOE* (1882), 2 O. R. 623.—*CAN.*

e. Renewal of tenancy—Time runs

from date of renewal.]—*DOE d. KINGSBURY v. STEWART* (1847), 5 U. C. R. 108.—*CAN.*

f. ———.]—Payment of part of the purchase-money by a person in possession of land under an agreement to purchase is a renewal of the tenancy at will, & Statute of Limitations begins to run from such payment.—*ANDERSON v. ANDERSON* (1906), 37 N. B. R. 432; 1 E. L. R. 443.—*CAN.*

g. Tenancy at will converted into tenancy at sufferance—Time runs from expiration of one year from commencement of tenancy at will.]—*COLVILLE v. MARTIN* (1853), 1 P. E. I. 83.—*CAN.*

h. Effect of owner entering on

land.]—Deft. went into possession of land as tenant at will to pltf., & remained in possession upwards of twenty years:—*Held*: such tenancy was not determined by an entry of the owner within twenty years with the consent of the tenant & pltf.'s right of entry was barred by Statute of Limitations.—*DOE d. BORSFORD v. TIDD* (1863), 5 All. 569.—*CAN.*

k. ———.]—If the owner visits the lands in the character of owner, & exercises rights of ownership *animo possidendi*, such visits may prevent Statute of Limitations from running in favour of the tenant at will.—*WOODHOUSE v. HOONEY*, [1915] 1 I. R. 296.—*IR.*

trust holding possession of land under the trustee. —GARRARD v. TUCK (1849), 8 C. B. 231; 18 L. J. C. P. 338; 14 L. T. O. S. 547; 13 Jur. 871; 137 E. R. 498; *on appeal* (1850), 19 L. J. C. P. 232, Ex. Ch.

Annotations:—*As to* (2) *Distd.* Melling v. Leak (1855), 16 C. B. 652. *Appld.* Drummond v. Sant (1871), L. R. 6 Q. B. 763. *As to* (3) *Refd.* Knight v. Bowyer (1858), 2 De G. & J. 421; Locking v. Parker (1872), 8 Ch. App. 35, n. *Generally, Mentd.* Alleyne v. R. (1855), 5 E. & B. 399; Bateman v. Boynton (1866), 14 W. R. 598.

1192. Proviso confined to actual express trusts.]—DOE d. STANWAY v. ROCK, No. 1188, *ante*.

1193. —.]—A. entered into arts. of agreement for leases of ninety-nine years from Lady Day, 1768, of certain building land abutting on the Thames with the trustees of D., who were tenants in fee. Soon afterwards, by a private Act, A. & others were empowered to embank the Thames, & win part of the bed of it: & s. 2 enacted that the ground & soil of the river to be enclosed & embanked in the front of each house should vest in the owner of the house according to his respective estate, trust or interest. A certain portion of the bed of the river, fronting the land on which he had built houses under his leases, was reclaimed by A. pursuant to the statute, & he occupied it more than twenty years before Lady Day, 1867. No lease of the reclaimed land was ever executed either by the trustees or by A. The leases, if they had been granted, would have expired at Lady Day, 1867. No rent was ever paid by A. in respect of the reclaimed land:—*Held*: by the private Act, s. 2, the fee simple of the reclaimed land was vested in the trustees; & their representatives were not barred by Real Property Limitation Act, 1833 (c. 27), & were entitled to the reclaimed land at Lady Day, 1867.

It may very well be that in construing the Act the terms trustee & *cestui que trust* are to be understood . . . as an actual direct trust; not such possible eventual trusts as may, in case certain facts are established in evidence, be declared in a ct. of equity (BLACKBURN, J.).—DRUMMOND v. SANT (1871), L. R. 6 Q. B. 763; 41 L. J. Q. B. 21; 25 L. T. 419; 20 W. R. 18.

Annotations:—*Consd.* Sands v. Thompson (1883), 22 Ch. D. 614. *Apprvd.* Warren v. Murray, [1894] 2 Q. B. 648. *Refd.* Beighton v. Beighton (1895), 64 L. J. Ch. 796.

1194. —.]—Under an agreement by the owners of land to grant leases of houses, when erected on such land by the intended lessees, the latter became entitled to a lease of two of such houses at a peppercorn rent for a term of years. No lease of these houses was ever granted, but the intended lessees & their successors in title continued in possession during the term of years under such circumstances that a ct. of equity, if applied to, would have decreed specific performance of the agreement for a lease:—*Held*: during such term of years Statute of Limitations did not begin to run against the owners of the land, inasmuch as they had not an effective right of entry or action for the recovery of the land.

An intended lessee so let into possession is a *cestui que trust* within the proviso to Real Property Limitation Act, 1833 (c. 27), s. 7, & therefore, the operative part of the sect. does not apply to his case.—WARREN v. MURRAY, [1894] 2 Q. B.

648; 64 L. J. Q. B. 42; 71 L. T. 458; 43 W. R. 3; 10 T. L. R. 573; 9 R. 793, C. A.

1195. Possession of one cestui que trust—Adverse to other cestuis que trust & trustees.]—A. devised a messuage to B. & C. in trust for D. for life & after his death, on certain other trusts. A. died in 1815. In 1818, pltf., who had married a daughter of one E., who it was assumed had been let into possession of the messuage by D., the tenant for life, succeeded E. in the possession of the premises & remained therein without payment of rent to or acknowledgement of title in any one, until 1854, when the heir-at-law of B. the surviving trustee, the tenant for life being dead, turned him out:—*Held*: pltf. had by his adverse possession for more than twenty years, acquired a title as well against the trustees as against the *cestui que trust*; for that, although a *cestui que trust* who is in possession with the consent or acquiescence of the trustees may be regarded as their tenant at will, yet, if he is only allowed to receive the rents or otherwise deal with the property in the hands of the occupying tenants, he stands in the relation merely of an agent on behalf of the trustees who choose to allow him to act for them in the management of the estate.—MELLING v. LEAK (1855), 16 C. B. 652; 3 C. L. R. 1017; 24 L. J. C. P. 187; 1 Jur. N. S. 759; 3 W. R. 595; 139 E. R. 915.

Annotations:—*Distd.* Drummond v. Sant (1871), L. R. 6 Q. B. 763. *Mentd.* Christchurch, Oxford (Dean & Chapter) v. Buckingham & Chandos (1864), 17 C. B. N. S. 391; Spencer v. Harrison (1879), 5 C. P. D. 97.

1196. —.]—Testatrix, by her will, devised real estate to trustees, their heirs & assigns, in trust for her daughter for life, & after her death to sell & divide the proceeds between four persons M., S., T., & J., share & share alike. On the death of testatrix the tenant for life entered & occupied until her own death in 1857. On her death T. & J. entered & remained in possession until the death of the latter in 1874. T. remained in possession until his death in 1880. The trustees never in any way acted, so far as the real estate was concerned, & the property was enjoyed by T. & J., & after the death of J., by T. without interruption & acknowledgment:—*Held*: the legal estate in fee of the trustees was extinguished by the expiration of twenty years from the death of the tenant for life, & with it the trusts by which it was affected; & it would be wrong to ascribe the possession of T. & J., which was unlawful for all the purposes of the will, to the supposed lawful title which they each had in respect of one-fourth share of the proceeds of sale.—BOLLING v. HOBDAV (1882), 31 W. R. 9.

1197. —.]—In 1887 C. & seven other persons formed a private partnership, & immediately afterwards C. conveyed to the eight partners certain real estate to hold unto & to the use of the grantees as part of the joint stock assets of the partnership. Shortly afterwards the business was converted into a limited liability co. & the Registrar of Joint Stock Cos. gave a certificate of incorporation as of the date of the formation of the partnership. There was no deed of conveyance of the property to the incorporated co., but in 1891 the co. conveyed it by deed to a new co. which in 1902

PART V. SECT. 3, SUB-SECT. 6.—C.

1195 i. Possession of one cestui que trust—Adverse to other cestuis que trust & trustees.]—Adverse possession of a widow, *cestui que trust*, as against the trustees, will inure for the benefit of her children, being also *cestuis que trust*, & cannot be set up against their title.—ARCHIBALD'S LESSEE v. BLOIS (1854), James, 307.—CAN.

1195 ii. —.]—A judgment appointing a *cestui que trust* as trustee cannot be extended beyond its ordinary meaning so as to take away a property of which the *cestui que trust* has become the absolute owner by adverse possession, & put it back into the trust estate.—MURCHISON v. MURCHISON (1889), 17 O. R. 254.—CAN.

1. Purchaser of land let into pos-

session.]—A purchaser of land let into possession under an agreement to purchase an estate in fee is not a *cestui que trust* of the vendor within Statute of Limitations, 1833 (c. 27). He is a tenant at will of the vendor for the purpose of acquiring title under the statute.—GLENNY v. RATHBONE (1900), 20 N. Z. L. R. 1.—N.Z.

Sect. 3.—When time begins to run: Sub-sect. 6, C.; sub-sects. 7 & 8, A., B. & C.]

agreed to sell it to a purchaser. Upon the purchaser's contention that the legal estate was outstanding in the eight grantees:—*Held*: the legal estate in the grantees as such trustees was, in view of the undisturbed possession of the new co. since 1891, barred & extinguished by operation of Real Property Limitation Acts, 1833 (c. 27), & 1874 (c. 57), & the vendors had therefore shown a good title.—*Re CUSSONS, LTD.* (1904), 73 L. J. Ch. 296; 11 Mans. 192.

SUB-SECT. 7.—YEARLY AND OTHER TENANCIES WITHOUT LEASE IN WRITING.

See Real Property Limitation Act, 1833 (c. 27), s. 8; & generally, LANDLORD & TENANT, Vol. XXXI., pp. 49 *et seq.*

1198. What tenancies included — Agreement not amounting to a lease.]—An entry in a parish book in the following form was signed by the ancestor of the lessor of pltf.: "I, J. H., do agree with the parish of W. to pay the overseers for the time being a rent of 1s. a year, on, etc., for the tenement I now inhabit; which tenement I do hereby acknowledge to belong to the parish at large; but in consideration of my having been at a considerable expense in adding to & repairing the said tenement, the parish doth consent that I shall continue in it during the term of my natural life, & that my wife shall have it for her life, provided I regularly pay the rent, & am not found guilty of endeavouring to deprive the parish of their right thereto":—*Held*: this was not a lease, so as to take the case out of Real Property Limitation Act, 1833 (c. 27), s. 8.—*DOE d. HUCK v. RIMALL* (1848), 10 L. T. O. S. 414; 12 J. P. Jo. 118.

1199. — — —.]—In 1824, B. was let into possession of a cottage under an agreement, purporting to be a demise by the churchwardens & overseers of the poor of the parish of P., at the rent of 1s. 6d. per week, B. to quit on one month's notice being given, etc. This agreement was signed only by one of the then overseers. The churchwardens did not sign, nor was there any evidence to show that they had assented to the agreement. B. never paid any rent or made any acknowledgment. B. afterwards sold the premises to deft.:—*Held*: in an action of ejectment brought, after twenty years, by the churchwardens & overseers for the time being against deft., as the agreement did not pass an interest it did not amount to a lease in writing within Real Property Limitation Act, 1833 (c. 27), s. 8, & consequently, the claim of the lessor of pltf. was barred by twenty years' adverse possession.—*DOE d. LANSDELL v. GOWER* (1851), 17 Q. B. 589; 21 L. J. Q. B. 57; 18 L. T. O. S. 135; 117 E. R. 1406.

Annotation:—*Mentd. Hodgson & Harland v. Hooper* (1860), 6 Jur. N. S. 911.

1200. Tenancy from year to year—Rent paid—Time runs from last payment.]—A. let land to B. by parol from year to year, reserving rent payable in Mar. & Nov. The last payment of rent was in 1846; rent again became due in Nov. but was not paid. A. died in Dec. of the same year & B. retained possession. In ejectment by A.'s heir:—*Held*: the time under Statute of Limitations ran from the last payment of rent, & not from

the death of A. as the case fell within sect. 8, & not within sect. 3.

Semble: if sect. 3 applied, A. was not shown to have continued in receipt of the rent till the time of her death, so as to bring the case within it.—*BAINES v. LUMLEY* (1868), 16 W. R. 674.

1201. — No rent paid—Time runs from termination of first year.]—*WEBB v. FORDRED* (1868), 32 J. P. 804.

1202. Holding under parol agreement for lease—Time runs from expiration of agreed term.]—*WHITE & WONTNER v. WHITEWOOD* (1897), 13 T. L. R. 409.

1203. Entry under void lease—Rent not paid for more than twelve years—Subsequent payment of rent—Statute runs afresh.]—*BUNTING v. SARGENT*, No. 1106, *ante*.

1204. — — — Time runs from last payment of rent.]—*WEBSTER v. SOUTHEY*, No. 1107, *ante*.

1205. What amounts to payment of rent—Payment by lessee—No payment by underlessee—Admission that underlessee tenant to lessee.]—Lessor of pltf. in ejectment proved a conveyance of the land to himself fifty years before the action brought: he had not occupied; but a person who had occupied proved payment of rent by himself to lessor of pltf., within thirty-three years of the action brought, at which time H. came into occupation. No lease to H. was shown. It was proved that, within twenty years before action brought, H., being in possession, declared that he was then paying rent to the lessor of pltf.; & that afterwards, & before action brought, deft. had said that he was tenant to H. H. died before the trial:—*Held*: pltf. was not barred by Real Property Limitation Act, 1833 (c. 27), s. 2, payment of rent being duly proved, by H.'s admission, so as to satisfy sect. 8, & deft. being bound by the evidence which was good as against H.; & sect. 14, which requires acknowledgments of title to be in writing, was inapplicable to this case.—*DOE d. SPENCER (EARL) v. BECKETT* (1843), 4 Q. B. 601; 12 L. J. Q. B. 236; 1 L. T. O. S. 143; 7 Jur. 532; 114 E. R. 1024.

SUB-SECT. 8.—LEASES IN WRITING.

A. Rent paid to Wrongful Claimant.

See Real Property Limitation Act, 1833 (c. 27), s. 9, & generally LANDLORD & TENANT, Vol. XXX., pp. 429 *et seq.*

1206. Time runs from payment of rent to wrongful claimant.]—Where property is under lease, adverse possession runs against the reversioner from the expiration of the lease, or from the time when the tenant pays rent to one claiming wrongfully to be entitled in immediate reversion.

A bill of discovery in aid of an action of ejectment, filed in 1840, stated that in 1776 A., being seised in fee, granted leases of the property which expired in 1825, & that pltf., as heir of A., was now entitled to the property, for the recovery of which he was about to bring an action of ejectment. Deft. pleaded Real Property Limitation Act, 1833 (c. 27), & averred that pltf. had not been in possession or received rents for more than twenty years before the bill was filed: that deft. had entered into possession as purchaser in fee-simple in 1819, & had ever since remained in peaceable possession as tenant in fee:—*Held*: this plea could not, in law, be sustained; for there being no allegation that the rent had been paid to any

PART V. SECT. 3, SUB-SECT. 8.—A.

1206 i. Time runs from payment of rent to wrongful claimant.]—*HAYES v. WOODLEY* (1852), 3 I. Ch. R. 142.—*IR.*

one wrongfully claiming to be entitled in reversion immediately expectant on the determination of the lease, *pltf.'s* right did not accrue until the expiration of the lease in 1825, or within twenty years from the filing of the bill.—*CHADWICK v. BROADWOOD* (1840), 3 Beav 308; 49 E. R. 121.

Annotation:—*Refld. Williams v. Allen* (1889), 5 T. L. R. 200.

1207. — Effect of distress by true owner.]—*GRANT v. ELLIS*, No. 1037, *ante*.

1208. Who is wrongful claimant—Receipt of rent by agent—Agent in fact true owner.]—Possession of an agent is possession of the principal; & the principal may acquire a possessory title to real estate by receiving the rents for twenty years through an agent, although that agent is the person really entitled to the estate. A person claiming, without any real title, to be entitled to land is a person “wrongfully” claiming within Real Property Limitation Act, 1833 (c. 27), s. 9; & that sect. applies, although the claim may be put forward under a mistake & without any improper intention to deprive others of their property.—*WILLIAMS v. POTT* (1871), L. R. 12 Eq. 149; 40 L. J. Ch. 775.

Annotation:—*Consd. Mitchell v. Mosley*, [1914] 1 Ch. 438.

1209. — Agent husband of true owner.]—B. died intestate in Dec. 1869, possessed of copyholds held of the manor of Taunton Dene, which by the custom of that manor devolved upon his widow. He left surviving him, besides his widow, his son P. & two daughters, of whom one was *pltf.* Mrs. H. The widow died on Jan. 7, 1870, having by her will devised to her two daughters “the share of her late husband’s estate” that she took or was entitled to on his decease, to be divided between them share & share alike. She also gave them pecuniary legacies, & declared that she made this provision for them in lieu of the freehold & copyhold lands which descended to her son on the intestacy of her husband; & she appointed H., the husband of Mrs. H., to be her exor. On her death it was erroneously assumed that the Taunton Dene copyholds had, upon B.’s death, devolved upon P. as his customary heir, & from that time the rents were collected by H., & applied to the maintenance of P. until he attained twenty-one, in 1878, when H. accounted to him & handed over the title-deeds. P. continued in possession till his death in 1890, having devised all his real estate to depts. The facts as to the devolution of the copyholds on B.’s death having been discovered, on Sept. 25, 1900, an action was brought by Mrs. H. & her husband in her right for a declaration that they were entitled to a moiety of the copyholds under the will of B.’s widow:—*Held*: assuming that the copyholds passed under the will, inasmuch as P. had been in possession through H. from the death of the widow, the action was barred by Real Property Limitation Act, 1874 (c. 57), s. 5, it not having been brought within thirty years of Jan. 7, 1870, when *pltf.’s* right first accrued.—*HOUNSELL v. DUNNING*, [1902] 1 Ch. 512; 71 L. J. Ch. 259; 86 L. T. 382.

1210. — Severance of reversion—Payment of rent to reversioner of greater part.]—The reversion upon a lease was severed by a conveyance to *pltf.*, in 1872, of a small part of the land out of which the rent issued. The rent was never legally apportioned; no rent was ever paid to *pltf.* in respect of his part of the reversion; but the whole rent continued to be paid, as before, by *deft.*, the

lessee, to H., the owner of the other part of the reversion, until Aug. 1875, when H. conveyed his part of the reversion to *deft.* The lease expired at Michaelmas, 1891:—*Held*: the payment of the whole rent to H. was not a payment to “some person wrongfully claiming to be entitled to” *pltf.’s* part of the land within Real Property Limitation Act, 1833 (c. 27), s. 9, & therefore time had not begun to run against *pltf.*—*LAYBOURN v. GRIDLEY* (1892), as reported in 61 L. J. Ch. 352; 40 W. R. 474; 36 Sol. Jo. 363.

Annotation:—*Apprvd. Mitchell v. Mosley*, [1914] 1 Ch. 438.

1211. —.]—*MITCHELL v. MOSLEY*, No. 1111, *ante*.

B. Leases for Lives.

1212. Time runs from death of last life.]—Where a tenant of copyholds held for lives, & it was proved that certain persons occupied the premises after that tenant, it was presumed that they held under the title of that tenant, so that the possession was not considered adverse until the dropping of the lives. Consequently, until they dropped, Statute of Limitations did not begin to run; & the lord bringing ejectment within twenty years from that time, was held entitled to recover.—*DEN d. SOUTHWOOD v. BLAKE* (1827), 6 L. J. O. S. K. B. 141.

C. Payment of Rent.

See Real Property Limitation Act, 1833 (c. 27), s. 9; sub-sect. 3, *C.*, *ante*.

1213. Effect of non-payment—Termination of tenancy may be presumed by jury.]—Non-payment of rent for the space of sixteen years, no demand being proved to have been made, is of itself sufficient evidence for a jury to presume the determination of a tenancy from year to year.—*STAGG v. WYATT* (1838), 1 Arn. 327; 2 Jur. 892.

1214. What is sufficient payment—Payment by lessee to owner of rentcharge.]—Where the lessor of *pltf.* in ejectment had purchased the reversion subject to a lease for years, at a rent of £4, & to an annuity of £4, & the tenant in possession under the lease had paid the sum of £4 yearly for upwards of twenty years to the annuitant, until his death in 1830, & subsequently to his widow:—*Held*: it was for the jury to consider in what character the tenant made such annual payment, & if as agent for his landlord, the possession was not adverse; & the right of the person entitled to the reversion was not barred by Real Property Limitation Act, 1833 (c. 27).—*DOE d. NEWMAN v. GODSILL* (1840), 4 Q. B. 603, n.; 5 Jur. 170; 114 E. R. 1025.

1215. — Payment of tithe rentcharge by tenant.]—By an agreement dated in 1891 D. agreed to let & B. agreed to take a farm which was subject to tithe rentcharges for a term which expired on Oct. 11, 1898, at a rent of £150 *per annum*, & in addition, to pay any amount assessed or charged by way of tithe rentcharge. B. entered into possession & so remained until the issue of a writ on June 9, 1911, in an action by the owners claiming possession of the farm, having throughout the whole period repaid to D.’s agent the amounts paid by him for the tithe rentcharge, but never having paid anything in respect of the £150 rent. B. pleaded his possession, & argued that, since by the Tithe Act, 1891 (c. 8),

PART V. SECT. 3, SUB-SECT. 8.—C.

m. Effect of non-payment.]—Non-payment of rent reserved on a lease, though for upwards of twenty years, does not bar the lessor from recover-

ing possession at the expiration of the term.—*SAUNDERS v. ANNESLEY* (LORD) (1804), 2 Sch. & Lef. 73.—*IR.*

n. —.]—So long as the relation of landlord & tenant subsists as a legal

relation, the landlord’s right to rent is not barred by non-payment, for however long a period. Statute of Limitation merely cuts off the recovery of more than six years’ arrears.—

Sect. 3.—When time begins to run: Sub-sect. 8, C. Sects. 4 & 5.]

his agreement as tenant to pay the tithe rentcharge was void, no inference adverse to his title could be drawn from the fact of such payments having been made by him:—*Held*: even assuming that the tenant's obligation to pay tithe rentcharge was void, regard must be had to the continuance of the practice obtaining during the term of repaying the tithe rentcharges to the landlord's agent, & B. was not paying them as owner of R. farm, but under the previous arrangement. The proper inference, therefore, to be drawn, was that there was a new agreement in 1899 creating the relationship of landlord & tenant between the parties under a tenancy from year to year, & pltf.'s title not being barred, they were entitled to a declaration of their title & an order for possession.—*NEALL v. BEADLE* (1912), 107 L. T. 646; 57 Sol. Jo. 77.

SECT. 4.—ENTRY AND CONTINUAL CLAIM.

See Real Property Limitation Act, 1833 (c. 27), ss. 10, 11.

1216. Entry amounting to resumption of possession—Entry animo possidendi.]—Where resp. applied to bring land under the provisions of the Real Property Act (26 Vict. No. 9) amended by 41 Vict. No. 18 & showed a complete documentary title & that he was in possession within twenty years before such application:—*Held*: the onus was on appls. who were caveators in possession to show that appt.'s title had been defeated, that is, that his entries on the land when vacant within the twenty years had been ineffective, in other words, had not been made *animo possidendi* or had been made after his title had been extinguished.—*SOLLING v. BROUGHTON*, [1893] A. C. 556; 63 L. J. P. C. 21.

1217. — Judgment.]—An ejectment & confession of lease, entry, & ouster, without further proceeding, not such an actual entry as will be sufficient to avoid a fine, or the Statute of Limitations.—*STERLING v. PENLINGTON* (1739), 9 Mod. Rep. 247; 88 E. R. 428, L. C.

1218. — Necessity for execution.]—In an action of ejectment by a mtgee. against a mtgor., to recover a house, pltf. gave in evidence the mtge. deed, which included the house & some other property, & judgment in ejectment for the mtged. property obtained in 1847; & showed that a paper, suggested to have been the declaration in ejectment, was, in that year, served on the mtgor. & that from 1847 the mtgor., who had till then been in possession of all the property, only held the house:—*Held*: there was no evidence of possession by the mtgee. or of the creation of a new tenancy under him in 1847, so as to prevent the operation of the Statute of Limitations.—*THORP v. FACEY* (1866), Har. & Ruth. 678; 35 L. J. C. P. 349; 12 Jur. N. S. 741.

PART V. SECT. 4.

1216 i. Entry amounting to resumption of possession—Entry animo possidendi.]—Where the true owner of land in possession of his right enters upon any of the land which is not in the actual possession of another, the entry is deemed to refer to the whole land.—*GREAT WESTERN RY. CO. v. LUTZ* (1881), 32 C. P. 166.—CAN.

1216 ii. — — —.]—*ARNOLD v. CUMMER* (1888), 15 O. R. 382.—CAN.

o. — — Nature of possession for jury to determine.]—*FRASER v. FRASER* (1864), 14 C. P. 70.—CAN.

1219 i. — Mere entry insufficient.]—*WILLIAMS v. McDONALD* (1874), 33 U. C. R. 423.—CAN.

1223 i. — Entry to give directions—Relating to user of land.]—*FOSTER v. EMERSON* (1854), 5 Gr. 135.—CAN.

1223 ii. — — —.]—*HENDERSON v. HARRIS* (1871), 30 U. C. R.

1219. — Mere entry insufficient.]—The mere entry upon land under a claim of right, & attempt to take possession, is not sufficient to prevent the operation of the Statute of Limitations.—*DOE d. LOVELL v. SMITH* (1844), 3 L. T. O. S. 53, 126.

1220. — — —.]—This [Real Property Limitation Act, 1833 (c. 27), s. 10] evidently applies to a mere entry as for the purpose of avoiding a fine which may be made by stepping on any corner of the land in the night time & pronouncing a few words without any attempt or intention or wish to take possession (*LORD CAMPBELL, C.J.*).—*RANDALL v. STEVENS* (1853), 2 E. & B. 641; 1 C. L. R. 641; 23 L. J. Q. B. 68; 21 L. T. O. S. 334; 18 Jur. 128; 118 E. R. 907.

Annotations:—Consd. Locke v. Matthews (1863), 13 C. B. N. S. 753; *Solling v. Broughton*, [1893] A. C. 556.

1221. — — —.]—*BRASSINGTON v. LLEWELLYN*, No. 1469, *post*.

1222. — Removal of portion of premises—Declaration to family of occupant.]—Deft. being in adverse possession of a hut & piece of land, the lord of the manor entered in the absence of deft., but in the presence of his family said he took possession in his own right, & he caused a stone to be taken from the hut, & a portion of the fence to be removed:—*Held*: these acts were not sufficient to disturb deft.'s possession, under Real Property Limitation Act, 1833 (c. 27), s. 10.—*DOE d. BAKER v. COOMBES* (1850), 9 C. B. 714; 19 L. J. C. P. 306; 15 L. T. O. S. 90; 137 E. R. 1073.

Annotation:—Refd. Worssam v. Vandenbrande (1868), 17 W. R. 53.

1223. — Entry to give directions—Relating to user of land.]—A person using land as a garden for more than twenty years, under permission from the owner to do so, in order to keep it from trespassers, the owner from time to time coming on the land & giving directions as to cutting of trees, etc.:—*Held*: (1) he had not got a title so as to enable him to sue a claimant under the owner for a forcible entry.

(2) Every time [the owner] put his foot on the land it was so far in his possession, that the statute would begin to run from the time when he was last upon it (*ERLE, C.J.*).—*ALLEN v. ENGLAND* (1862), 3 F. & F. 49.

1224. — Entire removal of adverse possession.]—If there be adverse possession of land, that adverse possession will be interrupted, so as to cause the Statute of Limitations to cease to run as against the true owner, by the true owner entering upon the land, asserting his rights, & entirely removing that which constituted the possession of the tortious possessor, & as a matter of law it is unnecessary for the true owner to go on & show that he continued in possession.—*WORSSAM v. VANDENBRANDE* (1868), 17 W. R. 53.

1225. — Entry after title extinguished.]—*SOLLING v. BROUGHTON*, No. 1216, *ante*.

1226. By whom entry may be made—Cestui que trust.]—The entry of *cestui que trust* is sufficient

360.—CAN.

1223 iii. — — —.]—*WORKMAN v. ROBB* (1882), 7 A. R. 389; 28 Gr. 243.—CAN.

p. By whom entry may be made.]—Occasional entries upon the land by a relative of deft. for the purpose of cutting hay for several years after deft. has left the land vacant has not the effect of continuing his actual possession beyond that time.—*BRITISH CANADIAN LOAN & AGENCY CO. v. FARMER* (1904), 15 Man. L. R. 593; 24 C. L. T. 273.—CAN.

to avoid the Statute of Limitations.—*GREE v. ROLLE* (1702), as reported in 1 *Ld. Raym.* 716; 91 *E. R.* 1377.

Annotation:—*Mentd.* *Weller v. Goyton & Walker* (1757), 1 *Burr.* 358.

SECT. 5.—POSSESSION BY CO-OWNER OR RELATIVE OF OWNER.

See Real Property Limitation Act, 1833 (c. 27), ss. 12, 13.

1227. Former law—Possession of one possession for all.—*PAGE v. SELBY* (1680), *Bull. N. P.*, 5th ed. p. 102, *N. P.*

1228. ———.]—*FORD v. GREY* (LORD) (1703), 6 *Mod. Rep.* 44; 1 *Salk.* 285; 87 *E. R.* 807.

1229. ———.]—*COPPINGER v. KEATING* (1781), cited 1 *East*, at p. 577; 102 *E. R.* 220.

Annotation:—*Refd.* *Peaceable d. Hornblower v. Read* (1801), 1 *East*, 568.

1230. ———.]—*DOE d. THORN v. PHILLIPS* (1832), 3 *B. & Ad.* 753; 1 *L. J. K. B.* 187; 110 *E. R.* 275.

Annotation:—*Mentd.* *Pickwell v. Spencer* (1871), *L. R.* 6 *Exch.* 190.

1231. ——— Necessity for adverse possession.—*READING v. ROYSTON* (1703), 2 *Salk.* 423; 2 *Ld. Raym.* 829; 91 *E. R.* 368.

Annotations:—*Refd.* *Story v. Windsor* (1743), 2 *Atk.* 630; *Hodgkinson v. Fletcher* (1781), 3 *Doug. K. B.* 31; *Doe d. Parker v. Gregory* (1834), 2 *Ad. & El.* 14. *Mentd.* *Allam v. Heber* (1748), 2 *Stra.* 1270; *Re Willatts, Willatts v. Artley*, [1905] 1 *Ch.* 378.

1232. ———.]—*STORY v. WINDSOR* (LORD) (1743), 2 *Atk.* 630; 26 *E. R.* 776, *L. C.*

Annotations:—*Mentd.* *Page v. Lever* (1794), 2 *Ves.* 450; *Jefferys v. Smith* (1820), 1 *Jac. & W.* 298; *Jackson v. Rowe* (1830), 9 *L. J. O. S. Ch.* 32; *Fripp v. Chard Ry., Fripp v. Bridgwater & Taunton Canal, etc. Co.* (1853), 11 *Hare*, 241.

1233. ———.]—*FAIRCLAIM d. EMPSON v. SHACKLETON* (1770), 2 *Wm. Bl.* 690; 5 *Burr.* 2604; 96 *E. R.* 406.

Annotations:—*Consd.* *Doe d. Fishar & Taylor v. Prosser* (1774), 1 *Cowp.* 217. *Refd.* *Peaceable d. Hornblower v. Read* (1801), 1 *East*, 568.

1234. ———.]—*DOE d. FISHAR & TAYLOR v. PROSSER* (1774), 1 *Cowp.* 217; 98 *E. R.* 1052; *sub nom.* *TAYLOR v. FISHER*, *Lofft*, 768.

Annotations:—*Consd.* *Peaceable d. Hornblower v. Read* (1801), 1 *East*, 568; *Cholmondeley v. Clinton* (1820), 2 *Jac. & W.* 1. *Distd.* *Doe d. Thorn v. Phillips* (1832), 3 *B. & Ad.* 753. *Refd.* *Chalmer v. Bradley* (1819), 1 *Jac. & W.* 51; *Price v. Bassett* (1836), *Donnelly*, 123; *Culley v. Doe d. Taylerson* (1840), 3 *Per. & Dav.* 539; *Doe d. Millett v. Millett* (1848), 11 *Q. B.* 1036.

1235. ———.]—*PEACEABLE d. HORNBLOWER v. READ* (1801), 1 *East*, 568; 102 *E. R.* 220.

Annotations:—*Refd.* *Doe d. Burrell v. Perkins* (1814), 3 *M. & S.* 271; *Doe d. Reed v. Taylor* (1833), 5 *B. & Ad.* 575.

PART V. SECT. 5.

1241 i. Effect of statute—Possession deemed separate—Possession of co-owner.—*BEAUMONT v. HOCHKINS* (1889), 15 *V. L. R.* 442.—*AUS.*

1241 ii. ———.]—*A.* being seized of a lot of land, died intestate in the year 1811, leaving five children. *B.*, his second son, took possession of the land, & exercised acts of ownership over the whole of it until 1824, when he conveyed it to *deft.*, who afterwards occupied it:—*Held*: *B.*'s possession was not limited to his undivided share, but extended over the whole lot, & after twenty years the right of the heirs of *A.*'s eldest son was barred by Statute of Limitations.—*DOE d. M'KAY v. ALLEN* (1851), 2 *All.* 191.—*CAN.*

1241 iii. ———.]—*RYERSE v. TEETER* (1878), 44 *U. C. R.* 8.—*CAN.*

1241 iv. ———.]—*VANVEL-*

SOR v. HUGHSON (1880), 45 *U. C. R.* 252.—*CAN.*

1241 v. ———.]—Where one of several tenants in common enters & dispossesses a trespasser, he is, as regards his co-tenants, in possession simply as any stranger would be; & such possession does not enure to the benefit of his co-tenants.—*HARRIS v. MUDIE* (1882), 7 *A. R.* 414; 30 *C. P.* 484.—*CAN.*

1241 vi. ———.]—*PRIDE v. RODGER* (1895), 27 *O. R.* 320.—*CAN.*

1241 vii. ———.]—*MYERS v. RUPORT* (1904), 4 *O. W. R.* 365; 25 *C. L. T.* 8; 8 *O. L. R.* 668.—*CAN.*

1241 viii. ———.]—Between co-owners the exclusive possession of one co-owner is to be regarded as adverse to the others, & such possession for the period fixed by Statute of Limitations is an absolute bar to the right to partition.—*MCDONALD v. RUDDER-*

1236. ———.]—*DOE d. HELLINGS v. BIRD* (1809), 11 *East*, 49; 103 *E. R.* 922.

Annotations:—*Refd.* *Culley v. Doe d. Taylerson* (1840), 3 *Per. & Dav.* 539. *Mentd.* *Re Mills, Mills v. Mille* (1886), 34 *Ch. D.* 186.

1237. ———.]—*DOE d. SOUTER v. HULL* (1822), 2 *Dow. & Ry. K. B.* 38; *sub nom.* *DOE d. — v. HALL*, 1 *L. J. O. S. K. B.* 37.

Annotations:—*Consd.* *Culley v. Doe d. Taylerson* (1840), 3 *Per. & Dav.* 539. *Refd.* *Gresley v. Mousley* (1859), 4 *De G. & J.* 78.

1238. ———.]—*DOE d. MILLETT v. MILLETT* (1848), 11 *Q. B.* 1036; 17 *L. J. Q. B.* 202; 11 *L. T. O. S.* 175; 12 *Jur.* 649; 116 *E. R.* 760.

Annotation:—*Mentd.* *A.-G. v. Horner* (No. 2), [1913] 2 *Ch.* 140.

1239. Effect of statute—Provisions retrospective.—*CULLEY v. DOE d. TAYLERSON*, No. 1017, *ante*.

1240. ———.]—Real Property Limitation Act, 1833 (c. 27), s. 12, operates to make the possession of tenants in common a separate possession, from the time they first became tenants in common, & not merely from the time of the passing of that statute.—*DOE d. HOLT v. HORROCKS* (1844), 1 *Car. & Kir.* 566.

1241. ——— Possession deemed separate—Possession of co-owner.—(1) By a marriage settlement a husband became entitled to the moiety of an estate in fee, which moiety originally belonged to his wife. During the coverture the other moiety descended to the wife as heiress-at-law of her brother.

The wife afterwards died in the husband's lifetime without issue; & the husband from the time of her death in Apr. 1815, till a sale of the estate in Nov. 1838, remained in uninterrupted possession of the entire property, without making any acknowledgment of the title of any other person:—*Held*: this was a case falling within Real Property Limitation Act, 1833 (c. 27), s. 15; & notwithstanding the husband's possession of the moiety which descended to the wife might not be adverse, the heir-at-law of the wife not having made his claim within five years after the passing of the Act, was barred by the statute.

(2) A constructive trust may be barred by long acquiescence.—*Re MANCHESTER GAS ACT, Ex p. HASELL* (1839), 3 *Y. & C. Ex.* 617; 3 *Jur.* 1101; 160 *E. R.* 848.

1242. ———.]—*CULLEY v. DOE d. TAYLERSON*, No. 1017, *ante*.

1243. ———.]—*DOE d. HOLT v. HORROCKS*, No. 1240, *ante*.

1244. ———.]—In ejectment, by the heir of *J.* for two acres of land, it appeared that the father of *J.* more than fifty years before, had

HAM (1921), 54 *N. S. R.* 258; 56 *D. L. R.* 589.—*CAN.*

1241 ix. ———.]—Adverse possession as between tenants-in-common depends not on a severance of the tenancy-in-common by partition, but on exclusive occupation by one co-tenant amounting to an ouster of the other.—*AMRITA RAVJI v. SHRIDHAR NARAYAN* (1908), 1 *L. R.* 33 *Bom.* 317.—*IND.*

1241 x. ———.]—*STEWART v. CONYNTHAM (MARQUIS)* (1851), 1 *I. Ch. R.* 534.—*IR.*

1241 xi. ———.]—*MURPHY v. MURPHY* (1864), 11 *L. T.* 189.—*IR.*

1241 xii. ———.]—The open, peaceable, *bona fide*, possession as of right of a definite share of an undivided farm for the period of prescription entitles the possessor to claim registration of title to such share.—*Ex p. MALHERBE* (1904), 14 *C. T. R.* 614.—*S. AF.*

Sect. 6.—Acknowledgment of title. Sect. 7: Subsects. 1 & 2.]

pltf. is barred by the Statute of Limitations, or whether the effect of the statute has been prevented by a tenancy at will created between him & deft., a letter, written within twenty years of action, to pltf., by deft.'s land agent or rent receiver, inquiring on what terms pltf. will let the property:—*Held*: not to be an acknowledgment of tenancy within Real Property Limitation Act, 1833 (c. 27), s. 14, not being by the "party in possession."

(2) Although in an ordinary case it might, coupled with subsequent possession, be evidence of a tenancy:—*Held*: not to be so where the parties were tenants in common, so that deft.'s possession would have been lawful, independent of any consent on the part of pltf. *Semble*: (3) to prove a tenancy at will under the statute, it is not sufficient that there has been a tacit acquiescence by the owner in an occupation by another, but that there should appear to have been some actual assent to it, or a recognition of it as a tenancy.—*LEY v. PETER* (1858), 3 H. & N. 101; 27 L. J. Ex. 239; 30 L. T. O. S. 367; 6 W. R. 437; 157 E. R. 403.

1262. — Must be by party in possession—Acknowledgment by agent.]—LEY v. PETER, No. 1261, *ante*.

1263. — Acknowledgment by defendant's predecessor in title.]—In 1871 a piece of land alongside a highway leading over a public bridge was enclosed & allowed to be occupied by W., who acknowledged the title of the improvement comrs. the highway authority. W. died in 1890, & deft. had occupied since & claimed to have acquired a title under the Statute of Limitations. There was evidence that before 1871 the piece of land had been used for loading & unloading barges, & for turning cattle on when two lots of cattle would otherwise have met on the bridge:—*Held*: the piece of land formed part of an ancient highway & no title had been acquired by deft.—*ST.*

A verbal offer by a person in adverse possession of land to lease it from the owner, or bidding for the land at an auction of it by the owner, is not an acknowledgment of title within Statute of Limitations.—*DOE d. ST. JOHN CITY (MAYOR, ETC.) v. HASSON* (1857), 3 All. 451.—*CAN.*

g. — Acknowledgment to third parties not sufficient.]—RUTTAN v. SMITH (1875), 35 U. C. R. 165.—*CAN.*

h. — —.]—HAYES v. COLEMAN (1889), Cass. Dig., 2nd ed. 833.—*CAN.*

k. — —.]—NUTSON v. HANRAHAN, [1924] 3 D. L. R. 173; *affg.*, 53 O. L. R. 99.—*CAN.*

l. — Agreement to purchase.]—Where the party in possession signed an agreement to purchase the land from pltf.:—*Held*: this, being an acknowledgment of pltf.'s title by the person in possession, took the case out of the statute.—*CAHUAC v. COCHRANE* (1877), 41 U. C. R. 436.—*CAN.*

m. — Acknowledgment to agent.]—GREENSHIELDS v. BRADFORD (1881), 28 Gr. 299.—*CAN.*

n. — —.]—CANADA CO. v. DOUGLAS (1877), 27 C. P. 339.—*CAN.*

o. — —.]—FERGUSON v. WHELAN (1877), 28 C. P. 112.—*CAN.*

p. — —.]—A proposal to purchase is an acknowledgment of title within 3 & 4 Will. 4, c. 27, s. 14, & the solr. having carriage is an agent within that sect. to receive it.—*JOHNSTON v. SMITH*, [1896] 2 I. R. 82.—*IR.*

q. — Application for leave to cut timber.]—HOOKER v. MORRISON (1881), 28 Gr. 369.—*CAN.*

r. — Offer to purchase.]—DONOVAN v. HERBERT (1884), 4 O. R. 635.—*CAN.*

t. — Payment for use & occupation.]—The only evidence as to interruption of prescription consisted of a letter enclosing a cheque in payment for "use of your interest in C. River this year, with the understanding that the navigation of the river is not to be prevented":—*Held*: the memorandum was too vague to serve as an interruptive acknowledgment.—*CAP ROUGE PIER, WHARF & DOCK CO. v. DUCHESNAY* (1910), 44 S. C. R. 130; 31 C. L. T. 257.—*CAN.*

a. — Tenants in common—Action in joint names.]—Where one of two tenants in common had possession of the land as against his co-tenant, the bringing of an action of ejectment in their joint names, & entry of judgment therein, gives a fresh right of entry to both & interrupts the prescription accruing in favour of the tenant in possession.—*HANDLEY v. ARCHIBALD* (1898), 32 N. S. R. 1; *affd. on appeal*, 30 S. C. R. 130.—*CAN.*

b. — Unexecuted decree for possession.]—DERHAM v. DOYLE, [1914] 2 I. R. 135.—*IR.*

1264 i. Acknowledgment after title extinguished.]—An acknowledgment in writing after the twenty years will not revive a title which the twenty years' possession has extinguished.—*DOE d. PERRY v. HENDERSON* (1847), 3 U. C. R. 486.—*CAN.*

1264 ii. —.]—MCDONALD v. MCINTOSH (1852), 8 U. C. R. 388.—*CAN.*

1264 iii. —.]—MCINTYRE v. CANADA CO. (1871), 18 Gr. 367.—*CAN.*

IVES CORPN. v. WADSWORTH (1908), 72 J. P. 73; 6 L. G. R. 306.

1264. Acknowledgment after title extinguished.]—SANDERS v. SANDERS, No. 1250, *ante*.

1265. Acknowledgment for part of period—Presumption of acknowledgment as to remainder.]—SANDERS v. SANDERS, No. 1250, *ante*.

1266. Evidence rebutting acknowledgment—Admissibility of fresh evidence—On appeal.]—SANDERS v. SANDERS, No. 1250, *ante*.

Redemption of mortgage.]—See Sect. 12, subsect. 2, B., post.

SECT. 7.—DISABILITIES.

SUB-SECT. 1.—IN GENERAL.

See Real Property Limitation Act, 1833 (c. 27), ss. 3, 4, 7–9, 14; Real Property Limitation Act, 1874 (c. 57), ss. 1, 2.

1267. Heir under disability—Death of ancestor under disability—Heir protected.]—COTTON'S CASE (1591), 1 Leon. 211; 74 E. R. 194; *sub nom.* *SMY v. JUNE*, Cro. Eliz. 219.

Annotations:—Consd. *Benyon v. Evelyn* (1664), O. Bridg. 324. *Refd.* *Dighton v. Greenvil* (1690), 2 Vent. 321. *Mentd.* *Foot v. Berkley* (1670), 1 Vent. 83; *Bagshaw v. Spencer* (1743), 2 Atk. 570; *Goodright d. Fowler v. Forrester* (1807), 8 East, 552.

1268. — Continuing until death—Right of heir to heir.]—A. seised in fee of lands dies leaving B. his heir, a *feme covert*. Upon his death a stranger makes a tortious entry on the lands, continues in possession, & levies a fine *sur cognizance de droit come ceo* with proclamations. B. afterwards dies under coverture, no entry having been made, on her behalf to avoid the fine, leaving C. her heir of the age of twenty-one, of sound mind, out of prison, & within the realm. The fine is a bar to the right of C., unless he make his claim within five years after the death of B.

The rights of those persons who were under disabilities & of their heirs, were saved as long as

1264 iv. —.]—BEIGLE v. DAKE (1877), 42 U. C. R. 250.—*CAN.*

1264 v. —.]—HILLOCK v. SUTTON (1893), 2 O. R. 548.—*CAN.*

1264 vi. —.]—Re M'CLURE & GARRETT'S CONTRACT, [1899] 1 I. R. 225.—*IR.*

1264 vii. —.]—Where the adverse possession of land has continued beyond the period fixed by Statute of Limitations, no subsequent acknowledgment of title or payment of rent will revive the title.—*KAWA v. CAMERON*, [1916] N. Z. L. R. 703.—*N.Z.*

c. When time begins to run.]—The moment after an acknowledgment of title within the meaning of Statute of Limitations is made, the time begins to run against the person to whom it is made.—*BURROUGHS v. M'CREEIGHT* (1844), 1 Jo. & Lat. 290.—*IR.*

PART V. SECT. 7, SUB-SECT. 1.

d. Absence beyond the seas.]—In ejectment, absence of pltf. beyond the seas at the time when his right accrued, is a disability which extends the period of limitations.—*HENLEY v. DUMPHY* (1878), 4 V. L. R. (L.) 291.—*AUS.*

e. —.]—Pltf. being charged with high treason, fled from the Province, leaving his family on the property in question, & they afterwards joined him in the enemy's country:—*Held*: the circumstances of his leaving should have been considered by the jury as conclusive of an intention to abandon the possession; & it could not be said that, leaving his family in possession was the same as remaining

the disabilities continued, & five years after, but no longer; therefore, the heir not being himself disabled, was barred unless he pursued his right within the five years after it accrued by the death of his ancestor dying under a disability; & consequently pltf. in this case was prevented by the fine from recovering the lands in question (*per CUR.*).—*DILLON v. LEMAN* (1795), 2 Hy. Bl. 584; 126 E. R. 717.

1269. Redemption of mortgage—Disability provisions inapplicable.—*RAFFETY v. KING*, No. 1398, *post*.

1270. ———.]—Under the Real Property Limitation Act, 1874 (c. 57), the twelve years' bar to a redemption suit from the time when the mtgee. took possession or from the last written acknowledgment is absolute & not to be extended by reason of any disability of the mtgor.—*FORSTER v. PATTERSON* (1881), 17 Ch. D. 132; 50 L. J. Ch. 603; 44 L. T. 465; 29 W. R. 463.

1271. ———.]—The rule that prevailed prior to Real Property Limitation Act, 1833 (c. 27), that no lapse of time barred the right of a mtgor. of lands to redeem the whole provided he held possession of part has been abolished by sect. 28 of the statute. Accordingly, where a mtgee. has been in undisturbed possession of part of the land comprised in the mtge. for upwards of twenty years, the right of the mtgor. to redeem was held to be barred by that sect., although he held possession of the remainder of the land. Real Property Limitation Act, 1833 (c. 27), s. 16, saving the rights of persons under disability, such as absence beyond seas, does not apply as between a mtgor. & mtgee.—*KINSMAN v. ROUSE* (1881), 17 Ch. D. 104; 50 L. J. Ch. 486; 44 L. T. 597; 29 W. R. 627.

SUB-SECT. 2.—INFANCY.

See Real Property Limitation Act, 1833 (c. 27), ss. 3, 4, 7–9, 14; Real Property Limitation Act, 1874 (c. 57), ss. 1, 2, 3.

1272. Delay after disability removed—Majority attained—No entry for six years.—An infant who neglects to enter six years after he comes of age is as much barred by the Statute of Limitations from bringing a bill for an account of profits, as he is from an action of account at common law.—

himself; the discontinuance commenced when they left; &, being abroad then, pltf. was entitled to the benefit of the disability.—*BUTLER & MCNEIL v. DONALDSON* (1855), 12 U. C. R. 255.—*CAN.*

f. ———.]—The right given to persons beyond seas to bring an action for the recovery of land within ten years after the disability ceases does not suspend the right of action during the person's absence.—*DOE d. FITZGERALD v. MAXWELL* (1865), 6 All. 233.—*CAN.*

g. ———.]—*TWISS v. NOBLETT* (1869), 4 I. R. Eq. 64.—*IR.*

h. ——— *Termination of disability—Onus of proof.*—*TULLIDGE v. ORR* (1855), 1 P. E. I. 108.—*CAN.*

k. ———.]—*CARR v. THOMAS* (1892), 10 N. Z. L. R. 641.—*N.Z.*

l. Period of limitation.—Forty years are allowed for the bringing of actions for land or rent in case of disabilities. The term of forty years, however, is not a universal bar. Twenty years forms the regular bar. But the twenty years run only from the time the right first accrued.—

PETRE v. MAILLOUX (1858), 8 C. P. 334.—*CAN.*

PART V. SECT. 7, SUB-SECT. 2.

m. Delay after disability removed—Majority attained—No entry for statutory period.—*SHAW v. SHAW* (1858), 8 C. P. 270.—*CAN.*

n. ———.]—*SHEA v. BURCHELL* (1894), 27 N. S. R. 235.—*CAN.*

o. ———.]—*LAMBERT v. BROWNE* (1871), 1 I. R. 5 C. L. 218.—*IR.*

p. ———.]—*Re MAGUIRE & M'CLELLAND'S CONTRACT*, [1907] 1 I. R. 393; 42 I. L. T. 182.—*IR.*

1273 i. Possession on behalf of infant—Time does not run—Possession by parent.—There is no irrebuttable presumption in the case of a parent & infant child entitled to undivided shares in land as tenants in common, that the parent in possession holds as "bailiff" in respect of the share of the child out of possession; the question for whom the possession was taken & held is always a question of fact, though ordinarily the finding should be that the possession of the parent is that of the child.—*FRY & MOORE v. SPEARE*

LOCKEY v. LOCKEY (1719), Prec. Ch. 518; 1 Eq. Cas. Abr. 304; 24 E. R. 232, L. C.

Annotations:—*Reid. Skirme v. Meyrick* (1739), 2 Com. 700; *Hony v. Hony* (1824), 1 Sim. & St. 568; *Hicks v. Sallitt* (1854), 3 De G. M. & G. 782; *Knox v. Gye* (1872), L. R. 5 H. L. 656; *Friend v. Young*, [1897] 2 Ch. 421; *Henry v. Hammond* (1913), 108 L. T. 729. *Mentd. Sturt v. Mellish* (1743), 2 Atk. 610; *Maddison v. Alderson* (1883), 8 App. Cas. 467.

1273. Possession on behalf of infant—Time does not run—Possession by parent.—*L.* died seised of freehold premises, leaving a widow, & a son by her, R., his heir-at-law, twelve years old. The widow entered into receipt of the rents, & two years afterwards married again, & went to reside on the premises, which she occupied with her second husband during his life, & from his death until her own, the whole period of such occupation by her being more than fifty years. During her occupation she frequently said that the premises, after her death, belonged to R.; but she left a will, devising the property to H., her son by her second husband, & describing it as having descended to her from her mother. After her death H., then in possession, promised that he would sign an agreement to rent the premises under R. but he never did sign it:—*Held*: upon these facts, a jury was not bound to find an adverse possession by the widow during the fifty years.—*DOE d. ROFFEY v. HARBROW* (1833), 3 Ad. & El. 67, n.; 1 Nev. & M. K. B. 422; 111 E. R. 338.

1274. ———.]—In 1832 pltf., then an infant, became entitled to real estate in fee & his father entered into possession. In 1836, pltf. attained his majority. In 1852 the father died, having continued in possession of the property down to the time of his death. In 1854 pltf. filed his bill against the devisees of his father for an account of the rents & profits:—*Held*: the entry of the father in 1832 must be taken to have been as guardian of the infant & not as a trespasser; & the Statute of Limitations, therefore, could not be set up.—*THOMAS v. THOMAS* (1855), 2 K. & J. 79; 25 L. J. Ch. 159; 1 Jur. N. S. 1160; 4 W. R. 135; 69 E. R. 701.

Annotations:—*Consd. Pelly v. Bascombe* (1863), 4 Giff. 390; *Tinker v. Kodwell* (1893), 69 L. T. 591. *Reid. Wall v. Stanwick* (1887), 34 Ch. D. 763; *Corea v. Appuhamy*, [1912] A. C. 230; *Muttunayagam v. Brito*, [1918] A. C. 895. *Mentd. Re Biss, Biss v. Biss*, [1903] 2 Ch. 40.

1275. ———.]—A father was entitled in fee to an undivided moiety of gavelkind land, & other moiety of which belonged to his wife in

(1915), 9 O. W. N. 196; 34 O. L. R. 632.—*CAN.*

1273 ii. ———.]—*MACCOR-MACK v. COURTNEY*, [1895] 2 I. R. 97.—*IR.*

1273 iii. ———.]—*DUNCAN v. DUNCAN*, [1920] N. Z. L. R. 108.—*N.Z.*

Possession by guardian.—During minority the guardian is a trustee of the lands for the infant, & cannot acquire a title to them by possession, but after the majority of the infant the possession of the guardian changes its character & becomes that of a stranger, & Statute of Limitations runs in favour of the guardian or those claiming under him.—*CLARKE v. MACDONELL* (1890), 20 O. R. 564.—*CAN.*

r. ——— *Possession by stranger.*—*MCMAHON v. HASTINGS*, [1913] 1 I. R. 395.—*IR.*

t. Possession not as bailiff of infant—Time runs from date of adverse possession.—*McKINNON v. BRODIE* (1874), 9 N. S. R. 410.—*CAN.*

a. ———.]—Where a person enters upon the lands of infants, not being a father or guardian, or standing

Sect. 7.—Disabilities: Sub-sects. 2, 3, 4 & 5.
Sect. 8.]

fec. She died in May, 1870, leaving two sons, S. & J. J. was then an infant. He attained twenty-one in 1877 & died in May, 1884. On the mother's death her moiety descended to her two sons in equal shares, as her co-heirs by the custom of gavelkind, but the father was by that custom entitled to a moiety of the rents of her moiety so long as he remained a widower. On the mother's death he entered into the receipt of the whole of the rents of her moiety, & continued in possession, without accounting to his sons or acknowledging their title in writing, for more than twelve years. On the death of J., 1884, his interest descended to his brother S. as heir of the mother. In Feb. 1884, the father had married a second wife, & in Nov. 1884, he died:—*Held*: (1) as to that one-eighth of the property to which J. became entitled in possession on the death of his mother, the father must be taken to have entered into receipt of the rents as bailiff for his infant son, & consequently the title of J. was not barred by Real Property Limitation Act, 1833 (c. 27), s. 12, & his brother S. was entitled to that one-eighth; (2) as to S.'s own one-eighth the same presumption did not arise & there being no evidence that the father had received rents as agent for S., or had before the expiration of the statutory period acknowledged his title in writing, or accounted to him for the rents, the title of S. to that one-eighth was barred by the statute.—*Re HOBBS, HOBBS v. WADE* (1887), 38 Ch. D. 553; 57 L. J. Ch. 184; 58 L. T. 9; 36 W. R. 445.

Annotations:—As to (1) *Appld. Tinker v. Rodwell* (1893), 69 L. T. 591. *Generally, Reifd. Garner v. Wingrove* (1905), 53 W. R. 588.

1276. — — — — —.]—Where a father has entered into possession of real property as natural guardian, & on behalf of his infant son, the mere fact of the coming of age of the son will not alter the nature of the father's possession: & if nothing else has been done to change the character of the possession, Statute of Limitations will not begin to run in favour of a person claiming against the son, until the death of the father.—*TINKER v. RODWELL* (1893), 69 L. T. 591; 9 T. L. R. 657; 8 R. 1.

1277. — — — — — Possession by uncle.]—Testator left two infant daughters his co-heiresses-at-law, & appointed his brother exor. of his will. He died in 1833. The brother entered into possession, kept down the interest on a mtge., & made permanent improvements. He died in

1858, when his widow as administratrix continued in possession, paid off the mtge. & procured a transfer of it to herself. One of the co-heiresses died in 1834, an infant, the other married in 1843, being then still an infant, & she & her husband now filed this bill for an account & to redeem the mtge.:—*Held*: there had been no adverse possession by the uncle against his nieces, & decreed accordingly.—*PELLEY v. BASCOMBE* (1865), 5 New Rep. 231; 34 L. J. Ch. 233; 11 L. T. 722; 11 Jur. N. S. 52; 13 W. R. 306, L. J.J.

1278. — — — — — Possession by purchaser.]—*YOUNG v. HARRIS*, No. 1347, *post*.

1279. — — — — —.]—A party in possession of an infant's estate, under a voidable deed, treated as his bailiff, & made to account for the rents for more than six years before the filing of the bill.—*NANNEY v. WILLIAMS* (1856), 22 Beav. 452; 52 E. R. 1182.

Annotations:—*Reifd. Pelly v. Bascomb* (1863), 4 Clif. 390. *Mentd. Hall v. Hall* (1873), 8 Ch. App. 430.

Protection of infant's property generally.]—See INFANTS, Vol. XXVIII., pp. 190 *et seq.*

SUB-SECT. 3.—COVERTURE.

See Real Property Limitation Act, 1874 (c. 57), s. 3.

See, now, Married Women's Property Act, 1882 (c. 75), ss. 1, 5, 12.

1280. Marriage & title to property accruing before 1883—Disability removed by discovery.]—In an action for a forfeiture under 32 Hen. 8, c. 9, s. 2, against the buyer of a right of entry, since Real Property Act, 1845 (c. 106), s. 6, the *onus* is upon pltf. to prove not only that the title purchased was bad, but also that the buyer knew that it was "pretenced," i.e. fictitious, or bad in fact. The mere fact that the right purchased was barred by the Statute of Limitations at the time of the purchase does not necessarily render the title "pretenced" within 32 Hen. 8, c. 9.

As far as one of the co-parceners was concerned, the statute had not run because six years had not elapsed since the death of her husband (whom she married in 1855, & who died in 1876). He right was therefore alive in 1880 by Real Property Limitation Act, 1874 (c. 57), s. 3 (*DENMAN, J.*).—*KENNEDY v. LYELL* (1885), 15 Q. B. D. 491; 53 L. T. 466; 1 T. L. R. 494; 1 Cab. & El. 584.

1281. — — — — — Disability of coverture operative.]—*HOUNSELL v. DUNNING*, No. 1209, *ante*.

in any fiduciary relation to the owner, & remains in possession for the statutory period, the rights of the infants will be barred.—*Re TAYLOR* (1881), 28 Gr. 640.—**CAN.**

b. — — — — — Possession by aunt.]—*MOLONEY v. MOLONEY* (1924), 58 I. L. T. 81.—**IR.**

c. When time begins to run—From majority.]—The right of a minor to sue may be exercised by any one duly appointed on his behalf during his minority, or by the infant himself, within the time limited by Limitation Act, 1877, after attaining his majority.—*KHODABUX v. BUDREE NARAIN SINGH* (1881), 1 L. R. 7 Calc. 137; 8 C. L. R. 306.—**IND.**

d. — — — — —.]—*MAHARAJA JAGADINDRA NATH ROY BAHADUR v. RANI HEMANTA KUMARI DEBI* (1904), 20 T. L. R. 718.—**IND.**

e. Infant purchaser—Time continues to run.]—Where a man permits another to enter into possession of a piece of land, & eighteen months after-

wards conveys it to an infant, the latter cannot on the ground of disability extend the period of limitation beyond twenty years.—*STEVENS v. GOODALL* (1883), 2 N. Z. L. R. (S. C.) 5.—**N.Z.**

PART V. SECT. 7, SUB-SECT. 3.

1. Suspension of cause of action—Married infant—Time runs from removal of disability.]—*STARKIE v. PARKS* (1849), 1 All. 556.—**CAN.**

g. — — — — —.]—*DOE d. ESTABROOKS v. HARRIS* (1850), 2 All. 42.—**CAN.**

h. — — — — —.]—*INGALLS v. REID* (1865), 15 C. P. 490.—**CAN.**

k. Removal of disability—By statute.]—In an action of trespass:—*Held*: the wife's disability of coverture having been removed in 1876, by 38 Vict. c. 16, Statute of Limitations ran against her from that time, & deft. had acquired a good title by possession against her.—*CAMERON v. WALKER*

(1889), 19 O. R. 212.—**CAN.**

l. — — — — —.]—*MCDONALD v. RUDDERHAM* (1921), 54 N. S. R. 258; 56 D. L. R. 589.—**CAN.**

m. — — — — — Separate property.]—Notwithstanding R. S. O., 1877, c. 125, s. 20, a married woman is still entitled under 21 Jac. 1, c. 16, to bring the action in respect of her separate property within six years after becoming discoverd.—*CARROLL v. FITZGERALD* (1889), 5 A. R. 322.—**CAN.**

n. — — — — —.]—*BOOTH v. PURSER* (1838), 1 I. Eq. R. 43.—**IR.**

o. Possession of wife—Possession for husband.]—When a husband & wife are living together, the possession of any property on which they are living or which is occupied by them must ordinarily be attributed to the husband as the head of the family, & the wife cannot acquire title to the property for herself by length of possession under Real Property Limitation Act, 1902.—*CALLAWAY v. PLATT* (1907), 17 Man. L. R. 485; 6 W. L. R. 467.—**CAN.**

SUB-SECT. 4.—DISABILITY AFTER TIME HAS
BEGUN TO RUN.

1282. Time continues to run—Notwithstanding disability.]—FLOYD v. MANSELL (1726), Gilb. Ch. 185; 25 E. R. 130, L. C.

Annotation :—Mentd. Bradish v. Gee (1754), Amb. 229.

1283. ———.]—KNOWLES v. SPENCE (1729), Mos. 225; 1 Eq. Cas. Abr. 315; 25 E. R. 362, L. C.

1284. ———.]—Deft. in replevin avowed the taking of the goods for arrears of an ancient quit rent issuing out of a tenement held of him as lord of a certain manor by fealty & 9s. rent. Pltf. pleaded *non tenuit*. The last payment was made on Jan. 25, 1825, for rent due on Oct. 11, 1824. The distress was made on May 13, 1845 :—*Held* : by the operation of Real Property Limitation Act, 1833 (c. 27), ss. 2, 3, & 34, the rent was extinguished by the lapse of twenty years from the day on which the last payment was made; & the limitation need not be pleaded specially, but was available under the plea of *non tenuit*.

The inconvenience of a person coming under disability after the receipt of rent, & before the right of action, etc., accrued, was strongly pressed, & is indeed more substantial; but it is to be observed, that the legislature, in passing this Act, has in a much more important instance left the rights of persons under disability unprotected, inasmuch as sect. 42, which bars the recovery of arrears after six years, has no proviso in favour of such persons. The circumstance, therefore, of their not being perfectly protected by sect. 16, does not afford a ground for presuming against a construction which involves that consequence (PATTESON, J.).—DE BEAUVOIR v. OWEN (1850), 5 Exch. 166; 19 L. J. Ex. 177; 14 L. T. O. S. 490; 14 J. P. 174; 155 E. R. 72, Ex. Ch.; *affg.* S. C. *sub nom.* OWEN v. DE BEAUVOIR (1847), 16 M. & W. 547.

Annotations :—*Refd.* Chichester v. Hall (1851), 17 L. T. O. S. 121; Zouche v. Dalbiac (1875), L. R. 10 Exch. 172. *Mentd.* Irish Land Commission v. Grant (1884), 10 App. Cas. 14; Howitt v. Harrington, [1893] 2 Ch. 497; Jones v. Withers (1896), 74 L. T. 572.

1285. ———.]—MURRAY v. WATKINS, No. 1293, *post*.

1286. ———.]—Where time under Real Property Limitation Act, 1874 (c. 57), has commenced to run in favour of a person in possession of land against an owner who is under no disability, the running of the time is not interrupted by the infancy of a person succeeding to the owner's interest, even if the legal title is in trustees.—GARNER v. WINGROVE, [1905] 2 Ch. 233; 74 L. J. Ch. 545; 93 L. T. 131; 53 W. R. 588; 49 Sol. Jo. 582.

1287. Disability of one co-parcener—Title of other not preserved.]—If an estate descend to parceners, one of whom is under a disability, which continues more than twenty years, & the other does not enter within twenty years, the disability of the one does not preserve the title of the other after the twenty years elapsed.—ROE d. LANGDON v. ROWLSTON (1810), 2 Taunt. 441; 127 E. R. 1149.

PART V. SECT. 7, SUB-SECT. 4.

1282 i. Time continues to run—Notwithstanding disability.]—Pltf. proved possession of nine acres of land cleared by him since 1847, more than twenty years. Deft.'s father died in 1850,

deft. being then only about four years old :—*Held* : pltf. as to this portion was clearly entitled by possession, for the statute having begun to run against deft.'s father, would continue as against deft., notwithstanding her infancy.—WIGLE v. STEWART (1870), 28 U. C. R.

SUB-SECT. 5.—SUCCESSIVE DISABILITIES.

See Real Property Limitation Act, 1833 (c. 27), s. 18, as amended by Real Property Limitation Act, 1874 (c. 57), s. 9.

1288. Whether extended period allowed—Disability in different persons.]—Real Property Limitation Act, 1833 (c. 27), s. 18, which provides that when any person who was under disability at the time of his right to bring an action to recover any land first accrued shall die under disability, no time to bring an action to recover the said land, beyond the period of twenty years after the right first accrued, or ten years after the time at which such person died shall be allowed, by reason of the disability of any other person, is so far retrospective as to extend to a case where the first person under disability died before the passing of the Act.—DEVINE v. HOLLOWAY (1861), 14 Moo. P. C. C. 290; 4 L. T. 190; 9 W. R. 642; 15 E. R. 314, P. C.

1289. ———.]—MURRAY v. WATKINS, No. 1293, *post*.

1290. ——— Disability in one person.]—When the person to whom the right to bring an action for the recovery of land accrues is under a disability, & before the removal of that disability, the same person falls under another disability, Real Property Limitation Act, 1833 (c. 27), s. 16, preserves his right to bring an action until ten years after the removal of the latter disability. In 1833 pltf. became entitled to land, which deft. then entered into possession of, & continued to occupy until action brought. At the time when pltf.'s title accrued she was an infant; she married under age, & continued under coverture until the time of bringing this action in 1870. In an action by herself & her husband in her right to recover the land :—*Held* : the action was maintainable, notwithstanding that more than twenty years had elapsed since the title accrued, & more than ten years since the removal of the disability of infancy.—BORROWS v. ELLISON (1871), L. R. 6 Exch. 128; 40 L. J. Ex. 131; 24 L. T. 365; 19 W. R. 350.

1291. ——— Redemption of mortgage.]—FORSTER v. PATTERSON, No. 1270, *ante*.

SECT. 8.—ESTATES TAIL.

See Real Property Limitation Act, 1833 (c. 27), ss. 21, 22.

1292. Tenant in tail barred—Issue in tail barred.]—In ejectment, pltf. proved that A., being seised in fee of the land in question, devised it to the father of pltf. in tail general, & died in 1799. Pltf.'s father received the rents & profits from 1799 to 1807, at which time he was succeeded by a person through whom deft. obtained possession :—*Held* : under Real Property Limitation Act, 1833 (c. 27), s. 21, since the tenant in tail was barred, the issue in tail was also barred.—AUSTIN v. LLEWELLYN (1853), 9 Exch. 276; 2 C. L. R. 408; 23 L. J. Ex. 11; 156 E. R. 118.

1293. ———.]—Pltf.'s mother was tenant in tail by descent of certain property which was entailed by the will of testator who died in Jan. 1811, & she became entitled to the possession of the property on the death of R., which took place

427.—CAN.

PART V. SECT. 7, SUB-SECT. 5.

1290 i. Whether extended period allowed—Disability in one person.]—SUPPLE'S LESSEE v. RAYMOND (1830), Hayes, 6.

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in Nov. 1871, at which time pltf.'s mother was under no disability either of coverture or infancy. She married in 1875, & died in 1882, without ever having acquired possession of the property. Upon her death pltf. became entitled to possession as her issue in tail, & in 1889 he commenced an action to enforce his right to such possession

The point of law raised by the pleadings in the action was set down for hearing before the trial, the question being whether pltf., not having claimed or taken possession until after the expiration of twelve years from Nov. 1871, & who was an infant on his mother's death, & also at the date of the action, was entitled to the benefit of his infancy to prevent Real Property Limitation Act, 1874 (c. 57), from running:—*Held*: (1) as pltf. claimed through his mother, as a tenant in tail, the right to possession first accrued to her; (2) as there had been no possession by either of them for twelve years, the statute applied; & pltf. was not now entitled to claim the property.—*MURRAY v. WATKINS* (1890), 62 L. T. 796.

Annotations:—As to (1) *Refd.* Garner v. Wingrove, [1905] 2 Ch. 233. As to (2) *Apprvd.* Garner v. Wingrove, [1905] 2 Ch. 233.

1294. Time commencing to run against tenant in tail—Continues against remainderman—Though under disability.]—Estate tail to A., remainder in tail to B., remainder to C. A. died, then B. died within twenty years, & C. became entitled in possession, being at the time under disability:—*Held*: Real Property Limitation Act, 1833 (c. 27), ss. 21, 22, commenced running against C. from the death of A.; & having commenced to run, C. was not saved from its operation under sect. 16 by being under disability when her right accrued in possession.—*GOODALL v. SKERRATT* (1855), 3 Drew. 216; 3 Eq. Rep. 295; 24 L. J. Ch. 323; 25 L. T. O. S. 6; 1 Jur. N. S. 57; 3 W. R. 152; 61 E. R. 885.

1295. Estate tail inalienable by statute—Limitation not applicable.]—By a private Act, certain lands were limited to certain members of the N. family in succession in tail male, with limitation over to Queen Mary, her heirs & successors, provided that "no feoffment, discontinuance, fine, or recovery, with voucher or otherwise, or any other act or acts thereupon to be made, done, suffered or acknowledged of the premises or parcel thereof by the said N.'s or any of them, or by any of the heirs male of their several bodies, should bind or conclude in right, or put from entry Queen Mary, her heirs & successors, or any of the heirs in tail, or any to whom the premises or any parcel thereof should descend, revert, remain," etc. In 1781 the then tenant in tail in possession of the entailed lands, as heir male of the body of E., granted a lease for three lives of part of the entailed lands. The last of the three lives expired in 1832, since which time no rent had been paid to the tenants in tail, nor had their titles been acknowledged in any way:—*Held*: the present heir in tail male of E. was not barred by Real Property Limitation Act, 1833 (c. 27).—*ABERGAVENNY (EARL) v. BRACE* (1872), L. R. 7 Exch. 145; 41 L. J. Ex. 120; 26 L. T. 514; 20 W. R. 462.

Annotations:—*Consd.* Bobbett v. S. E. Ry. (1882), 9 Q. B. D. 424. *Refd.* Brighton Corp'n. v. Brighton Grdns. (1880), 5 C. P. D. 368. *Mentd.* Wimbledon & Putney Commons Conservators v. Nicol (1894), 10 T. L. R. 247.

When time begins to run.]—See Sect. 3, subsect. 3, B., *ante*.

SECT. 9.—EQUITABLE RIGHTS TO REAL PROPERTY.**SUB-SECT. 1.—IN GENERAL.**

See Real Property Limitation Act, 1833 (c. 27), s. 24; Real Property Limitation Act, 1874 (c. 57).

1296. General rule—Limitation applicable to equitable claims.]—*ST. MARY MAGDALEN COLLEGE, OXFORD (PRESIDENT, ETC.) v. A.-G.*, No. 1051, *ante*.

1297. ———.]—*BLACKBURN v. BLACKBURN* (1891), 36 Sol. Jo. 27, C. A.

1298. ——— If equitable rights analogous to legal rights.]—So long as the relation of landlord & tenant subsists, the right of the landlord to rent is not barred by non-payment, except that under Real Property Limitation Act, 1833 (c. 27), s. 42, the amount to be recovered is limited to six years.

Real Property Limitation Act, 1833 (c. 27), s. 24, only bars equitable rights so far as they would have been barred if they had been legal rights.—*ARCHBOLD v. SCULLY* (1861), 9 H. L. Cas. 360; 5 L. T. 160; 7 Jur. N. S. 1169; 11 E. R. 769, H. L.

Annotations:—*Refd.* Webster v. Southey (1887), 36 Ch. D. 9; Beighton v. Beighton (1895), 64 L. J. Ch. 796; *Re* Astley & Tyldesley Coal & Salt Co. & Tyldesley Coal Co. (1899), 68 L. J. Q. B. 252; Dominion Coal Co. v. Maskinonge S.S. Co., [1922] 2 K. B. 132. *Mentd.* Le Clerc v. Greene (1873), 22 W. R. 428.

1299. To what claims limitations applicable—Prevention of setting up outstanding terms.]—The Statute of Limitations may be pleaded in bar to a bill to prevent the setting up of outstanding terms.—*JERMY v. BEST* (1819), 1 Sim. 373; 57 E. R. 617.

1300. ——— Recovery of title deeds.]—The dean & chapter of W. made a lease of a manor to D.; which expired in 1820. In 1822, the dean & chapter applied to D. by letter, requiring him to deliver up the ct. rolls & title deeds relating to the manor. There was no evidence as to the circumstances attending the letter, or as to what took place in consequence of the letter. In 1844, the dean & chapter filed a bill against D., for a delivery of the ct. rolls & title deeds. D. pleaded the Statute of Limitations:—*Held*: the dean & chapter had no right in equity to enforce the delivery up of the ct. rolls or title deeds.—*WELLS (DEAN & CHAPTER) v. DODDINGTON* (1845), 2 Coll. 73; 14 L. J. Ch. 304; 5 L. T. O. S. 170; 9 Jur. 768; 63 E. R. 642.

Annotation:—*Consd.* Beaumont v. Jeffery, [1925] Ch. 1.

1301. ——— Discovery in aid of ejectment.]—To a bill of discovery in aid of an action of ejectment, the ct. held a plea of the Statute of Limitations to be good.—*SCOTT v. BROADWOOD* (1846), 2 Coll. 447; 15 L. J. Ch. 257; 7 L. T. O. S. 80; 10 Jur. 214; 63 E. R. 809.

1302. ——— Exoneration of devised realty—From payment of debts.]—Testator, being seised of real estate subject to mtge. debts, devised one moiety to A. in tail & the other to B. in tail, & died in 1819. In 1827, B. died without having barred the entail, & her estate descended to the co-heirs of testator. In 1851, it was ascertained in a suit for the administration of testator's personalty, that his personal estate was insufficient to discharge the mortgage debts. Bill filed by A. to have her moiety exonerated out of the descended moiety:—*Held*: she was entitled, & her right was not barred by length of time; but she was entitled to interest only from the filing of the bill.—*NEWHOUSE v. SMITH* (1854), 2 Sm. & G. 344; 2 W. R. 618; 65 E. R. 429.

1303. ——— Partition action.]—*THORNTON v. FRANCE* No. 1397, *post*.

1304. Rights as against purchaser—With notice of defective title.]—A. contracted to purchase real estate, & died, having made his widow his universal devisee & legatee. The widow married B. who, in 1793, took a conveyance of the premises contracted to be purchased by A. to himself & a trustee, reciting the contract by A., his will & death, the marriage of his widow with B.; & that "thereupon B. became entitled to the beneficial interest in the purchase." B. in 1817 sold the premises to C., & C. took a conveyance from B. & his trustee, reciting that, by certain good & sufficient assurances in the law, the premises stood limited to B. & the trustee, but not reciting the deed of 1793. The widow died, leaving her heir-at-law an infant, who came of age in 1825 in the lifetime of B. The bill was brought by the heir in 1836, after the death of B., for a conveyance of the estate:—*Held*: (1) the recital in the deed must be understood as stating that the widow was devisee of the purchased premises, & that the title of B. accrued by the marriage; (2) the ct. would not presume, in favour of a purchaser, that B. had any other title than was so represented; (3) C. must be presumed to have been cognisant of, & to have taken the title of B., his vendor; (4) the equitable title of the heir-at-law of widow was not affected by the lapse of time; & the heir-at-law was entitled to the decree for a conveyance of the estate.—*NEESOM v. CLARKSON* (1842), 2 Hare, 163; 12 L. J. Ch. 99; 6 Jur. 1055; 67 E. R. 68; *subsequent proceedings* (1845), 4 Hare, 97.

Annotation:—As to (3) *Consd.* *Parkinson v. Hanbury* (1867), L. R. 2 H. L. 1.

1305. Rights as against trespasser—With notice of equities.]—A. being the owner in fee of estate K. & other estates in Ireland, subject to a mtge. in fee, by a deed of Feb. 1807, which upon the face of it was for valuable consideration, purported to convey these estates to trustees in fee, upon trust, for himself for life, remainder to his eldest son, B., then unmarried, for life, remainder to B.'s first & other sons, in tail male, etc. In June, 1807, A. & B. by deed, which on the face of it did not appear to be for value, purported to convey estate K. to trustees in fee, upon trust for A. for life, remainder to W., a younger son of A., for life, remainder to W.'s first & other sons in tail male, thereby in effect, treating the previous deed as cancelled. A. died in 1808, when W. entered into possession of estate K. & either he or applt., J., his eldest son, had remained in possession ever since. In 1811 the mtge. was paid off by B. & the legal fee in estate K. was conveyed to him. In 1815, W. married, upon which occasion estate K. was made the subject of settlement. In 1837, B. died, leaving resp., J., his eldest son, his heir-at-law & in tail. In 1844, J. claimed estate K. under the deed of Feb. 1807, & brought his ejectment against J. but failed, the judge who tried the case being of opinion, & so directing the jury, that pltf. was barred by the Statute of Limitations, & the twenty years' possession of deft. J. then brought his suit in equity to obtain possession of estate K. & that the reconveyance of the legal

fee in 1811 might be declared to have been obtained by B. as a trustee for the parties claiming under the deed of Feb. 1807:—*Held*: (1) the deed of Feb. 1807, should be treated as a deed for value, & that of June, 1807, as not for value; (2) the fee acquired under the Statute of Limitations did not create any bar in this case, for the possession of W. & his son was to be treated exactly in the same way as if he had obtained the legal fee by conveyance, in which case the trusts of the deed of Feb. 1807, would have attached.—*SCOTT v. SCOTT* (1854), 4 H. L. Cas. 1065; 23 L. T. O. S. 27; 18 Jur. 755; 10 E. R. 779, H. L.

1306. Possession of receiver—Acknowledgment of claim of outside incumbrancer—Possession on behalf of incumbrancer.]—The possession of a receiver in a suit is *prima facie* the possession of the parties who obtained his appointment; but the solrs. of the parties who had obtained the appointment of a receiver having written a letter to the solr. of an outside incumbrancer stating that the balances of the rents would be paid to him:—*Held*: the possession of the receiver thereby became the possession of the outside incumbrancer also, for the purpose of preventing the Statute of Limitations from running against him.—*PENNEY v. TODD* (1878), 26 W. R. 502.

SUB-SECT. 2.—ACTIONS FOR WASTE.

See Real Property Limitation Act, 1833 (c. 27), s. 24.

1307. Equitable waste—Time runs from death of tenant for life.]—The statutory rule, which gives to a remainderman twenty years from the time when his title accrues in possession for bringing an action or suit for the property, applies to a claim for compensation for equitable waste, as well as to a claim to the land itself. Therefore an account of equitable waste was decreed against the estate of the tenant for life thirty-eight years after the waste was committed, the title of pltf. as remainderman in tail, having accrued within twenty years before the filing of the bill.—*LEEDS (DUKE) v. AMHERST (EARL)* (1846), 2 Ph. 117; 16 L. J. Ch. 5; 10 Jur. 956; 41 E. R. 886, L. C.

Annotations:—*Consd.* *Dashwood v. Magniac*, [1891] 3 Ch. 306. *Mentd.* *Morris v. Morris* (1847), 8 L. T. O. S. 510; *Morris v. Morris* (1858), 28 L. J. Ch. 329; *Somersetshire Coal Canal Co. v. Harcourt* (1858), 2 De G. & J. 596; *Gent v. Harrison* (1859), John. 517; *Bright v. Legerton* (1861), 2 De G. F. & J. 606; *Bagot v. Bagot, Legge v. Legge* (1863), 32 Beav. 509; *Hogg v. Scott* (1874), L. R. 18 Eq. 444; *De Bussche v. Alt* (1878), 8 Ch. D. 286; *Northumberland v. Bowman* (1887), 56 L. T. 773; *Phillips v. Homfray*, [1892] 1 Ch. 465.

1308. ——— Effect of delay.]—Time is a bar in equity to state demands, independent of the Statute of Limitations.

Bill by tenant for life in remainder against the representatives of a prior tenant for life, for an account of timber improperly cut, dismissed with costs, on account of the delay, the bill not having been filed until nearly twenty years after the death of the first tenant for life.—*HARCOURT v. WHITE*

PART V. SECT. 9, SUB-SECT. 1.

1306 i. Possession of receiver—Acknowledgment of claim of outside incumbrancer—Possession on behalf of incumbrancer.]—The appointment of a receiver over the estate of a minor does not prevent Statute of Limitations from running against an incumbrancer on that estate who is not a party to the order appointing him, although the report, finding that a receiver should

be appointed, states that the estate is subject to the incumbrance in question.—*KYME v. DIGNAM* (1842), 4 L. Eq. R. 562.—IR.

1306 ii. ———.]—*HARRISON v. DUIGNAN* (1842), 2 Dr. & War. 295.—IR.

p. ——— Time continues to run.]—Though the appointment of a receiver does not prevent the bar of Statute of Limitations from operating against a

stranger, yet it will serve to prevent, at least in a ct. of equity time from running in favour of a stranger to the suit.—*WRIXON v. VIZE* (1842), 3 Dr. & War. 104.—IR.

PART V. SECT. 9, SUB-SECT. 2.

q. Legal waste—Time runs from commission of waste—Cutting down timber.]—*SIMPSON v. SIMPSON* (1879), 3 L. R. Ir. 308.—IR.

Sect. 9.—Equitable rights to real property: Sub-sects. 2 & 3. Sect. 10: Sub-sect. 1.]

(1860), 28 Beav. 303; 30 L. J. Ch. 681; 3 L. T. 4; 6 Jur. N. S. 1087; 8 W. R. 715; 54 E. R. 382.

Annotation:—*Mentd.* Ainslie v. Harcourt (1860), 28 Beav. 313.

1309. Legal waste—Time runs from commission of waste—Suspension of time during minority of remainderman.]—In 1831, & again in 1842, 1843, & 1844, A., tenant for life, impeachable for waste, with remainder in fee to his son B., cut timber & received the proceeds. B. came of age in 1834, lived with & was in partnership with A. for some years, & died intestate in 1844, leaving C. his only son & heir-at-law. A. took out administration to B.'s estate, during C.'s minority, & died in 1864. C. came of age in 1865, took out administration to B., & in 1866 filed a bill against A.'s exor. for an account of the proceeds of the timber.

The judge having held that the rights of suit which accrued to B. in 1842, 1843, & 1844, were barred by the Statute of Limitations; & if not, by the conduct of the parties:—*Held*: the rights of suit were not barred by acquiescence; & although commencing in 1842, 1843, & 1844 respectively, they were suspended during the period that A. was B.'s administrator & hence they were subsisting at the date of the filing of the bill.—*SEAGRAM v. KNIGHT* (1867), 2 Ch. App. 628; 36 L. J. Ch. 918; 17 L. T. 47; 15 W. R. 1152, L. C.

Annotations:—*Consd.* *Re* Benzon, *Bower v. Chetwynd* (1914), 83 L. J. Ch. 658. *Refd.* *Dashwood v. Magniac*, [1891] 3 Ch. 306.

1310. ———.]—In a case of legal waste he has *prima facie* only six years after the act of waste. Here the remainderman did not come into existence till 1863, & the action was commenced in 1889, that is, within six years after he attained twenty-one (*KAY, J.*).—*DASHWOOD v. MAGNIAC*, [1891] 3 Ch. 306; 60 L. J. Ch. 809; 65 L. T. 811; 7 T. L. R. 629, C. A.

Annotations:—*Mentd.* *Re* Chaytor, [1900] 2 Ch. 804; *Pardoe v. Pardoe* (1900), 82 L. T. 547; *Chaytor v. Trotter* (1902), 86 L. T. 33; *Re Trevor-Batye's Settlement*, *Bull v. Trevor-Batye*, [1912] 2 Ch. 339; *Re Hall, Hall v. Hall*, [1916] 2 Ch. 488; *Lloyd-Jones v. Clark-Lloyd*, [1919] 1 Ch. 424.

1311. ——— Cutting down & sale of timber.]—*HIGGINBOTHAM v. HAWKINS*, No. 1719, *post*.

1312. ——— Tenant for life also owner of first estate of inheritance.]—*Semble*: a claim in equity against the estate of a deceased tenant for life, who was also owner of the first estate of inheritance, for acts of waste committed by him, first arises at the death of such tenant for life & must be made within six years of that date.—*BIRCH-WOLFE v. BIRCH* (1870), L. R. 9 Eq. 683; 39 L. J. Ch. 345; 23 L. T. 216; 18 W. R. 594.

SUB-SECT. 3.—EFFECT ON BENEFICIARY WHERE TRUSTEE BARRED.

1313. Whether cestui que trust barred also.]—(1) The rule in this ct., that the Statute of Limitations does not bar a trust estate, holds only as between *cestui que trust* & trustees, not between *cestui que trust* & trustee on one side & strangers on the other, for that would be to make the statute of no force at all, because there is hardly any estate of consequence without such trust, & so the Act would never take place; & therefore,

where a *cestui que trust* & his trustee are both out of possession for the time limited, the party in possession has a good bar against them both (*LORD HARDWICKE, C.*).

(2) There may be a case where the circumstance of concealing of a deed shall prevent the statute's barring, but then it must be a voluntary & fraudulent detaining; for to say that newly having an old deed in one's possession shall deprive a man of the benefit of the Act is going too far, & would be a hard construction of a statute made for the quieting possessions (*LORD HARDWICKE, C.*).—*LEWELLIN v. MACKWORTH* (1740), 2 Eq. Cas. Abr. 579; 22 E. R. 488; *sub nom.* *LLEVELLYN v. MACKWORTH*, *Barn. Ch.* 445, L. C.

Annotation:—*Generally.* *Mentd.* *Codrington v. Lindsay* (1873), 8 Ch. App. 578.

1314. ———.]—Where the estate out of which a rentcharge issued passed to a bkpt.'s assignee under a certificate of title negligently granted to the bkpt. free of incumbrance:—*Held*: in an action brought by the beneficiaries against the Registrar-General for compensation out of the assurance fund created by the Act, their rights, being under the Act independent of the trustees & being saved by the provisions of the Act in regard to persons under disability, could be enforced notwithstanding that their trustees' rights were barred.

The circumstance that the trustees are barred by limitation is no ground for holding that the beneficiaries are barred too (*per CUR.*).—*WILLIAMS v. PAPWORTH*, [1900] A. C. 563; 69 L. J. C. P. 129; 83 L. T. 184, P. C.

SECT. 10.—TRUSTS AFFECTING REAL PROPERTY.

SUB-SECT. 1.—IN GENERAL.

See Real Property Limitation Act, 1833 (c. 27), s. 25.

1315. General rule—Possession of trustee possession of cestui que trust.]—A trustee who holds possession of land to which he has a valid legal title, cannot by any act of his own make that possession adverse to his real *cestui que trust*; & so long as he is in possession the Statute of Limitation will not run against the *cestui que trust*, even though the trustee should, through error or other cause, treat himself as trustee for other persons & account to them for the rents of the land.

Testator, possessing a farm in the parish of G., & a small piece of land in the adjoining parish of A., which had always been occupied & let at an entire rent with the farm in G., devised all his lands & hereditaments, "situate, lying & being within the parish of G., with the appurtenances," to G. for life with remainder to the child or children of G. in tail; & he empowered P. & J., the trustees of his will, during the minority of a tenant in tail entitled in possession, to take possession of the property on behalf of the minor, & to grant leases; & he devised the residue of his real estate to P. & J., during the life of M., in trust for M., with remainders over. Testator died in 1842, & thereupon G. took possession of the lands in G. & A. In 1850 G. died, leaving an only daughter, an infant, & P. & J. took possession of the land in G. & A., & in 1861 they granted a lease of the whole farm in pursuance of the power. In 1863

PART V. SECT. 9, SUB-SECT. 3.

1313 i. Whether cestui que trust barred also.]—*Cestui que trust* is barred by

length of time operating against his trustee.—*HOVENDEN v. ANNESLEY* (*LORD*) (1806), 2 Sch. & Lef. 607.—*IR.*

PART V. SECT. 10, SUB-SECT. 1.

1315 i. General rule—Possession of trustee possession of cestui que trust.]—*Re Goff* (1879), 8 P. R. 92.—*CAN.*

the daughter of G. came of age & took possession of the whole farm. In 1864 M. filed a bill to establish his right to the land in A. :—*Held* : the land in A. did not pass by the specific devise, but formed part of the residuary estate, & M.'s right was not barred by Statute of Limitations, inasmuch as the possession of P. & J. from 1850 to 1863 must be attributed to their character of devisees in trust of the residuary estate, & was therefore not adverse to that of M.—*LISTER v. PICKFORD* (1865), 34 Beav. 576; 6 New Rep. 243; 34 L. J. Ch. 582; 12 L. T. 587; 11 Jur. N. S. 649; 13 W. R. 827; 55 E. R. 757.

Annotations :—*Distd.* East Stonehouse U. C. v. Willoughby, [1902] 2 K. B. 318. *Refd.* Churcher v. Martin (1889), 42 Ch. D. 312. *Mentd.* Cuthbert v. Robinson (1882), 51 L. J. Ch. 238.

1316. To what trusts limitation applicable—Not to express trusts.—In consequence of the invalidity of an appointment, *pltf.* became entitled to a sum which was to be raised out of real estate under the trusts of a term of five hundred years, which was still subsisting, but no steps for questioning the validity of the appointment, or for the recovery of the money, had been taken till more than twenty years had elapsed since the title accrued :—*Held* : the right of *pltf.* was not barred by Real Property Limitation Act, 1833 (c. 27), that statute not applying to cases of this nature between trustees & *cestuis que trust*.—*YOUNG v. WATERPARK (LORD)* (1845), 15 L. J. Ch. 63; 6 L. T. O. S. 517; 10 Jur. 1, L. C.

Annotations :—*Appld.* Cox v. Dolman (1852), 2 De G. M. & G. 592; Snow v. Booth (1855), 2 K. & J. 132; Burrowes v. Gore (1858), 6 H. L. Cas. 907. *Consd.* Re Jordison, Raine v. Jordison, [1922] 1 Ch. 440. *Refd.* Hughes v. Williams, Chappell v. Rees (1852), 16 Jur. 415; Petre v. Petre (1853), 1 Drew. 371; Mansfield v. Ogle (1855), 1 Jur. N. S. 414; Knight v. Bowyer (1858), 2 De G. & J. 421; Lewis v. Duncombe (No. 2) (1861), 29 Beav. 175; Round v. Bell (1861), 31 L. J. Ch. 127. *Mentd.* Blower v. Blower (1858), 5 Jur. N. S. 33; Bulteel v. Plummer (1870), 6 Ch. App. 160; Balfour v. Cooper (1883), 23 Ch. D. 472.

1317. ———.—*ST. MARY MAGDALEN COLLEGE, OXFORD (PRESIDENT, ETC.) v. A.-G.*, No. 1051, *ante*.

1318. ———.—*P.*, in 1792, was an original subscriber to a tontine, & as such entitled to an annual sum during the life of his daughter Y., who was his nominee. In 1809 he died, having bequeathed this annual sum to his said daughter, then a married woman. In 1816 she & her husband, being indebted to W., deposited the debenture for this annual sum in his hands, with a view, as it was said on one side, that he might by means of it pay himself the debt due to him; on the other, that it was intended in liquidation of that debt. During the life of W., & until his death in 1848, the annuity was received by W., on production of the usual half-yearly certificate that Y. was alive, & she received for her trouble 10s. each half year. Her husband died in 1846, & shortly after 1848 she demanded the debenture from the representatives of W. :—*Held* : it was an express trust, & Statute of Limitations did not apply.—*Re O'HARA'S TONTINE & TRUSTEE RELIEF ACT* (1857), 30 L. T. O. S. 128; 3 Jur. N. S. 1145; 6 W. R. 45.

1319. ———.—In cases of express trust Statute of Limitations is no bar to the demand of a *cestui que trust*, though the other *cestui que trusts* have for more than twenty years received from the trustee the whole of the rents to the exclusion of claimant.—*KNIGHT v. BOWYER* (1858), 2 De G. &

J. 421; 27 L. J. Ch. 520; 31 L. T. O. S. 287; 4 Jur. N. S. 569; 6 W. R. 565; 44 E. R. 1053, L. JJ.

Annotations :—*Consd.* East Stonehouse U. C. v. Willoughby, [1902] 2 K. B. 318; *Re* Jordison, Raine v. Jordison, [1922] 1 Ch. 440. *Mentd.* Anderson v. Radcliffe & Walker (1860), 29 L. J. Q. B. 128; Radcliffe v. Anderson (1860), E. B. & E. 819; Dickinson v. Burrell, Dickinson v. Burrell, Stourton v. Burrell (1866), L. R. 1 Eq. 337; Bagnall v. Carlton (1877), 6 Ch. D. 371; Hunt v. Luck, [1901] 1 Ch. 45; Hunt v. Luck, [1902] 1 Ch. 428.

1320. ———.—*A* trustee of real estate devised his real estate to G., subject to the payment of a legacy, so that the trust estate did not pass. G. however acted as trustee :—*Held* : she must be deemed a trustee upon express trust, & Statute of Limitations was therefore no defence to a claim against her estate in respect of a breach of trust.

—*LIFE ASSOCN. OF SCOTLAND v. SIDDAL, COOPER v. GREENE* (1861), 3 De G. F. & J. 58; 4 L. T. 311; 7 Jur. N. S. 785; 9 W. R. 541; 45 E. R. 800, L. C. & L. JJ.

Annotations :—*Consd.* Lyell v. Kennedy, Kennedy v. Lyell (1889), 14 App. Cas. 437; Soar v. Ashwell, [1893] 2 Q. B. 390. *Refd.* Price v. Phillips (1894), 11 T. L. R. 86. *Mentd.* Re Carr's Trust (1871), 19 W. R. 675; Evans v. Davis (1878), 10 Ch. D. 747; Buckmaster v. Buckmaster (1886), 55 L. T. 279; Evans v. Benyon (1887), 37 Ch. D. 329.

1321. ———.—*DRUMMOND v. SANT*, No. 1193, *ante*.

1322. ———.—Under a devise of land upon trust for sale, the proceeds to be considered as part of the personal estate, the trustees allowed part of the land to remain unsold for fifty years :—*Held* : the trust was an express trust within Real Property Limitation Act, 1833 (c. 27), s. 25, & a decree for the execution of the trust of the unsold land made at the suit of a residuary legatee.—*MUTLOW v. BIGG* (1874), L. R. 18 Eq. 246; 22 W. R. 469; *on appeal* (1875), 1 Ch. D. 385, C. A.

Annotations :—*Mentd.* Meek v. Devenish (1877), 6 Ch. D. 566; *Re* Douglas & Powell's Contract, [1902] 2 Ch. 296; *Re* Sturt, De Bunsen v. Hardinge, [1922] 1 Ch. 416.

1323. ———.—*T.*, in 1824, became mtgee. in fee of Blackacre. The form of the conveyance was to him on trust to sell, & out of the proceeds to retain the debt, & pay the surplus if any, to the mtgor. In Feb. 1826, *T.* made his will, whereby he devised all his real estate, except mtge. & trust estates, & all his personal estate to trustees, upon trust for Y. & H. He also devised to the same trustees all his mtge. estates upon trust, on payment of the moneys due, to convey the same to the person who should be entitled to the equity of redemption; & directed the moneys to form part of his personal estate. In Mar. 1826, the mtgor. of Blackacre became bkpt.; & in June, 1826, *T.* contracted with the assignees in bkpcy. for the purchase of the equity of redemption. The purchase-money was paid by *T.*, but no conveyance from the assignees was ever executed. In Oct. 1826, *T.* died, leaving Y. & C. his co-heirs. C. by deed renounced to the trustees of the will all claim under the contract of June, 1826. The trustees under the will entered into receipt of the rents of Blackacre, & administered the same as part of testator's estate until 1869. Y. then claimed the right to a conveyance of one moiety of Blackacre as co-heir of *T.* :—*Held* : the claim of Y., as co-heir, against the trustees had become barred by Statute of Limitations.—*YARDLEY v. HOLLAND* (1875), L. R. 20 Eq. 428; 33 L. T. 301.

1316 i. To what trusts limitation
Not to express trusts.]—*v. BELL* (1891), 23 S. C. R.
498.—CAN.

1316 ii. ———.]—*A.-G. v. DAVIS*
(1870), 18 W. R. 1132.—IR.
r. ——— So long as trustee

retains the property.]—*LAW v. BAGWELL*,
EVANS v. BAGWELL (1843), 4 Dr. &
War. 398.—IR.

Sect. 10.—Trusts affecting real property: Sub-sects.

1324. — — — Arising upon construction of instrument.]—F. made a will in 1818 in which he said, "I leave & bequeath all my estate & property, real, freehold, & personal of every kind, save & except such parts thereof as are hereby otherwise specifically devised," to Shaw & Franks, "upon trust for the several uses, intents & purposes hereinafter mentioned"; he then gave an annuity to his wife during her viduity payable out of the profits of his business, & out of all profits of every part of his estate & property, & directed his three eldest sons L., J., & S. to manage his business, at that time a very profitable one; he left specific legacies to his other children; he bequeathed to L., J., & S. all the property of every sort then employed by him in carrying on his business; then directed a sale of a certain estate, & the investment of the produce thereof to accumulate until all the provisions of his will were carried into effect, & then to go to L., J., & S. After other specific bequests the will went on. "Whereas I am possessed of grounds in the county of Carlow called Seskin Ryan," of & the ground rent of houses in Sackville Street," & he directed that the rents, etc., of Seskin Ryan should be paid to his wife for her life " & after her death I give the said lands of Seskin Ryan to my eldest son L., his heirs & assigns," & the ground rents "to J. & S., their heirs & assigns"; & he directed that "all said bequests shall stand & hold good to L., J., & S. only on condition of well & truly paying the several legacies herein directed, & discharging with fidelity the different trusts of this will committed to them." Testator died in 1824. The business fell off, the payment of the annuity was not kept up, but considerable arrears accrued; the last payment of any sort was made in 1862. The widow died in 1865, & by her will bequeathed all her property, including the arrears of the annuity, to her youngest daughter, who died in Oct. 1873, without having received any portion of the arrears. L., who, on his mother's death, had entered into possession of Seskin Ryan, died in Jan. 1873, & the administrators of the youngest daughter filed their bill in July, 1875, against his representatives to recover the arrears of the annuity out of the lands of Seskin Ryan, which they insisted were held subject to a trust for satisfaction of the annuity:—*Held*: the words of the will did not create a trust with regard to the lands of Seskin Ryan, for the payment of the annuity, & the claim to the arrears was therefore barred by Real Property Limitation Act, 1833 (c. 27), s. 42.

The land must be vested in a trustee upon an express trust, & then the right of the *cestui que trust* to bring an action is saved by sect. 25.

There must be an express trust which arises upon the construction of the written instrument not upon any inference of law (LORD CAIRNS).—CUNNINGHAM v. FOOT (1878), 3 App. Cas. 974; 38 L. T. 889; 26 W. R. 858, H. L.

Price v. Phillips (1894), 11 T. L. R. 149. *Reid*. Toates v. Kydd, [1926] 2 K. B. 149. *Reid*. Toates

1325. — — —.]—BANNER v. BERRIDGE, No. 1650, *post*.

1326. — — —.]—Testator devised a house & all other his real estate to his exors. upon trusts, the declaration of trust being as to the house only. He died seised of two other houses, & his exors. took possession of them, & received the rents for

more than twelve years from the death of testator. His heir-at-law afterwards brought an action against the exors., alleging that the two houses vested in them in trust for him, & claimed execution of the trust:—*Held*: there was on the face of the will an express trust for the heir-at-law within Real Property Limitation Act, 1833 (c. 27), s. 25, & his right was not barred.—PATRICK v. SIMPSON (1889), 24 Q. B. D. 128; 59 L. J. Q. B. 7; 61 L. T. 686; 6 T. L. R. 23, D. C.

Annotations:—*Distd.* *Re* Lacy, Royal General Theatrical Fund Assocn. v. Kydd, [1899] 2 Ch. 149. *Reid*. *Re* Gompertz, Parken v. Gompertz (1911), 105 L. T. 664.

1327. — — —.]—SOAR v. ASHWELL, No. 1677, *post*.

1328. — — —.]—Where a statement of claim alleges that A., as trustee & guardian of B., took possession of lands, this constitutes at most a constructive trust & not an express trust, & such possession having been taken in 1771, the statement of claim was on motion ordered to be struck out as disclosing no reasonable cause of action.

It cannot be said that this is a case where the requisites of the express trust could be found upon the construction of the instrument (CHITTY, J.).—PRICE v. PHILLIPS (1894), 11 T. L. R. 86; 39 Sol. Jo. 97; 13 R. 191.

Annotation:—*Mentd.* *Re* Page, Hill v. Fladgate, [1910] 1 Ch. 489.

1329. — — —.]—(1) Prior to 1873 pltf., a married woman, was owner of certain estates in Ceylon, subject to a considerable mtge. In 1873 the mtgees. sold & conveyed the estates to deft., who, without the privity of pltf. raised large sums by mtge. of them, & afterwards became bkpt. in 1879, & obtained his discharge in 1880. The estates were afterwards sold by the mtgees. Pltf.'s case was that deft. had purchased the estates as trustee for her subject to a lien for his advances. In 1880 deft.'s trustee in bkpcy. repudiated pltf.'s title. Deft. never expressly did so, & pltf. never gave either of them to understand that she had given up her claim; but she took no active steps to assert it till 1894, when she commenced an action against deft., asking for a declaration that deft., purchased as a trustee for her, & for an account of his dealings with the property & payment of what should be found due from him. Deft. pleaded (a) that the estates were conveyed to him as beneficial owner; (b) that the trust alleged by pltf. was not evidenced by any writing signed by deft., & that the Statute of Frauds was a defence; (c) that pltf.'s claim, if proved, was barred by deft.'s bankruptcy, by the Statutes of Limitations; by laches & delay:—*Held*: even if the letters signed by deft. did not contain enough to satisfy Stat. Frauds, s. 7, parol evidence was admissible; & as the whole of the evidence taken together established that deft. had purchased as a trustee pltf. was entitled to a decree.

(2) A trust thus established is an express trust within the definition given in *Soar v. Ashwell*, No. 1677, *post*, & the Statute of Limitations therefore is in no defence to the claim.

The trust which pltf. has established is clearly an express trust. . . . This case is not one in which an equitable obligation arises although there may have been no intention to create a trust. The intention to create a trust existed from the first. Deft. is not able in this case to claim the benefit of Trustee Act, 1888 (c. 59), s. 8, & the statute which is applicable is Jud. Act, 1873 (c. 66), s. 25 (2). The Statutes of Limitation therefore afford no defence (LINDLEY, M.R.).—ROCHEFOUCAULD v. BOUSTEAD, [1897] 1 Ch

196; 66 L. J. Ch. 74; 75 L. T. 502; 45 W. R. 272; 13 T. L. R. 118, C. A.

Annotations:—As to (2) *Reid*. Taylor v. Davies, [1920] A. C. 636. *Generally*, *Mentd.* *Re* Gallard, *Ex p.* Gallard, [1897] 2 Q. B. 8; Isaacs v. Evans (1899), 16 T. L. R. 113; Brooks v. Muckleston, [1909] 2 Ch. 519.

1330. — Constructive trusts.—The rule that trusts are not within the Statute of Limitations applies only as between trustee & *cestui que trust* & will not hold where a claim is made after a great length of time against a trustee by implication of law, more especially where such implication is to be raised upon a doubtful equity.—TOWNSEND v. TOWNSEND (1783), 1 Cox, Eq. Cas. 28; 1 Bro. C. C. 550; 29 E. R. 1047.

Annotations:—*Consd.* Beckford v. Wade (1805), 17 Ves. 87; Soar v. Ashwell, [1893] 2 Q. B. 390. *Mentd.* Wedderburn v. Wedderburn (1838), 4 My. & Cr. 41.

1331. — — ——By a will, dated in 1761, a trust was created in favour of a certain class of testator's relations, nearly all of whom were paid their proportions. The surviving exor. & trustee of testator had the remainder of the funds standing in his name at his death, & by his will he recognised the existence of the trust & directed that it should devolve upon his nephew. Administration *de bonis non* was granted in 1822 to the surviving exor.'s estate, & subsequently to another person in 1826, when the remaining trust fund was mixed up with such administrator's personal estate, & applied in the purchase of real estate. A bill was filed by a person claiming part of the legacy under the original testator's will, charging a breach of trust by the surviving exor., & that his real & personal estate were liable to make good the amount:—*Held*: the real estate could not be charged with the legacy; there was an implied trust created by the will, but the right of claimants having accrued more than twenty years since, their claim was barred by the Statute of Limitations.—HENDERSON v. ATKINS (1859), 28 L. J. Ch. 913; 33 L. T. O. S. 159; 7 W. R. 387.

1332. — — ——DAWKINS v. PENRHYN (LORD), No. 1463, *post*.

1333. — — ——SOAR v. ASHWELL, No. 1677, *post*.

1334. — — ——*Re* LACY, ROYAL GENERAL THEATRICAL FUND ASSOCN. v. KYDD, No. 834, *ante*.

1335. — Direct trusts.—DRUMMOND v. SANT, No. 1193, *ante*.

1336. Wrongful or mistaken payments by trustees — Payment to some beneficiaries only.—KNIGHT v. BOWYER, No. 1319, *ante*.

1337. — To persons not entitled.—LISTER v. PICKFORD, No. 1315, *ante*.

Actions against trustees.—See Part VI., *post*.

SUB-SECT. 2.—ANNUITY CHARGED ON REALTY.

See Real Property Limitation Act, 1833 (c. 27), s. 25; Real Property Limitation Act, 1874 (c. 57).

1338. Annuity charged on land secured by trust—Limitation not applicable.—Testator who died in 1795 devised his real estates to trustees to sell, & out of the interest of the proceeds, & out of the rents of the estates until they should be sold, to pay certain annuities. No payment has been made in respect of any of the annuities for more than twenty years before the bill was filed; but the trustees entered into possession of the estates on testator's death, & the surviving trustee continued in possession until about eleven years prior to the filing of the bill:—*Held*: pltf.'s right to the annuities was not barred by the Statute of

Limitations.—WARD v. ARCH (1842), 12 Sim. 472; 59 E. R. 1214.

Annotations:—*Apld.* Gough v. Bult (1848), 16 Sim. 323. *Reid.* Petre v. Petre (1853), 1 Drew. 371; Knight v. Bowyer (1858), 2 De G. & J. 421; *Re* Turner, Klaffenberger v. Groombridge, [1917] 1 Ch. 422; *Re* Jordison, Raine v. Jordison, [1922] 1 Ch. 440.

1339. — — ——CUNNINGHAM v. FOOT, No. 1324, *ante*.

1340. — — — Amount of arrears recoverable.—If real estate is conveyed to trustees to secure the payment of an annuity, it is within Real Property Limitation Act, 1833 (c. 27), s. 25, which excepts the charge from the operation of the statute, & in a suit instituted by a third party for redemption of the estates, the annuitant was declared entitled to all the arrears which had been accumulating from the year 1839, though the trustees, on the reversion falling in, had omitted to take possession of the estates.—LEWIS v. DUNCOMBE (1861), 29 Beav. 175; 30 L. J. Ch. 732; 3 L. T. 867; 7 Jur. N. S. 695; 9 W. R. 446; 54 E. R. 594.

Annotations:—*Apld.* Round v. Bell (1861), 30 Beav. 121. *Distd.* Mason v. Broadbent (1863), 33 Beav. 296. *Consd.* Thompson v. Bowyer (1863), 9 L. T. 12; *Re* Jordison, Raine v. Jordison, [1922] 1 Ch. 440.

1341. — — ——HUGHES v. COLES, No. 971, *ante*.

1342. — — — Delay in enforcing payment.—The Statute of Limitations does not apply to an express trust for a legacy, yet where the beneficiary or his representative has allowed a very long time to elapse without attempting to enforce the trust, equity will, when enforcing it, apply, as to interest on the legacy, the principal of the statute. A will, in 1807, began thus: "I hereby appoint my afternamed exor., Charles E., my youngest brother, to be trustee for the following legacies." Several were then named, & the will went on, "Considering that money will be more essential to my dear brother Samuel E. than a distant possession of land, I bequeath to Samuel E., during his natural life, the interest of £3,000, & after his death to his eldest son James E., by his last wife, Margaret J., or M., or E. till he attains twenty-one, & then to obtain the principal. I order that my youngest brother Charles E. shall be liable to all my lawful debts of every description, & pay them as soon as he can, & also pay my legatees when regularly due, & all expenses, etc., & to enable him to do all this, I bequeath, unconditionally, to him all my estates & landed property, with all emoluments belonging to them, in the county of Armagh. I also bequeath to him, the said Charles, all my estates, etc., with all their emoluments, in the county of Louth, or elsewhere," etc.:—*Held*: the will constituted an express trust, so as to prevent the Statute of Limitations applying to it.

It appears to me that your lordships would act upon an intelligible & wholesome principle in this case if you limited the amount of interest upon this legacy to that period of six years, which is the ordinary period of limitation laid down by the statute, not doing so by way of submitting to a bar created by the statute but in the discretion of the ct. itself as the length of time over which the claim of pltf. should be allowed to range, & preventing that claim going back so far as would create actual injustice towards those against whom it would be enforced (LORD CAIRNS, C.).—THOMSON v. EASTWOOD (1877), 2 App. Cas. 215, H. L.

Annotations:—*Distd.* The Kong Magnus, [1891] P. 223. *Reid.* Cunningham v. Foot (1878), 3 App. Cas. 974; *Re* Lloyd, Lloyd v. Lloyd, [1903] 1 Ch. 385; Lewis v. McKay, Algate v. Vugler, Clark v. Potter (1924), 93 L. J. K. B. 840. *Mentd.* Dougan v. Macpherson, [1902] A. C. 197.

Sect. 10.—Trusts affecting real property: Sub-sects. 2, 3, 4 & 5. Sects. 11 & 12: Sub-sect. 1, A. (a).]

1343. Devise subject to annuity—Devisee not trustee for annuitant—Amount of arrears recoverable.]—FRANCIS *v.* GROVER, No. 965, *ante*.

1344. ——— Limitation applicable.]—Testator devised freeholds & copyholds to his son for life & after his decease to his first & other sons paying £10 a year to M. for life:—*Held*: the word "paying" created a charge & not a trust.

The word "paying" creates, not a trust, but a charge or condition; & therefore pltf.'s claim is barred by the statute [Real Property Limitation Act, 1833 (c. 27)] (SHADWELL, V.-C.).—HODGE *v.* CHURCHWARD (1847), 16 Sim. 71; 60 E. R. 799. *Annotation*:—*Reid*. Cunningham *v.* Foot (1878), 3 App. Cas. 947.

SUB-SECT. 3.—CHARITIES.

See CHARITIES, Vol. VIII., pp. 353–355, Nos. 1498–1519.

SUB-SECT. 4.—PURCHASERS FROM TRUSTEES.

See Real Property Limitation Act, 1833 (c. 27), s. 25.

1345. Purchaser with notice—Whether limitation applicable.]—A renewable leasehold for lives was vested in A., in trust for B., for life, with remainders in the events that happened to C. & his heirs. Afterwards, on the marriage of B., a settlement was made, on the construction of which it was doubtful whether the leasehold passed, on B. for life, remainder to the sons of that marriage in tail: under which D. would be entitled. The lease being still subsisting in A., B. took a renewal in his own name without noticing the trust; & after the death of B., D. entered & took a renewal in his own name, & the property continued to be enjoyed by him & those claiming under him, for a time much beyond the period of limitation, & more than twenty years before the commencement of a suit by those claiming under C. D. on his marriage, assigned the leasehold to the trustees of his marriage settlement & they were enjoyed accordingly until the filing of the bill. The transactions relating to the deed, on the construction of which the doubts arose took place sixty-two years before the filing of the bill, which was not filed till after all the persons who could have explained those transactions were dead; there was much ground for believing that the parties had intended the deed to include the leaseholds:—*Held*: (1) assuming the possession of D., & those claiming under him, to have been originally wrongful, he & they were not express trustees within Real Property Limitation Act, 1833 (c. 27), s. 25, & might set up the statute as a bar; (2) even if there had been an express trust, those claiming under the settlement by D. could, as purchasers, set up the statute.—PETRE *v.* PETRE (1853), 1 Drew. 371; 1 W. R. 189; 61 E. R. 493.

Annotations:—As to (1) *Consd.* Banner *v.* Berridge (1881), 18 Ch. D. 254. *Reid.* Sands to Thompson (1883), 22 Ch. D. 614; Price *v.* Phillips (1894), 13 R. 191. *Generally*, *Reid.* Vane *v.* Vane (1873), 8 Ch. App. 883; Lawrance *v.* Norreys (1888), 39 Ch. D. 213; Willis *v.* Howe, [1893] 2 Ch. 545; Thorne *v.* Heard, [1894] 1 Ch. 599; *Re* Astley & Tyldesley Coal & Salt Co. & Tyldesley Coal Co. (1899), 68 L. J. Q. B. 252; *Re* McCallum, McCallum *v.* McCallum, [1901] 1 Ch. 143.

1346. ———.]—When an exor. has committed a breach of trust, by selling some of the trust property to a purchaser with notice at an undervalue, a bill against the exor. & purchaser for administration of the trust & restoration of the property sold is not multifarious. In such a case, however, the purchaser is not an express trustee within Real Property Limitation Act, 1833 (c. 27), s. 25, & the suit must therefore be instituted against him within the time fixed by that Act.—PYRAH *v.* WOODCOCK (1871), 24 L. T. 407; 19 W. R. 463.

1347. ——— Purchaser of infant's share.]—Real estate was held in undivided shares by several persons as tenants in common in fee, & all of such tenants in common, except the holders of one share, were *sui juris*, & owners of the legal & equitable estates & interests in their respective shares in their own right. The remaining share was vested in trustees upon trusts to apply the income or such part thereof as they should think expedient for the benefit of two infants during minority, & for them absolutely upon their attaining twenty-one. In 1868 the property was by a deed, to which all the owners who were *sui juris* were parties, as were also nominally the infants, conveyed to a purchaser for value, with notice of the infants' interest; & the deed contained a declaration that N., who was a party thereto for that purpose, should stand possessed of a sum representing the infants' share of the purchase-money upon trusts for their benefit during their infancy, & if within one month after coming of age they should execute the deed, or otherwise convey their interest to the purchaser, then in trust for them absolutely, but if not, then in trust for the purchaser absolutely. The infants came of age in 1884 & 1885 respectively but did not execute the deed or otherwise convey their interest as aforesaid. The purchaser & his assigns having been in possession since the date of the deed, an action was brought in 1889 by a person claiming under one of the infants to recover her share from assigns of the purchaser. Defts. contended that, at the time of the conveyance of 1868, the infants had no estate, the share in dispute being vested in trustees, with discretionary powers for their benefit merely; but those trustees were barred by lapse of time under the Real Property Limitation Act, 1874 (c. 57), & consequently the infants & those claiming under them were also barred, & could not recover the share:—*Held*: (1) the purchaser under the deed of 1868 having entered into possession, with full notice & knowledge of the infants' rights, the claim was not barred by the statute; (2) *Semble*: he would also be treated as not being in adverse possession at all, but merely in right of the infants, & not, therefore, as in a position to set up the statute against them or their assigns.—YOUNG *v.* HARRIS (1891), 65 L. T. 45.

1348. Time runs from execution of conveyance.]—A. being a lessee of lands under a charity, & being also the owner of an adjoining public-house & premises, was, in 1794, appointed a trustee of the charity, & jointly with the other trustees, took a conveyance of the charity estates. A., in 1817, after the expiration of his lease, took another lease for twenty-one years of lands of the charity, which were described as part of a room in the public-house, but were not otherwise defined. A. subsequently sold the public-house to defts. B. & C., & died; & B. & C. in July, 1823, took a

PART V. SECT. 10, SUB-SECT. 4.

*Purchaser with notice—Whether limitation applicable.]—*MORRISON *v.* McLEOD (1906), 1 E. L. R. 112.—CAN.
*Time runs from execution of conveyance.]—*THOMPSON *v.* SIMPSON (1841), 1 Dr. & War. 459.—IR.

PART V.—LAND OR RENT.

conveyance & assignment of the freehold premises & the lease from the exors. of A. In 1832 B. became a trustee & executed the deed of trust, in which the whole of the room in the public-house, & other parts of the premises, were described as the property of the charity. In May, 1843, the information was filed, at the suit of the trustees other than B. claiming rent in respect of the whole of the room in the public-house, & other parts of the premises, as being the property of the charity in the occupation of defts.; & praying that defts. might be decreed to convey the lands in question to the trustees of the charity:—*Held*: so far as the case was one of trust, it was one of express trust, within Real Property Limitation Act, 1833 (c. 27), s. 25, & therefore, the information having been filed within twenty years after the conveyance was executed to defts. B. & C., the statute was not a bar to the suit.—*A.-G. v. FLINT* (1844), 4 Hare, 147; 67 E. R. 597; *subsequent proceedings* (1845), 9 J. P. 836.

1349. —.]—*ST. MARY MAGDALEN COLLEGE, OXFORD (PRESIDENT, ETC.) v. A.-G.*, No. 1051, *ante*.

SUB-SECT. 5.—MORTGAGEES AS TRUSTEES.
See Part V., Sect. 12, sub-sect. 3, *post*.

SECT. 11.—FRAUD.
Fraud.]—See Part VIII., Sect. 3, *post*.

SECT. 12.—MORTGAGOR AND MORTGAGEE.
SUB-SECT. 1.—RIGHT OF MORTGAGEE TO RECOVER MORTGAGED LAND.

A. *When Mortgagor is in Possession.*

(a) *In General.*

1350. *How mortgagee's title extinguished.*]—(1) When the money due upon a mtge. has been paid to the mtgee., but no reconveyance has been executed, the mtgor. becomes from the date of such payment a tenant at will to the mtgee., & the legal estate of the mtgee. is extinguished by thirteen years' adverse possession of the mtgor. Real Property Limitation Act, 1833 (c. 27), s. 25, relates to express trusts only, & does not apply to the relation between a mtgee. whose mtge. has been satisfied & the mtgor.

It appears to me equally, that the mtgee. was not a trustee, & the mtgor. was not a *cestui que trust* (FRY, J.).

(2) A mtge. had been paid off more than thirteen years, but no reconveyance executed:—*Held*: a purchaser could not require, the concurrence of the mtgee., on the ground that the mtgor. had become tenant at will to the mtgee., & time began to run one year thereafter.—*SANDS TO THOMPSON* (1883), 22 Ch. D. 614; 52 L. J. Ch. 406; 48 L. T. 210; 31 W. R. 397.

Annotations:—As to (1) *Reid. Warren v. Murray*, [1894] 2 Q. B. 648. *Generally, Mentd. Charles v. Jones* (1887), 35 Ch. D. 544.

PART V. SECT. 12, SUB-SECT. 1.—
A. (a).

1350 i. *How mortgagee's title extinguished.*]—*ROSS v. POMEROY* (1881), 28 Gr. 436.—CAN.

1350 ii. —.]—*STEVENS v. JEFFERS* (1907), 3 E. L. R. 471; 38 N. B. R. 233.—CAN.

t. *Possession of part—Possession of whole.*]—Where several lots of land are mortgaged, & the mtgor. & his heir remain in possession of one of them for more than twenty years, so as to bar the mtgee.'s title:—*Held*: the mtgor.'s title by possession is not, like that of a mere trespasser, confined to the land which he actually occupies,

but covers the whole land included in the mtge., as well the lot upon which the mtgor. lives as the other unoccupied lots.—*DOE d. DUNLOP v. McNAB* (1849), 5 U. C. R. 289.—CAN.

a. *Exercise of power of sale—Time continues to run.*]—The exercise of the power of sale by the mtgee. has not the

HAZELDINE'S TRUSTS, No.

1468, *post*.

1352. —.]—(1) In 1897 freehold property was mortgaged in fee simple to secure certain moneys payable on demand, but there was no covenant by the mtgor. for payment. At the date of the mtge. the property was subject to a lease for twenty-one years from July 29, 1896. The yearly rent of £50 had been paid in advance for seventeen & a half years upon the execution of the lease, & no quarter's rent became due until Jan. 29, 1914. After July, 1903, no payment was made or acknowledgment given in respect of the mtge. On Jan. 15, 1916, the mtgees. commenced foreclosure proceedings:—*Held*: the estate claimed by the mtgees. was not "an estate or interest in reversion or remainder, or other future estate or interest," within the meaning of those terms as used in Real Property Limitations Act, 1833 (c. 27), s. 3, but was a present estate in fee simple, & none the less an estate in possession because it was subject to an occupation lease; the mtgees.' right to bring an action first accrued immediately upon the execution of the mtge.; & as more than twelve years had elapsed since the last acknowledgment their right of action was barred.

(2) Inasmuch as the object of a foreclosure action is not to obtain the payment of rent but to deprive the mtgor. of his right to redeem the fact that the mtgee. will not by bringing his action derive any immediate pecuniary benefit from the rents & profits, & because, for instance, the rent is a peppercorn or has been paid in advance, will not prevent time from running under the statute.—*WAKEFIELD & BARNSELY UNION BANK, LTD. v. YATES*, [1916] 1 Ch. 452; 85 L. J. Ch. 360; 114 L. T. 914; 60 Sol. Jo. 352, C. A.

1353. — *Existence of prior mortgage—Acquisition of priority by second mortgagee.*]—Real Property Limitation Act, 1833 (c. 27), s. 34, which provides that at the determination of the statutory period of limitation for bringing an action "the right & title" to the land shall be extinguished, applies as between a mtgee. & a mtgor. in possession, & in favour of the latter, although a prior mtge. has been in existence during the earlier part of such statutory period. The effect of barring the mtgee.'s title is to vest the legal estate in the mtgor., & therefore, if he afterwards grants a mtge. to another person, & the subsequent mtgee. brings an action, against the mtgor. & the mtgee. against whom the statute has run, to enforce his security, pltf. may rely on such extinguishment of title in support of his own claim as first mtgee., although the mtgor. does not rely on the statute & has, after the expiration of the statutory period; given his co-deft. a written acknowledgment.—*KIBBLE v. FAIRTHORNE*, [1895] 1 Ch. 219; 64 L. J. Ch. 184; 71 L. T. 755; 43 W. R. 327; 13 R. 75.

Annotations:—*Consd. Re Hazeldine's Trusts* (1907), 97 L. T. 818. *N.F. Johnson v. Brock*, [1907] 2 Ch. 533.

1354. *What rights extinguished.*]—*DEARMAN v. WYCHE*, No. 849, *ante*.

1355. *Acknowledgment of right.*]—No interest had been paid for more than twenty years, but a further charge had been indorsed upon the mtge.:—*Held*: a sufficient acknowledgment to maintain

Sect. 12.—Mortgagor and mortgagee: Sub-sect. 1, A.
(a) & (b) i. & ii.]

the right of action under Real Property Limitation Act, 1833 (c. 27), s. 14.—*DOE d. ABBOT v. ENGLAND* (1843), 1 L. T. O. S. 77.

1356. Possession of prior mortgagee—Effect of.]
 —(1) When the right of action of a mtgee. to recover land has accrued, the possession of the land by a prior mtgee. does not suspend the running of the period of limitation against the subsequent mtgee.

(2) The right of action is to be deemed to have accrued when J. became entitled to possession or receipt of the rents & profits; & that, as has been decided in many cases, is when his estate became absolute at law, namely, at the time fixed for payment of the mtge. money, after which the mtgor. has only an equity of redemption (*PARKER, J.*). —*JOHNSON (SAMUEL) & SONS, LTD. v. BROCK*, [1907] 2 Ch. 533; 76 L. J. Ch. 602; 97 L. T. 294.

Annotation:—*As to (2) Reid. Wakefield & Barnsley Union Bank v. Yates*, [1916] 1 Ch. 452.

(b) When Time Begins to Run.
i. In General.

1357. Mortgage by tenant for life—Whether during life—Tenant by curtesy.]—Baron & feme seised in fee in right of the feme, mortgaged by fine & afterwards conveyed the equity of redemption by lease & release to the mtgee.; the mtgee. remained in possession as complete owner for more than twenty years during the life of the husband tenant by the curtesy from whom he had his conveyance; the heir of the wife was held not barred of his equity of redemption by lapse of time.—*CORBETT v. BARKER* (1796), 1 Bli. 136, n.; 3 Anst. 755; 145 E. R. 1029.

Annotations:—*Consd. Raffety v. King* (1836), 1 Keen, 601. *Reid. Raval v. Russell* (1830), You. 9; *Ashton v. Milne* (1833), 6 Sim. 369; *Bandon v. Becher* (1835), 9 Bli. N. S. 532. *Mentd. Jackson v. Innes* (1819), 1 Bli. 104.

1358. ———.]—Where a mtgee. is also tenant for life of the mtged. estate, Statute of Limitations does not begin to run against the mtge. title until his death, & the same rule applies where the mtgee. is a tenant in common, with others, of the mtged. estate.—*WYNNE v. STYAN* (1847), 2 Ph. 303; 41 E. R. 959, L. C.

1359. ———.]—*Re HAWES, Re BURCHELL, BURCHELL v. HAWES*, No. 931, ante.

1360. Proviso for quiet possession till default—Operation of mortgage as redemise for such term—Time runs from day named.]—Pltf. mortgaged land in fee, with a proviso for redemption on payment of principal in June, 1833; but it was agreed that the mtgee. should not call in the principal till 1840, if interest were regularly paid in the meantime; & that the mtgor. should hold the premises & take the rents, issues, & profits for his own use, till default should be made in the payment of principal & interest as aforesaid:—*Held*: this operated as a redemise to the mtgor. till 1840.—*WILKINSON v. HALL* (1837), 3 Bing. N. C. 508; 13 Hodg. 56; 4 Scott, 301; 6 L. J. C. P. 82; 132 E. R. 506.

Annotations:—*Reid. Doe d. Lyster v. Goldwin* (1841), 2 Q. B. 143; *Doe d. Roylance v. Lightfoot* (1841), 8 M. & W. 553. *Mentd. Alderman v. Neate* (1839), 8 L. J. Ex. 89; *Gibson v. Kirk* (1841), 1 Q. B. 850; *Chapman v.*

Beecham (1842), 3 Gal. & Dav. 71; *Doe d. Parsley v. Day* (1842), 2 Q. B. 147; *Manders v. Williams* (1849), 4 Exch. 339; *Duxbury v. Sandiford* (1898), 80 L. T. 552.

1361. Time runs from execution of deed.]—Lands were mortgaged by lease & release in Sept. 1819, subject to a proviso that if mtgor. should well & truly pay, etc., on Mar. 25 then next the mtgees., etc., would reassure. Covenant that mtgee. might if default, etc., peaceably re-enter, etc.; also covenant for further assurance in case of such default:—*Held*: mtgee. had right of possession not merely from Mar. 25, but from time of execution of deed & therefore ejectment by heir at law of mtgee. brought within twenty years of the former, but not of the later date, was too late.—*DOE d. ROYLANCE v. LIGHTFOOT* (1841), 8 M. & W. 553; 11 L. J. Ex. 151; 5 Jur. 966; 151 E. R. 1158.

Annotations:—*Reid. Hemming v. Blanton* (1873), 42 L. J. C. P. 158. *Mentd. Doe d. Parsley v. Day* (1842), 2 Q. B. 147; *Gale v. Burnell* (1845), 7 Q. B. 850; *Rogers v. Grazebrook* (1846), 8 Q. B. 895; *Knight v. Robinson* (1856), 2 K. & J. 503; *R. v. Champneys* (1871), L. R. 6 C. P. 384; *Re Bellis's Trusts* (1877), 5 Ch. D. 504.

1362. Mortgage by demise—With right of entry—Time runs from execution.]—In trespass *quære clausum fregit*, pltf. made title under a mtge. deed of Mar. 6, 1840, by which the mtgor., H., demised premises to pltf. from thenceforth for a certain term, subject to a proviso that the demise should cease & be void if H. paid principal & interest by Mar. 6, 1841, & interest at stated periods in the meantime; & to another proviso, empowering pltf. to sell, after, three months' notice, if default should be made in payment of principal & interest at the times named. Then followed covenants, among others, by H. to pltf., for payment of principal & interest at the days appointed, & that, at any time after default made in such payment, it should be lawful for pltf. peaceably & quietly to enter upon the premises, & from thenceforth, for the residue of the term, to hold the same & take the rents & profits without lawful interruption from H. or any other person, etc. On pleadings in trespass, setting forth the deed, & showing that pltf. had entered upon the mtged. premises after the execution of the deed but before Mar. 6, 1841, & before default in payment, & raising the question whether or not he had a right so to enter:—*Held*: the deed gave power to the mtgee. to enter before default, & before the day named for any payment.—*ROGERS v. GRAZEBROOK* (1846), 8 Q. B. 895; 7 L. T. O. S. 109; 115 E. R. 1111.

Annotation:—*Mentd. Manders v. Williams* (1849), 4 Exch. 339.

1363. Where right of entry exists—Time runs from last payment of interest.]—In ejectment by mtgee., the mtge. being above twenty years old, & the interest upon it having been paid by the mtgor., pltf. was allowed to recover upon proof of an agreement between them, & deft. showing that he had held under them on terms which gave them a right of re-entry. The mtge. being more than twenty years old, & the payments of interest not having been kept by deft., pltf.'s right to recover must depend on the proviso in Real Property Limitation Act, 1833 (c. 27), s. 7 (*MARTIN, B.*).—*POLE v. DAVIS* (1858), 1 F. & F. 284, N. P.

1364. Time runs against second mortgagee—From time first mortgagee paid off.]—Z. being

effect of stopping the running of the Statute of Limitation.—*WATSON v. LINDSAY* (1879), 27 Gr. 253; 6 A. R. 609.—*CAN.*

b. Title extinguished—Recovery of possession by mortgagee.]—*DOE d. HAZEN v. LASKEY* (1883), 23 N. B. R.

481.—*CAN.*

PART V. SECT. 12, SUB-SECT. 1.

A. (b) i.

c. Where right of entry exists—Time runs from date of right of entry.]—*BRAJANATH KUNDU CHOWDHRY v.*

KHILATCHANDRA GHOSH (1871), 8 B. L. R. 104; 14 Moo. Ind. App. 144; 16 W. R. P. C. 33.—*IND.*

d. ———.]—*MODUN MOHUN CHOWDHRY v. ASHAD ALLY BEPAREE* (1883), 1 L. R. 10 Cal. 68; 13 C. L. R. 51.—*IND.*

indebted to A., executed in his favour a written of certain lands, in which it was agreed that, the debt was not repaid within a fixed time, A. should be put into possession of the lands. Subsequently Z. executed in favour of P., to whom also he owed money, a second mtge. of the same land subject to the same condition. P. not receiving payment within the stipulated time, sued Z. on the mtge., & obtained a decree for possession of the lands, under which he was put into possession in the year 1846. After P. had obtained his decree, A., whose debt had likewise remained unpaid, brought a suit as first mtgee. against Z. & P. for the possession of the lands, & obtaining a decree, recovered possession in the year 1847, dispossessing P. In the year 1870, the heirs of Z. having paid off the debt due to A., resumed possession, whereupon the heirs of P. applied to be restored to possession in execution of the decree obtained by P. in 1846. This application having been rejected on the ground that that decree had been fully executed when P. obtained possession under it, the heirs of P. instituted a suit against the heirs of Z. to recover possession & for interest during the time they were dispossessed:—*Held*: the heirs of P. were entitled to possession on A.'s mtge. being paid off, & their cause of action accrued & limitation ran against them from the time when the heirs of Z. resumed possession.—*NARAIN SINGH v. SHIMBHOO SINGH* (1876), L. R. 4 Ind. App. 15, P. C.

1365. Mortgage of reversionary interest—Time runs from falling into possession.—Time begins to run for the purpose of barring a foreclosure action on an equitable charge on a contingent reversionary interest in land only from the time the interest falls into possession.—*HUGILL v. WILKINSON* (1888), 38 Ch. D. 480; 57 L. J. Ch. 1019; 58 L. T. 880; 36 W. R. 633.

Annotations:—*Expld.* *Re Owen*, [1894] 3 Ch. 220. *Distd.* *Re Witham, Chadburn v. Winfield*, [1922] 2 Ch. 413. *Refd.* *Kibble v. Fairthorne* (1894), 13 R. 75; *Powell v. Brodhurst*, [1901] 2 Ch. 160; *Re Jauncey, Bird v. Arnold*, [1926] Ch. 471.

1366. ———.]—In 1870 A., B. & C. mortgaged certain reversionary shares in a fund in ct. to which B. & C. were entitled under a will to secure the repayment by A. of a sum of £70. The mtge. contained a joint & several covenant by A. & C. for repayment of principal & interest. In 1873 the mtgee. recovered judgment against C. on her covenant. In 1889 the reversionary interests fell into possession. No interest had ever been paid on the mtge. or judgment, nor had any acknowledgment been given:—*Held*: although the personal remedy against C. was barred by Statute of Limitations, the assignment of the property comprised in the mtge. was nevertheless good.—*Re LAKE'S TRUSTS* (1890), 63 L. T. 416.

1367. ——— **Real Property Limitation Act, 1874 (c. 57).**—Testator gave the whole of his residuary estate in trust for his wife for life, with

remainder to his children in equal shares, & he died in 1894, leaving a widow & seven children. In 1903 one of testator's sons mortgaged his one-seventh share in his father's estate, which at that date consisted of personalty & realty. Testator's widow died in 1918, & after her death most of the realty was realised. No interest was ever paid, & no acknowledgment of the mtge. debt was given since 1903:—*Held*: the mtge. debt, as against the proceeds of sale of the real estate, was barred by above Act, sect. 8.—*Re WITHAM, CHADBURN v. WINFIELD*, [1922] 2 Ch. 413; 92 L. J. Ch. 22; 128 L. T. 272; 66 Sol. Jo. 557.

Annotation:—*Consd.* *Re Jauncey, Bird v. Arnold*, [1926] Ch. 471.

1368. ——— **What constitutes—Mortgage of property where rent paid up in advance.**—*WAKEFIELD & BARNESLEY UNION BANK, LTD. v. YATES*, No. 1352, *ante*.

1369. Where remedy is foreclosure—Time runs from date for payment.—*JOHNSON (SAMUEL) & SONS, LTD. v. BROCK*, No. 1356, *ante*.

ii. *Payment of Principal or Interest.*

See Real Property Limitation Acts, 1837 (c. 28), 1874 (c. 57), s. 1.

1370. General rule—Statute prevented from running.—Paying interest upon a mtge. will prevent Statute of Limitations from attaching in favour of the party paying it.—*HATCHER v. FINEAUX* (1701), 1 Ld. Raym. 740; 91 E. R. 139, N. P.

1371. What amounts to—Payment amounting to acknowledgment of liability by person paying—Payment of rent—By tenant of mortgaged property.—*HARLOCK v. ASHBERRY*, No. 1379, *post*.

1372. ——— **Payment after right extinguished.**—*HEMMING v. BLANTON*, No. 1393, *post*.

1373. By whom payment must be made—Person liable to pay as mortgagor—Or agent.—*NEWBOULD v. SMITH*, No. 923, *ante*.

1374. ——— **Surety.**—*CANN v. TAYLOR* (1859), 1 F. & F. 651, N. P.

1375. ——— **Tenant for life—As against remainderman.**—*GREGSON v. HINDLEY*, No. 936, *ante*.

1376. ——— **Widow entitled to dower.**—*AMES v. MANNERING*, No. 916, *ante*.

1377. ———.]—*BARCLAY v. OWEN*, No. 1384, *post*.

1378. ——— **Stranger.**—*CHINNERY v. EVANS*, No. 912, *ante*.

1379. ———.] — (1) A payment, to come within Real Property Limitation Act, 1837 (c. 28), must be a payment of principal or interest by the mtgor., or some person bound or entitled to pay principal or interest on his behalf. The word "paid" in Real Property Limitation Act, 1833 (c. 27), s. 40, involves as a necessary implication the addition of "by the person liable to pay." A payment to the mtgee. of rent by a tenant of the mtged. premises is not such a payment. Payment of rent of part of a property in mtge. does

1369 i. Where remedy is foreclosure—Time runs from date for payment.—*LEWIN v. WILSON* (1884), 9 S. C. R. 637.—*CAN.*

1369 ii. ———.]—*WRIXON v. VIZE* (1842), 3 Dr. & War. 104.—*IR.*

g. Mortgage as collateral security to abide event—Time runs from execution of mortgage—Not from breach of condition.—*DOE d. FALLS v. JONES* (1862), 5 All. 252.—*CAN.*

h. Acknowledgment after title extinguished—Inoperative.—*BEAMISH v. WHITNEY*, [1909] 1

i. Proviso for principal not to be called in for certain period—Time runs from termination of period.—*HAMILL v. MATHEWS* (1909), 44 I. L. T. 25.—*IR.*

PART V. SECT. 12, SUB-SECT. 1.—A. (b) ii.

1370 i. General rule—Statute prevented from running.—*DOE d. MCLEAN v. FISH* (1849), 5 U. C. R. 295.—*CAN.*

1370 ii. ———.]—The payment of interest by one of those claiming under the mtgor. is a sufficient payment to keep the mtge. alive as against all persons claiming under him.—*MCKAY v. HUTCHINGS* (1918), 41 O. L. R. 46; 13 O. W. N. 203.—*CAN.*

h. ——— **When time runs against remainderman.**—If interest is not paid on a mortgage for a period exceeding the statutory period to a person who is tenant for life of the

mtgee.'s estate, this will not bar the remainderman. But the remainderman is barred by non-payment of interest for twelve years, if the mtgee.'s estate is vested in trustees, with full powers of converting & realising the mtge. debt.—*BARCROFT v. MURPHY*, [1896] 1 I. R. 590.—*IR.*

k. What amounts to—Payment amounting to acknowledgment of liability by person paying—Payment of interest on collateral mortgage.—*FARMERS' LOAN & S. CO. v. SPROTT*, 20 C. L. T. 165.—*CAN.*

1373 i. By whom payment must be made—Person liable to pay as mortgagor—Or agent.—*Re MUSKERRY & CHINNERY* (1858), 9 I. Ch. R. 94.—*IR.*

Sect. 12.—Mortgagor and mortgagee: Sub-sect. 1, A. (b) ii., & (c), B. & C.]

not keep alive the right of the mtgee. as to other parts of the mtged. property, in respect of which no rent has been paid.

(2) A payment sufficient to prevent the operation of Statute of Limitations must be such a payment as to amount to an acknowledgment of liability to pay on the part of the payor, & to an admission of the right of the payee.—**HARLOCK v. ASHBERRY** (1882), 19 Ch. D. 539; 51 L. J. Ch. 394; 46 L. T. 356; 30 W. R. 327, C. A.

Annotations:—As to (1) **Consd.** *Lewin v. Wilson* (1886), 11 App. Cas. 639; *Re Clifden, Annaly v. Agar-Ellis*, [1900] 1 Ch. 774. **Expld.** *Bradshaw v. Widdrington*, [1902] 2 Ch. 430. **Refd.** *Topham v. Booth* (1887), 56 L. J. Ch. 812; *Newbould v. Smith* (1888), 29 Ch. D. 882; *Re Lacey, Howard v. Lightfoot*, [1907] 1 Ch. 330. As to (2) **Refd.** *Re Cross, Harston v. Tenison* (1882), 20 Ch. D. 109; *Lewin v. Wilson* (1886), 11 App. Cas. 639; *Taylor v. Holland*, [1902] 1 K. B. 676. **Generally, Mentd.** *Badeley v. Consolidated Bank* (1888), 57 L. J. Ch. 468; *Hugill v. Wilkinson* (1888), 38 Ch. D. 480; *Re Owen*, [1894] 3 Ch. 220; *Kibble v. Fairthorne*, [1895] 1 Ch. 219; *London & Midland Bank v. Mitchell*, [1899] 2 Ch. 161; *Re Witham, Chadburn v. Winfield*, [1922] 2 Ch. 413.

1380. — As between himself & mortgagor.]—BRADSHAW v. WIDDRINGTON, No. 925, ante.

1381. — Wrongful administrator.]

A mtgor., who had deposited the lease of a house to secure his mtge. debt, died, leaving a will by which he appointed an exor. The mtgor.'s son paid off the debt with money which he borrowed for the purpose, deposited the lease with the lender of the money as security for the loan & obtained letters of administration to his father's estate. The will was subsequently proved, & the letters of administration were revoked. The house having many years afterwards been sold by the sole beneficiary under the will, the lender's representatives brought an action against the purchaser for foreclosure:—**Held**: the letters of administration being wholly void, the son had no power to create a valid mtge. to the lender, & in the circumstances of the case, any claim was barred by Statute of Limitations & by the fact that the son was debtor to the father's estate.—**ELLIS v. ELLIS**, [1905] 1 Ch. 613; 74 L. J. Ch. 296; 92 L. T. 727; 53 W. R. 617.

Annotations:—Mentd. *Craster v. Thomas*, [1909] 2 Ch. 348; *Hewson v. Shelley*, [1914] 2 Ch. 13.

1382. — Trustee of settlement.]—ALSTON v. MINEARD (1906), 51 Sol. Jo. 132.

1383. — Devisee of mortgaged property—Mortgagee having no right of administration of whole estate.]—Re LACEY, HOWARD v. LIGHTFOOT, No. 919, ante.

1384. To whom payment must be made—Person entitled to receive it as mortgagee.]—In 1836, shortly after a mtge. of certain freeholds had been executed, the mtgee. died intestate, leaving four next of kin, viz., his brothers R. & C., another brother, & a lunatic sister. R. was the heir-at-law of intestate. C. took out letters of administration to intestate's estate & paid his lunatic sister's share into ct.; paid to his two brothers their shares & took receipts, & retained a fourth of the estate, including the mtge., for himself. Interest

on the mtge. was paid by the tenant for life of the equity of redemption to C., the administrator, till his death in 1863; then to his widow, extrix. & residuary legatee under his will, till 1883, when she died intestate; & then to her administrator & sole next of kin till 1886. In an action by the last-named person for foreclosure of the mtge., all debts admitted the payment of interest, but two of them set up the defence of Statute of Limitations, & argued that an administrator had no power to appropriate a chose in action, that the mtge. was, therefore, not properly appropriated by C. & did not pass under his will, that after his death there was no legal personal representative of the mtgee., & consequently that the subsequent payments of interest were not made to persons entitled to receive them:—**Held**: Statute of Limitations did not apply; an administrator had power to appropriate a debt in this way; the right of an administrator, who was also one of the next of kin, to appropriate part of the estate to his own share was a right entirely independent of the agreement of the next of kin, & this right was not confined to chattels; & the payments of interest were made to the right persons.—**BARCLAY v. OWEN** (1889), 60 L. T. 220.

Annotations:—Mentd. *Re England, Steward v. England* (1895), 73 L. T. 237; *Re Brooks, Coles v. Davis* (1897), 76 L. T. 771; *Re Beverly, Watson v. Watson*, [1901] 1 Ch. 681; *Re Bythway, Gough v. Dames* (1911), 80 L. J. Ch. 246.

(c) Effect of Foreclosure Order.

See, generally, MORTGAGE.

1385. General rule—Accrual of fresh right of recovery.]—A legal mtge. of freehold land in 1856; no possession by the mtgee., & no payment of principal or interest to him, nor any acknowledgment of his title. In 1870 a bill by the mtgee. for redemption or foreclosure; in 1874 a decree nisi for redemption or foreclosure; & in 1877 an order absolute for foreclosure. In 1878 an action by the mtgee. to recover possession of the land:—**Held**: although brought more than twenty years after the date of the mtge. deed the action was not barred by Real Property Limitation Act, 1833 (c. 27), & Real Property Limitation Act, 1837 (c. 28). **Semble**: the action being brought by one who had become absolute owner of the land under the foreclosure decree was an action as to which the right to bring it must be taken to have accrued within Real Property Limitation Act, 1833 (c. 27), s. 2, at the date of that decree; & Real Property Limitation Act, 1833 (c. 27), s. 2, in defining when the right shall be deemed to have accrued is not necessarily exhaustive or otherwise inconsistent with this view.—**PUGH v. HEATH** (1882), 7 App. Cas. 235; 51 L. J. Q. B. 367; 46 L. T. 321; 30 W. R. 553, H. L.; *affg. S. C. sub nom. HEATH v. PUGH* (1881), 6 Q. B. D. 345, C. A.

Annotations:—Expld. *Thornton v. France*, [1897] 2 Q. B. 143. **Refd.** *Harlock v. Ashberry* (1882), 19 Ch. D. 539; *Badeley v. Consolidated Bank* (1888), 57 L. J. Ch. 468; *Re Lake's Trusts* (1890), 63 L. T. 416; *Williams v. Thomas* (1909), 100 L. T. 630; *Re Witham, Chadburn v. Winfield*, [1922] 2 Ch. 413. **Mentd.** *Wood v. Wheeler* (1882), 22 Ch. D. 281; *Fowke v. Draycott* (1885), 29 Ch. D. 996; *Re Owen*, [1894] 3 Ch. 220; *Huntington v. I. R. Comrs.*, [1896] 1 Q. B. 422; *London & Midland Bank v. Mitchell*, [1899] 2 Ch. 161; *Matthews v. Usher*

1384 i. To whom payment must be made—Person entitled to receive it as mortgagee.]—MEADE v. BANDON (1814), 2 Dow. 268.—IR.

1. From date of last payment.]—MANITOBA MORTGAGE & INV. CO. v. DALY (1895), 10 Man. L. R. 425.—CAN.

BRITISH CANADIAN LOAN & AGENCY CO. v. FARMER (1904),

15 Man. L. R. 593; 24 C. L. T. 273. O. W. N. 1459; 12 D. L. R. 64.—CAN.

—CAN. **n. —.]—Re SCOTT** (1858), 8 L. Ch. R. 316.—IR.

o. From date of default.]—Where there is an acceleration clause in a mtge. & default is made in the payment of interest, Statute of Limitation begins to run from that date.—CAMERON v. SMITH (1913), 24 O. W. R. 767; 4

PART V. SECT. 12, SUB-SECT. 1.—A. (c).

1385 i. General rule—Accrual of fresh right of recovery.]—Re BAIN & CHAMBERS (1897), 11 Man. L. R. 550.—CAN.

1385 ii. —.]—ARCHIBALD v. LAWLOR (1902), 35 N. S. R. 48.—CAN.

1886. L. J. Q. B. 988; United Realization Co. v. I. R. Comrs., [1899] 1 Q. B. 361; Re Lloyd, Lloyd v. Lloyd, [1903] 1 Ch. 385; Re Lovell & Collard's Contract, [1907] 1 Ch. 249; Copestake v. Hoper, [1908] 2 Ch. 10; Turner v. Walsh, [1909] 2 K. B. 484.

1386. Assignment of mortgage after foreclosure—Without benefit of foreclosure—New right of redemption in later mortgagees.]—After a decree to foreclose the mtgor. & some creditors whose debts were charged on the estate, one of the creditors, pays off the mtge., & agrees with the rest that they should redeem him at a further day, otherwise he should hold the lands absolutely. The mtgee. assigned to the creditor his mtge. only, & not the benefit of the decree of foreclosure. This gives the other creditors a new redemption; & accordingly a redemption decreed, though after twenty years' possession & great improvements made.—*EXTON v. GREAVES* (1682), 1 Vern. 138; 1 Eq. Cas. Abr. 317; 23 E. R. 371.

Annotation:—Expld. Whiting v. White (1792), 2 Cox, Eq. Cas. 290.

B. When Mortgagee has Beneficial Interest.

1387. When time begins to run.]—WYNNE v. STYAN, No. 1358, ante.

C. Where Third Party is in Possession.

When time begins to run.]—See Real Property Limitation Act, 1833 (c. 27), s. 3.

1388. — Effect of payment of interest—As against mortgagor & persons claiming under mortgage—Possession not adverse.]—Lessor of pltf. was the assignee of a mtge., made more than twenty years before ejectment brought; but the mtgor. had, within twenty years, paid interest on the mtge. Deft. had been let into possession more than a year before the mtge., by the mtgor., & suffered by him, as a favour, to occupy the premises without payment of rent, & without any written acknowledgment. The mtgor.'s right of entry as against deft. accrued, under Real Property Limitation Act, 1833 (c. 27), less than twenty years before the mtge., but more than twenty years before ejectment brought:—*Held*: Real Property Limitation Act, 1837 (c. 28), preserved to the lessor of pltf., being a mtgee., the same right of entry as if Real Property Limitation Act, 1833 (c. 27), had not passed; & deft.'s possession never having been such as, before Real Property Limitation Act, 1833 (c. 27), would have been adverse to the lessor of pltf., he was entitled to recover; though the mtgor.'s right of entry within Real Property Limitation Act, 1833 (c. 27), had accrued before the mtge., & was barred under that statute by lapse of time before commencement of the action.

(2) It was argued before us that the owner of an estate, who is himself barred by a tenant having occupied twenty years without payment of rent or acknowledgment, might, by executing a mtge., & payment of interest to a mtgee., vest in the latter a right of entry which he could not exercise himself; but by such a mtge. nothing

would pass, under Real Property Limitation Act, 1833 (c. 27), s. 34, the right of the owner being extinguished at the end of the period of limitation (LORD CAMPBELL, C.J.).—*DOE d. PALMER v. EYRE* (1851), 17 Q. B. 366; 20 L. J. Q. B. 431; 17 L. T. O. S. 221; 15 Jur. 1031; 117 E. R. 1320.

Annotations:—Folld. Ford v. Ager (1863), 2 New Rep. 366. *Refd. Doe d. Baddeley v. Massey* (1851), 17 Q. B. 373; *Hemming v. Blanton* (1873), 42 L. J. C. P. 158; *Thornton v. France*, [1897] 2 Q. B. 143.

]—(1) A

taking in land adjacent to his own, by encroachment, must, as between himself & the landlord, be deemed, *prima facie*, to take it as part of the demised land; but that presumption will not prevail for the landlord's benefit against third persons. The landlord of A. & B., adjacent closes, mortgaged them, & afterwards demised A. The tenant of A. built upon B. without leave of the landlord, who, on permission being asked, refused it, saying he had granted rights over B. to occupier of other adjoining lands. The tenant held both A. & B. for twenty years, paying rent to the landlord under the demise of A., but not expressly in respect of B.:—*Held*: on this evidence, he might insist, as against the landlord, on a twenty years' occupation of B. within Real Property Limitation Act, 1833 (c. 27), ss. 2, 3.

(2) On a purchase of lands which were under mtge., the purchaser paid the principal & interest due on the mtge., & took a conveyance in which mtgor. & mtgee. joined, of the premises, & of the mtgor.'s equity of redemption & all the residue of his interest:—*Held*: the purchaser was a person "claiming under" a mtge., within Real Property Limitation Act, 1837 (c. 28); & the twenty years' limitation under Real Property Limitation Act, 1833 (c. 27), s. 2, ran from the paying off of the mtge. & interest.—*DOE d. BADDELEY v. MASSEY* (1851), 17 Q. B. 373; 20 L. J. Q. B. 434; 17 L. T. O. S. 221; 15 Jur. 1031; 117 E. R. 1322.

Annotations:—As to (2) Distd. Thornton v. France, [1897] 2 Q. B. 143. *Refd. Hemming v. Blanton* (1873), 42 L. J. C. P. 158.

1390. — — — — —.]—A., being owner in fee of a house & land, let B. into possession, by favour, in 1837, & subsequently, in the same year, mortgaged the premises by demise for one thousand years to C., & paid interest on the mtge. up to 1848, when he sold & conveyed the equity of redemption to D. B. continued in possession & occupation of the premises, without any written acknowledgment, & without payment of rent to A. or any one from 1837 to 1862, when, A. having died in the meantime, B. sold & conveyed the property in fee to pltf., but continued in the occupation of it, as tenant to pltf. at a certain fixed rent, under an agreement in writing between them. Subsequently to this C., the mtgee., & D. the owner of the equity of redemption, having brought ejectment against B., paid him £5 to give up possession to them, which he did, & C. & D. then joined in conveying the premises in fee to

PART V. SECT. 12, SUB-SECT. 1.—B.

1387 I. When time begins to run.]—CARBERRY (LORD) v. PRESTON (1850), 13 I. Eq. R. 455.—IR.

1387 II. —.]—Re FINNEGAN'S ESTATE, [1906] 1 I. R. 370.—IR.

PART V. SECT. 12, SUB-SECT. 1.—C.

1388 I. When time begins to run—Effect of payment of interest—As against mortgagor & persons claiming under mortgage—Possession not adverse.]—EYRE v. WALSH (1860), 10 I. C. L. R. 346.—IR.

p. — — — Possession adverse prior to mortgage.]—The possession of a stranger which has not ripened into a title as against the owner of land, will not enure to the benefit of him so in possession as against the mtgee., so long as his interest is regularly paid by the owner.—*CHAMBERLAIN v. CLARK* (1881), 28 Gr. 454.—CAN.

q. — — — Wild lands.]—Real Property Limitation Act does not begin to run against a mtgee. of land in a state of nature until actual possession is taken by some person not claiming under him.—*BUCKNAM v. STEWART* (1897), 11 Man. L. R. 625.—CAN.

r. — — — Possession subsequent to mortgage—Effect of foreclosure.]—ARCHIBALD v. LAWLOR (1902), 35 N. S. R. 48.—CAN.

t. — — — From date of possession.]—SRIMATI ANAND MAYI DASI v. DHARANDRA CHANDRA MOOKERJEE (1871), 8 B. L. R. 122; 14 Moo. Ind. App. 101; 16 W. R. P. C. 19.—IND.

a. — — — — —.]—AIMADAR MANDAL v. MAKHAN LAL DAY (1906), 1 I. L. R. 33 Cal. 1015.—IND.

b. Constructive possession of mortgagee—Vacant lands.]—Where a right

Sect. 12.—Mortgagor and mortgagee: Sub-sect. 1, C.; sub-sect. 2, A. (a).]

defts., the mtge. being then paid off. On ejectment by pltf. to recover possession from defts.:—*Held*: (1) defts., as claiming title under the mtge., were not estopped, by having obtained possession from B., pltf.'s tenant, in the manner above mentioned, from setting up their title under the mtge. in answer to pltf.'s action; & they were not bound to have given up the possession so obtained by them, before setting up such title in answer to the action; (2) defts., being persons claiming under a mtge., on which interest had been paid within twenty years before ejectment brought, came within Real Property Limitation Act, 1837 (c. 28), & consequently was not barred by Real Property Limitation Act, 1833 (c. 27), s. 2.—*FORD v. AGER* (1863), 2 H. & C. 279; 2 New Rep. 366; 32 L. J. Ex. 269; 8 L. T. 546; 9 Jur. N. S. 804; 11 W. R. 1073; 159 E. R. 117.

Annotation:—*As to* (2) *Reid*. *Hemming v. Blanton* (1873), 42 L. J. C. P. 158.

1391. ———— *Real Property Limitation Act, 1837 (c. 28), which provides that a person entitled to or claiming under a mtge. of land may make an entry or bring an action at law or suit in equity to recover such land at any time within twenty, now twelve, years next after the last payment of any part of the principal or interest secured by such mtge. applies not only as against the mtgor. & persons claiming under him, but also as against a person who has acquired a good title by virtue of Statute of Limitations as against the mtgor. & those claiming under him.*—*LUDBROOK v. LUDBROOK*, [1901] 2 K. B. 96; 70 L. J. K. B. 552; 84 L. T. 485; 49 W. R. 465; 17 T. L. R. 397; 45 Sol. Jo. 393, C. A.

1392. ———— *Person in possession having no title as against mortgagor.*—*DOE d. PALMER v. EYRE*, No. 1388, *ante*.

1393. ———— *Where a demise for a term of one thousand years by way of mtge. is created in land, & no payment of principal or interest or acknowledgment is made for more than twenty years, & the mtgor. & those claiming under him remain in possession of the premises without interruption, the title of the mtgee. under the mtge. is thenceforth barred, therefore a payment of arrears of interest & the principal to the mtgee. under a decree in a foreclosure suit, after that time has elapsed, does not revive the title in the mtgee., & an ejectment does not then lie to recover the possession.*—*HEMMING v. BLANTON* (1873), 42 L. J. C. P. 158; 21 W. R. 636.

1394. ———— *Against subsequent mortgagee—Prior mortgagee in possession.*—*JOHNSON (SAMUEL) & SONS, LTD. v. BROCK*, No. 1356, *ante*.

1395. *Who are persons claiming under mortgage—Person paying off mortgage debt—Taking conveyance of legal estate—& equity of redemption.*—*DOE d. BADDELEY v. MASSEY*, No. 1389, *ante*.

1396. ———— *FORD v. AGER*, No. 1390, *ante*.

1397. ———— *Mortgagor.*—In 1886 the owner of one undivided moiety of premises, which had been during the previous eleven years in the

sole possession of the owners of the other moiety, mortgaged his moiety; & in 1890, the premises having in the meantime continued & still continuing to be in the sole possession of the owners of the other moiety, he executed a conveyance of his moiety, subject to the mtge., to pltf., who subsequently paid off the mtge. In an action for partition of the property:—*Held*: (1) pltf. did not, on paying off the mtge., become a "person claiming under a mtge." within Real Property Limitation Act, 1837 (c. 28), which, as modified by the Real Property Limitation Act, 1874 (c. 57), s. 9, give such a person a period of twelve years from the last payment of any part of the principal money or interest secured by the mtge. for bringing an action to recover the land; (2) the Real Property Limitation Act, 1837 (c. 28), did not confer a new right of entry on the mtgee. where at the date of the mtge. a person is in possession adversely to the mtgor. & the Statute of Limitations had already begun to run in his favour against the mtgor.—*THORNTON v. FRANCE*, [1897] 2 Q. B. 143; 66 L. J. Q. B. 705; 77 L. T. 38; 46 W. R. 56, C. A.

Annotation:—*Reid*. *Ludbrook v. Ludbrook*, [1901] 2 K. B. 96.

SUB-SECT. 2.—REDEMPTION ACTIONS.

A. When Mortgagor is Barred.

(a) In General.

See Real Property Limitation Act, 1874 (c. 57), s. 7.

1398. *Entry by mortgagee.*—If the mtgee. enters into possession in his character of mtgee., or by virtue of his mtge. title alone, he is for the period of twenty years liable to account, & if payment be tendered to him, liable to become trustee for the mtgor; but, if the mtgor. permits the mtgee. to hold for twenty years without accounting, or admitting his mtge. title, the mtgor. loses his right of redemption, & the title of the mtgee. becomes as absolute in equity as it was previously at law; & in such a case, the time runs against the mtgor. from the moment the mtgee. takes possession, & continues to run against all those claiming under the mtgor., whatever may be the disabilities to which they may be subjected.

But if the mtgee. enters, not in his character of mtgee. only, but as purchaser of the equity of redemption, he must look to the title of his vendor, & the validity of the conveyance he takes, & if the conveyance be such as gives him only the estate of a tenant for life, he is bound, having united in himself the characters of mtgor. & mtgee., to keep down the interest of the mtge. for the benefit of the person or persons entitled in remainder, & time will not run against the remaindermen during the continuance of the estate for life.—*RAFFETY v. KING* (1836), 1 Keen, 601; 6 L. J. Ch. 87; 48 E. R. 439.

Annotations:—*Mentd.* *Davis v. Quarterman* (1840), 4 Y. & C. Ex. 257; *Wicks v. Scrivens* (1860), 1 John. & H. 215.

1399. ———— *Whether remainderman barred.*—If a mtgee. enters in the lifetime of the tenant for life of the mtged. estate, the remainderman will be barred of his right to redeem after twenty years

of entry has accrued to a mtgee. without actual entry by him, & the mortgaged lands are subsequently left vacant before a title by possession has been acquired, by any one, the constructive possession thereof is in the mtgee., & the Statute of Limitation does not run against him so as to extinguish his title to the lands; the mtge. being in default & no presumption of payment arising.—*DELANEY v.*

CANADIAN PACIFIC RY. CO. (1891), 21 O. R. 11.—CAN.

c. ———— *CREAMER v. GOODERHAM* (1914), 27 W. L. R. 646; 6 W. W. R. 250; 17 D. L. R. 235; 7 Sask. L. R. 173.—CAN.

d. ———— *PEACOCKE & PEACOCKE v. AUCKLAND DISTRICT LAND REGISTRAR* (1901), 20 N. Z. L. R. 81.—N.Z.

PART V. SECT. 12, SUB-SECT. 2.—A. (a).

e. *Entry by mortgagee—Effect of subsequent administration order.*—A mtgee. having obtained possession by ejectment has a good title after twenty years, notwithstanding that during these years an order for the administration of the estate of the person, not being the mtgor., entitled to the equity

from such entry.—*HARRISON v. HOLLINS* (1812), 1 Sim. & St. 471; 57 E. R. 187.

Annotations:—*Reid. Bennett v. Colley* (1832), 5 Sim. 181; *Ashton v. Milne* (1833), 6 Sim. 369; *Raffety v. King* (1836), 1 Keen, 601. *Mentd. Bandon v. Becker* (1835), 9 Bl. N. S. 532.

1400. — Mortgage containing power of sale with trust of surplus for mortgagor—Extinguishment of trust.—Where twenty years have elapsed from entry by a mtgee., & there has been no subsequent acknowledgment, the mtgor.'s right of redemption becomes extinct, under Real Property Limitation Act, 1833 (c. 27), ss. 28, 34; & if in such a case the mtge. deed contained a power of sale with a trust of surplus proceeds for the mtgor. & his representatives, & that power of sale has not been exercised within the twenty years from entry by the mtgee., the trust of surplus proceeds becomes equally extinct, & cannot be enforced with respect to surplus proceeds resulting from a subsequent sale.—*CHAPMAN v. CORPE* (1879), 41 L. T. 22; 27 W. R. 781.

1401. — Extent to which mortgagor barred—Entire subject matter of deed—Policy of insurance.—Where real property & a policy of insurance have been included in one mtge. deed, to secure one indivisible amount, & all subject to one & the same proviso for redemption, & the mtgee. has been in possession of the property for more than twelve years without giving any acknowledgment of the title of the mtgor., so that the right of the mtgor. to redeem the land has become barred by Real Property Limitation Act, 1874 (c. 57), the right to redeem the policy will also be barred.—*CHARTER v. WATSON*, [1899] 1 Ch. 175; 68 L. J. Ch. 1; 79 L. T. 440; 47 W. R. 250; 43 Sol. Jo. 12. *Annotation*:—*Consd. Re Jauncey, Bird v. Arnold*, [1926] Ch. 471.

1402. — Descent of property—Death of mortgagee before mortgagor barred.—Where a person dies entitled to a mtge. interest, that is personal estate at that time; & though afterwards the mtgor. may be barred, that would not convert the property as between the representatives at the time of his death from personal to real (*LORD ELDEN, C.*).—*A.-G. v. VIGOR* (1803), 8 Ves. 256; 32 E. R. 352, L. C.

Annotations:—*Appld. Re Loveridge, Drayton v. Loveridge*, [1902] 2 Ch. 859. *Mentd. Goodright v. Forrester* (1807), 8 East, 552; *Simpson v. Walker* (1831), 5 Sim. 1; *Doe d. Meyrick v. Meyrick* (1832), 2 Tyr. 178; *Jones v. Skinner* (1835), 5 L. J. Ch. 87; *Culley v. Doe d. Taylerson* (1840), 3 Per. & Dav. 539; *Andrew v. Andrew* (1855), 3 Sm. & G. 130; *Quested v. Michell* (1855), 1 Jur. N. S. 488; *Brookman v. Smith* (1871), L. R. 6 Exch. 291.

1403. — — — — ——Where a mtgee. of freeholds enters into possession of the mtged. land, & dies leaving all his property to his widow for life but otherwise intestate, & the possession is continued by the widow, who is not solely entitled to the mtge. debt, until the equity of redemption is barred by Real Property Limitation Act, 1874 (c. 57), the mtged. land passes as personalty to his next of kin.—*Re LOVERIDGE, DRAYTON v. LOVERIDGE*, [1902] 2 Ch. 859; 71 L. J. Ch. 865; 87 L. T. 294; 51 W. R. 232; 46 Sol. Jo. 701.

1404. — — — — ——(1) L. was the mtgee. in fee of land of which he took possession in 1861.

of redemption, has been obtained.—*CROOKS v. WATKINS* (1860), 8 Gr. 340.—CAN.

f. — Possession enures to grantees.—*BRIGHT v. MCMURRAY* (1882), 1 O. R. 172.—CAN.

g. — Constructive entry—Wild lands—Payment of taxes.—*MCDONALD v. MACDONELL* (1864), 2 E. & A. 393.—CAN.

h. — — — — ——Under a deed of conveyance of wild land the

mtgee., for over twenty years before the mtgor.'s suit for redemption, performed the only act of possession, of which it appeared to be capable, namely, he paid, with the mtgor.'s acquiescence, all the taxation upon it, & the mtgor. made no payment of either principal or interest & had repudiated all connection with the property:—*Held*: the suit to redeem was barred by R. S. B. C., 1897 (c. 123), s. 40.—*KIRBY v. COWDEROY*, [1912] A. C. 599.—CAN.

He remained in possession till his death in 1864. By his will he made his widow extrix. & tenant for life, & subject thereto died intestate, leaving I. his heir. The widow & I. were entitled to L.'s personalty. On L.'s death his widow took possession, which she retained until her death in 1900:

—*Held*: although the land descended to I. as heir, he held it as trustee for the widow who was entitled to the mtge. debt as extrix.; I. was not discharged from the trusteeship when the mtgor. was statute barred; & the land devolved on the extrix. of L. as personalty.

(2) I. died in 1880, having been of unsound mind ever since death of L. He died intestate, & P. was his administrator & A. & X. were his co-heiresses:—*Held*: the mtgor. was statute barred on Jan. 1, 1879, when Real Property Limitation Act, 1874 (c. 57), s. 7, came into force; the one-half share of the land in which I. was beneficially interested vested in him as realty & descended on his death to his co-heiresses.—*Re LOVERIDGE, PEARCE v. MARSH*, [1904] 1 Ch. 518; 73 L. J. Ch. 15; 89 L. T. 503; 52 W. R. 138; 48 Sol. Jo. 33.

1405. Extension of time for redemption—Mortgage providing for redemption at any time.—A. conveyed a life estate to B. in consideration of £4,739. By a deed of even date B. contracted that if A. should at any time desire to repurchase the life-estate for £4,739, B. would reconvey it to him for that sum. All the expenses of this transaction were paid by A. B. took possession, insured A.'s life for £4,739, & after payment of premiums, the surplus rent was between £6 & £6 10s. per cent. on the purchase-money. B. left a will, by which he spoke of the life estate as redeemable on payment of £4,739 & interest, & spoke of his interest as a security. A. after a lapse of nearly thirty years, & many years after the death of the solr. who conducted the transaction, filed a bill to redeem, & failed in proving by direct evidence that the parties intended a mtge.:—*Held*: the transaction was to be treated as a conditional sale, & not as a mtge., & A. had no right to an account of rents & profits. *Semble*: his right to repurchase on the payment of the full sum of £4,739 was not barred by Statute of Limitations. *Qu.*: whether Statute of Limitations was not an answer to the claim to redeem on the footing of the transaction being a mtge.

I am disposed to think that the statute cannot apply so as to make the mere possession by the mtgee. for twenty years without acknowledgment a bar to redemption where the original contract is in terms that the mtgor. may redeem at any time during a period extending beyond the twenty years (*LORD ORANWORTH, C.*).—*ALDERSON v. WHITE* (1858), 2 De G. & J. 97; 30 L. T. O. S. 297; 4 Jur. N. S. 125; 6 W. R. 242; 44 E. R. 924, L. C.

Annotations:—*Mentd. M. S. & L. Ry. v. North Central Wagon Co.* (1888), 13 App. Cas. 554; *Beckett v. Tower Assets Co.*, [1891] 1 Q. B. 1.

1406. Receipt of rents from tenant in possession—By mortgagee—Or agent—Who may be considered agent.—*WARD v. CARTTAR*, No. 1109, *ante*.

Vacant lands.—*MAHAR v. FRASER* (1867), 17 C. P. 408.—CAN.

l. — — — — ——*RUTHERFORD v. MITCHELL* (1904), 15 Man. L. R. 390.—CAN.

m. — — — — ——*CAMPBELL v. IMPERIAL LOAN CO.* (1908), 18 Man. L. R. 144; 8 W. L. R. 502.—CAN.

n. — Under order of court—Time runs from entry.—*PANDU v.*

Sect. 12.—Mortgagor and mortgagee: Sub-sect. 2, A. (a), (b) & (c), & B. (a) & (b).]

1407. ————.]—(1) In 1828 pltf. mortgaged freehold property to B., & in 1832, being about to reside abroad, he gave a full power of attorney to deft., who was a solr., to receive the rents & profits of all his property, & to apply them in payment of the incumbrances. In 1841 pltf. settled accounts with deft., showing a large balance due to deft., which pltf. agreed to secure by a mtge. of his real estates when required. In 1845 pltf. became bkpt., but his assignee did not interfere with the mtged. property, & deft. continued to receive the rents & profits. In 1849 deft. took a transfer himself of B.'s mtge. to which pltf. was not a party. In 1863 deft. wrote a letter to pltf. expressing his readiness to settle all accounts. In 1877, pltf.'s bkpcy. was annulled, & pltf. brought an action against deft. claiming to redeem the mtge., & claiming an account against him as mtgee. in possession, & by amendment, as agent & trustee for him. Deft. pleaded Real Property Limitation Act, 1833 (c. 27):—*Held*: on pltf.'s bkpcy. deft. ceased to be the agent & attorney of pltf., & did not become the agent of the assignee; & even if the assignee would have been entitled to call upon deft. to account, pltf. did not, on the annulment of the bkpcy., succeed to the assignee's right; pltf.'s estate as mtgor. having ceased on the bkpcy., the letter written to him in 1865 could not operate as an acknowledgment, either of his title or that of the assignee, to the equity of redemption, so as to take the case out of Real Property Limitation Act, 1833 (c. 27); as the assignee was barred by the statute pltf. was also barred, notwithstanding the annulment of the bkpcy.

(2) *Qu.*: whether an acknowledgment of the title of a mtgor. is effectual to take the case out of Real Property Limitation Act, 1833 (c. 27), if it is not made till after the time limited by the statute has expired.—*MARKWICK v. HARDINGHAM* (1880), 15 Ch. D. 339; 43 L. T. 647; 29 W. R. 361, C. A.

Annotation:—*Reid. Sanders v. Sanders* (1881), 19 Ch. D. 373.

1408. Mortgagee in possession of part of land for statutory time—Mortgagor's right barred as to that part.—*KINSMAN v. ROUSE*, No. 1271, *ante*.

Disabilities.—*See Sect. 7, sub-sect. 1, ante.*

(b) Mortgages by Tenant for Life.

1409. Mortgagee purchasing equity of redemption—Whether remainderman barred.—*RAFFETY v. KING*, No. 1398, *ante*.

1410. ————.]—A mtgee. in possession for six years, without making any acknowledgment of the mtgor.'s title, then purchased the interest of the tenant for life of the equity of redemption, & continued in possession for twenty years longer:—*Held*: such possession was not adverse during the existence of the life estate so purchased, & Real Property Limitation Act, 1833 (c. 27), s. 28, was not therefore a bar to any suit for redemption by the remainderman or reversioner.—*HYDE v. DALLAWAY* (1843), 2 Hare, 528; 67 E. R. 218.

Annotation:—*Mentd. Prout v. Cook*, [1896] 2 Ch. 808.

1411. Mortgage by married woman for term—Husband executor of mortgagee—Merger.—A.,

a married woman, being tenant for life of lands allotted & exchanged under an Inclosure Act, in 1810 mortgaged them for one thousand years to B. to secure £105 advanced by him to pay her share of the expenses of the inclosure. B. died in 1812, & the husband of A. was his exor. & one of his residuary legatees. The term passed to A.'s husband as exor., & he died in 1824. After the death of B. no interest was paid, & upon the death of A. the remainderman took possession. A.'s husband bequeathed all his property to A. & made her one of his exors., but she did not prove. In ejectment upon demises by the exor. of A. & also by the exors. of A.'s husband:—*Held*: the term of one thousand years had not merged in A.'s estate for life, & Statute of Limitations did not apply.—*DOE d. FRANCIS v. HARE* (1850), 15 L. T. O. S. 203.

1412. Mortgage under power—Excess interest charged on corpus—Limitation of account.—A tenant for life had power to charge the estate with £20,000, & interest for his own benefit, & to limit a term upon trust to raise it by mtge. He exercised the power to charge, & limited a term to a trustee upon trust, to raise the principal money by mtge. He afterwards by deeds, in which the trustee concurred, mortgaged the £20,000 & interest, along with other property, for securing a further sum. The rents of the property were insufficient, after payment of the interest on certain prior charges, to pay the interest on the £20,000. The tenant for life, however, paid the interest to the mtgees. in full during his life:—*Held*: Statute of Limitations did not apply, so as to restrict the account to the period of six years before the death of the tenant for life.—*KENSINGTON (LORD) v. BOUVERIE* (1855), 7 De G. M. & G. 134; 3 Eq. Rep. 765; 24 L. J. Ch. 442; 25 L. T. O. S. 169; 1 Jur. N. S. 577; 3 W. R. 469; 44 E. R. 53, L. J.J.; *on appeal* (1859), 7 H. L. Cas. 557, H. L.

Annotations:—*Reid. Howlin v. Sheppard* (1870), 19 W. R. 253. *Mentd. Mayer v. Murray* (1878), 8 Ch. D. 424; *Noyes v. Pollock* (1886), 32 Ch. D. 53.

1413. Estate charged with debts—Entry by mortgagee—Whether creditors barred.—Testator, who died in 1884, by his will devised his real & personal estate to trustees upon trust for A. for life with remainders over, & charged the property he owned in the county of Y. with the payment of his debts so far as his personal estate should be insufficient. Testator's estate consisted of property in the counties of Y. & N. The property in the county of Y. had been mortgaged by testator, & the interest was kept down & paid out of the Y. property for more than twelve years after the death of testator. In 1885 the tenant for life mortgaged the N. property. The personal estate was insufficient to pay the debts & mtges. of testator, & in the year 1902 the creditors obtained an order for the administration of the estate. In 1893 the mtgee. of the life estate in the N. property entered into possession, having obtained an order for foreclosure absolute. The creditors now sought to sell the N. property, & claimed to be paid out of the proceeds of such sale. The mtgees. in possession of the N. property took out a summons for a declaration that the creditors were not entitled to enforce their claims against the N. property or the proceeds of sale thereof so as to affect the life estate therein:—*Held*: the claim

VITHU (1895), 1 L. R. 19 Bom. 140.—*IND.*

o. ———— *Under settlement of equity of redemption.*—*BROWNE v. CORE* (Bp.) (1839), 1 Dr. & Wal. 700.—*IR.*

p. *Nature of possession required.*

—Where actual possession is once obtained by a mtgee. in assertion of his entry, it need not be continuously for twenty years.—*WILSON* (1877), 2 A. R.

PART V. SECT. 12, SUB-SECT. 2.—A. (b).

q. *Redemption by tenant for life—Non-payment of interest—Time does not run.*—*BALDWIN v. BALDWIN* (1855), 4 L. Ch. R. 501.—*IR.*

of the creditors was not barred by Statutes of Limitations.—*Re ATKINSON, HARTLEY v. ATKINSON* (1907), 98 L. T. 369; *on appeal, sub nom. Re ATKINSON, PROCTOR v. ATKINSON*, [1908] 2 Ch. 307, C. A.

1414. What interest recoverable.]—*Re TURNER, TURNER v. SPENCER*, No. 1002, *ante*.

(c) *Conveyance in Form of Trust for Sale.*

1415. Whether a mortgage.]—A security in the form of a trust for sale is a mtge. within above sect.

Before 1829 L. had demised two estates to P. for long terms of years by way of mtge. On Feb. 11, 1829, P. made to L. a further advance, & L., by a deed to which P. was a party, but not a conveying party, conveyed the fee in those estates & another estate to C. upon trust for P., his heirs, exors., administrators, & assigns, nevertheless upon the further trusts hereinafter declared; which were, to permit L. to continue in possession & receipt of rents till Aug. 11, & if L. should then repay the further advance with interest, & the other mtges. charged on the property & therein-after specified, to reconvey to L., his heirs or assigns; but, in default of payment, then that C., his heirs or assigns, should immediately, or at their or his discretion, enter into possession, & sell the estates, & stand possessed of the proceeds in trust, in the first place, to pay costs, then the sums due to P. with interest, & a sum due on mtge. to another person with interest, & to pay the surplus to L., his exors., administrators, or assigns. L. at the same time attorned tenant to P. Default having been made in payment, P. entered into possession in 1832, & thenceforth received the rents & let the property. Sales were subsequently made of parts of the property, the last being in 1848, & C. conveyed to the purchasers, P. being a party, & it was agreed that all terms should be assigned in trust to attend. In 1871 L.'s heir-at-law filed a bill to have the trusts of the deed of 1829 carried into execution:—*Held*: the deed of 1829 did not create a trust of the estate for the benefit of the mtgor. which he could enforce, so as to bring the case within above Act, sect. 25, but was a mtge. within above Act, sect. 28.—*LOCKING v. PARKER* (1872), 8 Ch. App. 30; 42 L. J. Ch. 257; 27 L. T. 635; 21 W. R. 113, L. JJ.

Annotations:—*Apld. Re Allison, Johnson v. Mounsey* (1879), 11 Ch. D. 284. *Consd. Chapman v. Corpe* (1879), 41 L. T. 22; *Banner v. Berridge* (1881), 18 Ch. D. 254. *Expld. Rochefoucauld v. Boustead*, [1897] 1 Ch. 196. *Refd. Sanders v. Sanders* (1881), 30 W. R. 280. *Mentd. Warner v. Jacob* (1882), 20 Ch. D. 220; *Liquidation Estates Purchase Co. v. Willoughby*, [1898] A. C. 321.

1416. —.]—In 1827 S. conveyed certain premises to A. by way of security for £3,000 & interest, in trust to sell, & out of the purchase-moneys to pay costs, principal, interest, & pay the surplus to S. In 1833 S. conveyed the same hereditaments to M., & assigned to her the surplus purchase-moneys arising from any sale by A. by way of mtge. to secure £300 & interest. A. took possession in 1849, & held it till he died in 1874. In 1876 the trustees of his will sold under the trusts of the mtge. deed. The purchase-money being more than sufficient to pay A.'s principal, interest, & costs, the representatives of M. claimed to have their debt paid out of the surplus:—*Held*: the equity of redemption had been barred by the lapse of time, & A. the first mtgee., had become absolute owner; no dealings by his devisees or exors. could alter the character of that estate, & the representatives of M., the second mtgee., were not entitled to the surplus.—*Re ALISON, JOHNSON v.*

MOUNSEY (1879), 11 Ch. D. 284; 40 L. T. 234; 27 W. R. 537, C. A.

Annotations:—*Apld. Chapman v. Corpe* (1879), 41 L. T. 22. *Consd. Rochefoucauld v. Boustead*, [1897] 1 Ch. 196. *Apld. Re Metropolis & Counties Permanent Investment Bldg. Soc., Gatfield's Case*, [1911] 1 Ch. 698. *Refd. Banner v. Berridge* (1881), 29 W. R. 844; *Sanders v. Sanders* (1881), 19 Ch. D. 373; *Re Loveridge, Drayton v. Loveridge*, [1902] 2 Ch. 859; *Nicholson v. England*, [1926] 2 K. B. 93. *Mentd. Warner v. Jacob* (1882), 20 Ch. D. 220.

1417. Trust for payment of surplus to mortgagor—Extinguished along with right of redemption.]—*CHAPMAN v. CORPE*, No. 1400, *ante*.

B. Acknowledgments.

(a) *In General.*

Effect of acknowledgment.]—*See* Real Property Limitation Act, 1874 (c. 57), s. 7.

(b) *By Whom Made.*

See Real Property Limitation Act, 1874 (c. 57), s. 7.

1418. Mortgagee—One or more of several mortgages.]—An acknowledgment of the title of a mtgor. given by one only of two joint mtgees., who, on the face of the mtge. deed, were shown to advance the money on a joint account as trustees, did not keep alive the right of redemption either as against the whole property or against a moiety of it, but was wholly inoperative.—*RICHARDSON v. YOUNGE* (1871), 6 Ch. App. 478; 40 L. J. Ch. 338; 25 L. T. 230; 19 W. R. 612, L. JJ.

1419. Person claiming under mortgagee.]—A letter from a party, representing himself as deriving title under the mtgee., admitting the right of the mtgor., or his representative, to redeem a mtge., & written within the twenty years:—*Held*: an acknowledgment in writing within Real Property Limitation Act, 1833 (c. 27).—*UTTERMARE v. STEVENS* (1851), 17 L. T. O. S. 115.

1420. Assignee of equity of redemption—Payment of interest.]—*FORSYTH v. BRISTOWE*, No. 789, *ante*.

1421. Tenant in tail under devise from mortgagee.]—A mtgee. in fee, who had been in possession for more than twenty years, died in 1805, leaving a will, by which he devised the property to S., his eldest son in tail, with divers remainders over, & appointed him his exor. & residuary legatee. In 1812, the persons claiming under the will of the mtgor. filed a bill against S. to redeem, & the suit was compromised in 1814 on the terms of S. paying a sum for the equity of redemption, which was accordingly conveyed to him. He afterwards died without issue, & without having done any act to bar the entail created by his father's will:—*Held*: his heir-at-law was entitled to the equitable fee, & the remaindermen under his father's will had no title in equity.

S. was heir-at-law of the mtgee., & was exor. & residuary legatee of the mtgee., & it was admitted that from the time of his father's death he had never acted as tenant in tail or done anything inconsistent with the supposition that he still held under the mtge. I think, therefore, that the same effect is to be given to his acknowledgment as if he had held only under the mtge. & his father's will had not contained the limitations by which an estate tail was given to him with remainders over (*LORD CAMPBELL, C.*).—*PENDLETON v. ROTH* (1859), 1 De G. F. & J. 81; 29 L. J. Ch. 265; 1 L. T. 284; 6 Jur. N. S. 182; 8 W. R. 101; 45 E. R. 289, L. C. & L. JJ.

Sect. 12.—Mortgagor and mortgagee: Sub-sect. 2, B. (c), (d), (e) & (f); sub-sect. 3.]

(c) To Whom Made.

1422. Mortgagor—After bankruptcy of mortgagor.]—*MARKWICK v. HARDINGHAM*, No. 1407, *ante*.

1423. Agent of mortgagor—Who may be considered agent.]—Then it was objected that, as the letter was not written either to the grand-daughter or to a person authorised to act as her agent, it was not such a written acknowledgment as the statute requires. The question, however, is whether the party who wrote the letter, did not treat the party to whom it was written as the agent of the child. She was at that time an infant; & the writer made the statements, in his letter, in answer to the grandfather's letter upon the infant's business; & when he said: "I am very willing to settle if your grand-daughter is of age," can it be supposed that that was not meant to be a statement of which the grand-daughter might avail herself, when she came of age? It would be a forced construction to say that this was not an acknowledgment within the statute, or that it was not given to the agent of the person claiming the estate of the mtgor. It is not necessary to make a person an agent, that he should have an actual authority to act. It is quite sufficient that the grandfather acted as the agent of his grandchild; & that she, when she came of age, adopted what he had done on her behalf (*SHADWELL v. C.*).—*TRULOCK v. ROBEY* (1841), 12 Sim. 402; 5 Jur. 1101; 59 E. R. 1186; *subsequent proceedings* (1846), 15 Sim. 265; (1847), 2 Ph. 395, L. C.

Annotations:—Apld. *Stansfield v. Hobson* (1852), 16 Beav. 236. *Refd.* *Richardson v. Younge* (1870), L. R. 10 Eq. 275.

1424. —.]—*FORSYTH v. BRISTOWE*, No. 789, *ante*.

1425. Stranger.—Redemption decreed against the heir of mtgee. & a purchaser with notice upon acknowledgment of the mtge. within twenty years before the bill in transactions with other persons, not with the heirs of the mtgor.—*HANSARD v. HARDY* (1812), 18 Ves. 455; 34 E. R. 389.

1426. — **Deed of assignment reciting mortgage.**—A. mortgaged an estate to B. for a thousand years. B. died, having bequeathed the mtge. to his widow. She also died; & in 1822, her personal representatives entered into & continued in possession of the estate until 1838, when they sold & assigned the mtge. to C., who entered & continued in possession until 1843, when A.'s heir filed a bill to redeem, on the ground that the deed of assignment recited the mtge. & conveyed the term to C., subject, expressly, to the equity of redemption of A. or his legal representatives:—*Held*: the deed was not such an acknowledgment of the mtgor.'s title as to make the estate redeemable.—*LUCAS v. DENNISON* (1843), 13 Sim. 584; 2 L. T. O. S. 186; 7 Jur. 1122; 60 E. R. 227.

1427. — —.]—The recital of a mtgor.'s title to redeem in a transfer by a mtgee. in possession is not sufficient to prevent Real Property Limitation Act, 1833 (c. 27), being a bar to the right of the mtgor. to redeem.—*BATCHELOR v.*

MIDDLETON (1848), 6 Hare, 75; 8 L. T. O. S. 513; 67 E. R. 1088.

(d) Time for Making.

1428. Before expiration of statutory period.—Acknowledgment of mtge. title within twenty years of bill filed maintains the equity of redemption.—*HODLE v. HEALEY* (1819), 6 Madd. 181; 56 E. R. 1061.

Annotations:—Apld. *Rayner v. Oastler* (1822), 6 Madd. 274. *Consd.* *Richardson v. Younge* (1870), L. R. 10 Eq. 275.

1429. —.]—A mtgor. will be entitled to redemption against a mtgee., who, after more than twenty years' possession, makes admissions, which prove, that he has all along considered himself only as mtgee.—*OUTLER v. CREMER* (1823), 1 L. J. O. S. Ch. 108.

1430. —.]—After a mtgee. had been more than twenty years in possession of property mtged., the mtgor.'s solr. wrote a letter asking when the mtgee. would see him on the mtgor.'s claims. The mtgee. wrote back to the solr., "I do not see the use of a meeting unless some party is ready to pay me off." The mtgor. filed a bill to redeem:—*Held*: this was a sufficient acknowledgment in writing of the title of the mtgor. to his solr. acting as his agent, to bring the case within Real Property Limitation Act, 1833 (c. 27), s. 28.—*STANSFIELD v. HOBSON* (1853), 3 De G. M. & G. 620; 22 L. J. Ch. 657; 20 L. T. O. S. 301; 1 W. R. 216; 43 E. R. 244, L. JJ.

Annotations:—Distd. *Thompson v. Bowyer* (1863), 2 New Rep. 504. *Consd.* *Richardson v. Young* (1870), 18 W. R. 800. *Distd.* *Sanders v. Sanders* (1881), 19 Ch. D. 373.

1431. —.]—*MARKWICK v. HARDINGHAM*, No. 1407, *ante*.

1432. —.]—*SANDERS v. SANDERS*, No. 1250, *ante*.

1433. —.]—*KIBBLE v. FAIRTHORNE*, No. 1353, *ante*.

1434. —.]—*NICHOLSON v. ENGLAND*, No. 1472, *post*.

(e) Sufficiency.

1435. Payment of interest.—*GRUBB v. WOODHOUSE* (1692), Freem. Ch. 187; 22 E. R. 1151.

1436. —.]—Mtge., though never so old, is redeemable, if interest has been paid.—*FLOYER v. LAVINGTON* (1714), 1 P. Wms. 268; 2 Atk. 496, n.; 24 E. R. 384.

Annotations:—Refd. *Whiting v. White* (1792), 2 Cox, Eq. Cas. 290. *Mentd.* *Mellor v. Lees* (1742), 2 Atk. 494; *Woodhouse v. Shepley* (1742), 2 Atk. 535.

1437. Settlement of account.—Length of time pleaded in bar to a redemption of a mtge., being made in 1713, the mtgor.'s solr. appearing to have settled an account in 1730, in order to pay off the mtge.:—*Held*: that would save the right of redemption.—*ANON.* (1742), 2 Atk. 333; 26 E. R. 603.

Annotation:—Refd. *Whiting v. White* (1792), 2 Cox, Eq. Cas. 290.

1438. Delivery of account—By agent of mortgagee—Authority.—Equity of redemption barred by possession for twenty years; unless circumstances are proved by the mtgor., showing an acknowledgment of his title by the mtgee. within that period; as accounts delivered by the mtgee.; if by parol evidence, it must be clear & unequivocal. Accounts, kept by the mtgee.'s receiver, in a

PART V. SECT. 12, SUB-SECT. 2.—B. (c).

1425 i. Stranger.—An acknowledgment of title need not be made to the mtgor. or his representatives; any acknowledgment in writing signed by the mtgee. is sufficient.—*ALI HOSSEIN v. RAM DYAL* (1871), 3 N. W. 78.—*IND.*

1425 ii. —.]—The Act for the limitation of suits does not require that the acknowledgment of the title of a mtgor. should be made to any particular person or at any particular time before the institution of the suit in which the bar is pleaded.—*NARRAINA TANTRI v. UKKOMA* (1871), 6 Mad. 207.—*IND.*

r. Person seeking to recover posses-

sion.—Acknowledgment of liability, in order to be within Limitation Act, must be an acknowledgment of liability to the person who is seeking to recover possession, or some person through whom he claims.—*MYLAPORE IYASAWMY VYAPOORY MOODLIAR v. YEO KAY* (1887), 1 L. R. 14 Calc. 801; L. R. 14 Ind. App. 168.—*IND.*

distinct book, & delivered to the mtgor., but without authority, will not have that effect.—*BARRON v. MARTIN* (1815), Coop. G. 189; 19 Ves. 327; 35 E. R. 526.

1439. Account kept by mortgagee.]—Qu.: whether, since Real Property Limitation Act, 1833 (c. 27), s. 28, the bar created by twenty years' possession by a mtgee. is defeated by his having kept accounts of the rents received by him.—*BAKER v. WETTON* (1845), 14 Sim. 426; 4 L. T. O. S. 451; 9 Jur. 98; 60 E. R. 423.

1440. —.]—A member of a building society mortgaged leaseholds to the society to secure an advance of £400 on her shares repayable with interest by monthly instalments extending over ten years. The rules of the society provided that when the claims of the society upon any mtged. property had been satisfied the statutory receipt should be indorsed upon the mtge. at the expense of the mtgor. The deed conveyed the property to the society upon trust to permit the mtgor. to receive the rents until default in payment of any instalment &, upon default, to enter into possession of the rents & to apply the same in payment of all sums due from the mtgor. & to pay the balance, if any, to the mtgor.; the deed also contained a trust for sale. In 1887 the mtgor. made default & the society went into possession & managed the property, treating it in their books as a mtge. transaction, & by 1902 all sums payable under the deed were satisfied. After 1902 the society entered the rents to a "suspense account" in their ledger until 1910, when the society was ordered to be wound up; the same year the lease of the property expired. In the winding up the mtgor. claimed the surplus rents standing to the credit of the suspense account on the ground that the society were trustees thereof for her & that Statute of Limitations did not apply:—*Held*: (1) the deed though in form of trust was in substance a mtge., Statute of Limitations commenced to run when the society took possession in 1887, & therefore the claim of the mtgor. was barred; (2) the annual statutory accounts which the society published pursuant to Building Societies Act, 1874 (c. 42), s. 40, & in which the leaseholds were included in the properties of which the society were in possession as mtgees., were not acknowledgments of the mtgor.'s title within Real Property Limitation Act, 1874 (c. 57), s. 7, so as to preclude the operation of that sect.—*Re METROPOLIS & COUNTIES PERMANENT INVESTMENT BUILDING SOCIETY, GATFIELD'S CASE*, [1911] 1 Ch. 698; 80 L. J. Ch. 387; 104 L. T. 382.

1441. — Delivered to third person—Not authorised as agent to receive such account.]—A mtge. by a member of a building society to the society provided that, if the mtgor. paid all the instalments according to the rules of the society, the society would "at any time thereafter, upon the request of the mtgor.," endorse the mtge. deed with a receipt, & that it should thereupon be vacated. It also provided that, upon default in payment of any of the instalments, the balance of the advance unpaid should immediately become due, & the society might thereupon enter into

possession. The mtgor. being in default, the society entered into

possession of the property for over twelve years. Within the period of twelve years before action brought, the mtge. & the amount outstanding had been included, under the heading of mtges., in balance sheets of the society signed by the auditors & delivered to the committee:—*Held*: (1) the title of the mtgor. was barred under Real Property Limitation Act, 1874 (c. 57), s. 7; & (2) the committee were not the mtgor.'s agents to receive acknowledgment of his title contained in the balance sheets.—*WILSON v. WALTON & KIRKDALE PERMANENT BUILDING SOCIETY* (1903), 19 T. L. R. 408.

Annotations:—As to (1) Reifd. Re Metropolis & Counties Permanent Investment Bldg. Soc., Gatfield's Case, [1911] 1 Ch. 698. As to (2) Follid. Re Metropolis & Counties Permanent Investment Bldg. Soc., Gatfield's Case, [1911] 1 Ch. 698.

1442. Recital in conveyance of equity of redemption.]—Where the purchaser of an equity of redemption had the legal estate conveyed to him by a deed, dated Aug. 24, 1796, in which it was recited that the purchaser had some time since paid to the mtgee. the money due on his mtge., & a bill to redeem was filed on Jan. 29, 1816:—*Held*: the recital was an acknowledgment of the mtge. title, within twenty years from the filing of the bill.—*PRICE v. COPNER* (1823), 1 Sim. & St. 347; 1 L. J. O. S. Ch. 178; 57 E. R. 139.

Annotations:—Reifd. Bennett v. Colley (1832), 5 Sim. 181; *Ashton v. Milne* (1833), 6 Sim. 369; *Bandon v. Becher* (1835), 9 Bli. N. S. 532; *Raffety v. King* (1836), 1 Keen, 601.

1443. —.]—*FORSYTH v. BRISTOWE*, No. 789, ante.

1444. Expression inferring admission of right to redeem.]—*STANSFIELD v. HOBSON*, No. 1430, ante.

1445. Denial of right.]—B. having been in possession of an estate as first mtgee. for upwards of twenty years, on being applied to for an account of the rents & profits on behalf of a person who had a subsequent charge upon the property, replied as follows: "In answer to your letter I beg to say that I deny the claim of your client. If he were entitled to the account, it would be of no use, as the rents & profits of the estate have never been sufficient to pay the interest of the first charge":—*Held*: not to be an acknowledgment of pltf.'s title to redeem within Real Property Limitation Act, 1833 (c. 27), s. 28.—*THOMPSON v. BOWYER* (1863), 2 New Rep. 504; 9 L. T. 12; 27 J. P. 692; 9 Jur. N. S. 863; 11 W. R. 975; *previous proceedings* (1859), 32 L. T. O. S. 294.

(f) Evidence.

1446. Admissibility—Parol evidence.]—*REEKS v. POSTLETHWAITE* (1815), Coop. G. 161; 35 E. R. 515.

Annotation:—Reifd. Barron v. Martin (1815), Coop. G. 189.

1447. —.]—*RAYNER v. OASTLER* (1822), 6 Madd. 274; 56 E. R. 1095.

SUB-SECT. 3.—MORTGAGEES AS TRUSTEES.

1448. Mortgage with power of sale—Improper exercise of power—Mortgagee purchasing mort-

of sale by the mtgee. on the mtgor. does not give the mtgor. a right to redeem, the mtgee.'s statutory title being in no way affected thereby.—*SHAW v. COULTER* (1905), 11 O. L. R. 630; 6 O. W. R. 55.—CAN.

PART V. SECT. 12, SUB-SECT. 2.—

B. (a).

1444 i. Expression inferring admission of right to redeem.]—*MALLOCH v. PINHEY* (1862), 9 Gr. 550.—CAN.

1444 ii. —.]—*MILLER v. BROWN* (1882), 3 O. R. 210.—CAN.

1444 iii. —.]—An acknowledgment must be an acknowledgment of a present existing title in the mtgor.—*RAM DAS v. BIRJUNDUN DAS* (alias

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*interest by mortgagor.]—**HENDERSON v.*

run against of a notice

PART V. SECT. 12, SUB-SECT. 3.
b. Trust for sale—& to pay surplus to mortgagor—Time does not run.]—*BIGGS v. FREEHOLD LOAN &*

Sect. 12.—Mortgagor and mortgagee: Sub-sect. 3. Sects. 13, 14 & 15: Sub-sect. 1.]

gaged property.]—Deft. acquired the right under which he now claims as purchaser from his own vendee in 1847. That is not a length of time which can be considered of any importance in the case; but if the time were infinitely longer, if the time were twenty or thirty years, I have yet to learn that where the question is a mtgor.'s right to redeem, it can be said, that if that right of redemption is arrested upon the ground of what this ct. will consider a fraudulent & improper exercise of a power of sale, bare length of time will be enough to sanction a title acquired by means such as are disclosed in this case (STUART, V.-C.).—ROBERTSON v. NORRIS (1857), 1 Giff. 421; 30 L. T. O. S. 253; 4 Jur. N. S. 155; 65 E. R. 983; *affd.* (1858), 4 Jur. N. S. 443, L. C.

*Annotations:—*Mentd. Thurlow v. Mackeson (1868), 9 B. & S. 975; Martinson v. Clowes (1882), 21 Ch. D. 857; Warner v. Jacob (1882), 20 Ch. D. 220; Pooley's Trustee v. Whetham (1886), 33 Ch. D. 111; Farrar v. Farrars (1888), 40 Ch. D. 395; Colson v. Williams (1889), 58 L. J. Ch. 539; Belton v. Bass, Ratcliff & Gretton, [1922] 2 Ch. 447.

1449. Trust for sale—& to pay surplus to mortgagor—Whether trust for payment of arrears of interest on mortgage debt.]—A mtge., executed in 1848, contained a power of sale of the mtged. property, followed by a declaration that the proceeds of the sale were to be applied in payment of a prior mtge., & then “of the sum of £800, & interest thereon, or so much as should be then unpaid, & all accruing interest on the £800, at five per cent. *per annum*; & then in payment to other parties of a sum of £1,150 & all interest thereon from the day of the date thereof, at the rate of five per cent. *per annum*,” & the surplus proceeds of the sale were to be handed over to the mtgor. The mtged. property was sold in 1862. Upon the question, what arrears of unpaid interest were then payable under the deed:—*Held*: no trust was created for the payment of the interest on the mtge. debt, & therefore no more than six years' arrears were payable.—MASON v. BROADBENT (1863), 33 Beav. 296; 3 New Rep. 101; 9 L. T. 565; 28 J. P. 4; 12 W. R. 118; 55 E. R. 381.

*Annotations:—*N.F. Edmunds v. Waugh (1866), L. R. 1 Eq. 418. *Consd.* Dingle v. Coppen, Coppen v. Dingle, [1899] 1 Ch. 726. *Reid.* Re Marshfield, Marshfield v. Hutchings (1887), 34 Ch. D. 721; Re Lloyd, Lloyd v. Lloyd, [1903] 1 Ch. 385.

1450. ——— Retention of surplus—Whether Statute of Limitations applies.]—In 1868, upon the death of the mtgor., the mtged. property was sold by A., the mtgee., under the power of sale contained in the mtge. deed. The balance of the proceeds after payment of the mtge. debt was retained by B., who, in effecting the mtges., had acted as solr. for both parties, & conducted the sale on behalf of A. The power of sale in the mtge. deed contained the usual provision that the surplus proceeds should be paid to the mtgor., his heirs, or assigns. The mtgor. had died unmarried & intestate, & being illegitimate left no next of kin. Administration had not been taken out to him. A. died in 1877, having left all his property to his widow C., whom he appointed his extrix. C. died in 1878, having appointed B. & R. her exors. Upon the death of B. in 1881, R., as being through C. the legal personal representative of A., claimed as against B.'s estate the balance of the proceeds of the sale in 1868 of the mtged. property:—*Held*:

SAVINGS CO. (1898), 26 A. R. 232.—CAN.

c. ——— & to pay surplus to second mortgagee—Second mortgagee's right to account.]—OCEAN ACCIDENT &

GUARANTEE CORPN., LTD. & HEWITT v. COLLUM & ARCHDALL, [1913] 1 I. R. 328.—IR.

d. Mortgagee in possession — Oc

B., having received this balance in a fiduciary character as agent for A., & with full knowledge that A. was an express trustee of the balance for the mtgor., & in the circumstances, liable to a claim by the Crown, & Statute of Limitations could not be set up as a bar to the claim.—*Re BELL, LAKE v. BELL* (1886), 34 Ch. D. 462; 56 L. J. Ch. 307; 55 L. T. 757; 35 W. R. 212.

*Annotation:—*Reid. Soar v. Ashwell, [1893] 2 Q. B. 390.

————— **Redemption actions.]**—See Nos. 1415-1417, *ante*.

1451. ——— & to pay surplus to second mortgagee—Mortgagee's innocent breach of trust—Date from which statute runs.]—THORNE v. HEARD, No. 1535, *post*.

1452. Term created as trust for security—Effect as to recovery of interest.]—SHAW v. JOHNSON, No. 996, *ante*.

1453. Trustee of legal estate for mortgagor—Acquisition of possessory title by mortgagee.]—SANDS to THOMPSON, No. 1350, *ante*.

1454. Statutory trust of surplus for second mortgagee—Right of beneficiary to execution of trust.]—

(1) A first mtgee. who has sold the mtged. property under his statutory power of sale is under a statutory obligation by virtue of Conveyancing & Law of Property Act, 1881 (c. 41), ss. 21 (3), 22, to hand the surplus proceeds remaining after his claim as first mtgee. has been satisfied to the second mtgee. or other the person entitled to the mtged. property & authorised to give a receipt for the proceeds of sale thereof. He is not entitled to retain the surplus proceeds & assert on behalf of a third mtgee. or the mtgor. a right to be paid the whole surplus after payment to the second mtgee. of the principal moneys owing on the second mtge. & six years' arrears of interest only.

(2) A summons by a second mtgee. against the first mtgee. & other persons interested in the surplus proceeds of sale to have it determined whether he is entitled to repayment of the principal moneys owing on the second mtge. & all arrears of interest & costs, & to obtain payment accordingly, is in substance an action by a beneficiary for execution of the trusts of the surplus proceeds & is not an “action or suit” for the recovery of “interest in respect of . . . money charged upon or payable out of . . . land” within Real Property Limitation Act, 1833 (c. 27), s. 42.—*Re THOMSON'S MORTGAGE TRUSTS, THOMSON v. BRUTY*, [1920] 1 Ch. 508; 89 L. J. Ch. 213; 123 L. T. 138; 64 Sol. Jo. 375.

SECT. 13.—PROPERTY OF SPIRITUAL AND ELEMOSYNARY CORPORATIONS.

See Real Property Limitation Act, 1833 (c. 27), s. 29.

Period of limitation—Recovery of tithes & tithe rentcharges.]—See ECCLESIASTICAL LAW, Vol. XIX., pp. 409, 482 *et seq.*, Nos. 2436, 3412 *et seq.*

1455. ——— Recovery of land.]—*Ex p.* SUNDER LAND FREEMEN & STALLINGERS, *Ex p.* DURHAM (BP.) (1852), 1 Drew. 184; 18 L. T. O. S. 329; 61 E. R. 422; *sub nom.* SUNDERLAND FREEMEN & STALLINGERS v. DURHAM (BP.), 22 L. J. Ch. 145; 16 Jur. 370.

1456. ———.]—By an inclosure award made in 1866 a piece of land was allotted to the rector

cupation rent.]—Statute of Limitations forms no bar to a claim against a mtgee. in possession for occupation rent.—COLDWELL v. HALL (1862), 9 Gr.

of the parish in compensation for rights of turbary possessed by him as such rector, & the land was then in the occupation of a person who had encroached upon it some years before:—*Held*: in an action brought in 1913 by the rector of the parish to recover possession of the land from the successor of the person who had originally encroached upon it, deft. could not set up the defence that the encroachment in question was an "ancient inclosure" at the date of the award; pltf. had made out a good *prima facie* title by production of the award of 1866; &, as pltf. was an ecclesiastical corpn. sole & as deft. & his predecessor had not been in possession for sixty years since the award, pltf.'s right to recover possession was not barred by Real Property Limitation Act, 1833 (c. 27), s. 29.—*BLACKETT v. RIDOUT*, [1915] 2 K. B. 415; 84 L. J. K. B. 1535; 113 L. T. 267, C. A.

Annotation:—*Reid*. *Collis v. Amphlett*, [1918] 1 Ch. 232.

1457. ——— By Ecclesiastical Commissioners as transferees.—An allotment under an Inclosure Act, described as 137 A, was made in respect of premises held by a person under lease from a dean, the property leased being that of the dean in right of his deanery. By Real Property Limitation Act, 1833 (c. 27), s. 29, a dean could recover possession of such land within the term of sixty years from the time when the right of action first accrued. By Ecclesiastical Commissioners Act, 1840 (c. 113), deanery lands, after the death of any dean then in possession, passed to the Ecclesiastical Comrs.; & Ecclesiastical Commissioners Act, 1840 (c. 113), s. 57, declared that "the Ecclesiastical Comrs. shall for the purpose of enforcing payment of all profits & emoluments to be paid to them, & of obtaining possession of all lands, tithes, or other hereditaments vested in or accruing to them as aforesaid, & of recovering the rents & profits thereof, have & enjoy all rights, powers & remedies at law & in equity which belonged, or belong, or would belong, or have belonged to the holder of the deanery, etc., in respect of which such profits & emoluments, etc., respectively are, by or under the provisions of this Act, to be paid or accrue to & be vested in the said Comrs." Renewals of the original leases had been made, but the allotment 137 A was never referred to in them. It had been in 1821 purchased from the representatives of the original allottee, the title of the dean to it had never been asserted, & it was, in that way, held adversely to him. The dean died in 1854, & the Comrs. then came into possession, under the statute, of the property of the deanery. In 1877 the Comrs. brought an action to recover the allotment:—*Held*: under the words of Ecclesiastical Commissioners Act, 1840 (c. 113), s. 57, the Comrs. had the same time within which to enforce their claim to the property that the dean would have had under Real Property Limitation Act, 1833 (c. 27), s. 29. There was a legal continuity between the rights, powers & remedies of the dean, & those of the Comrs. His right of action was transferred to them by statute, & was not barred by the mere fact of the transfer.

I am of opinion that a right of action did, before 1854, accrue to the dean, & that this right accrued not later than the earliest grant of a lease by way of renewal which was made by the dean after the commencement of the possession of S. . . . Her possession commenced during the currency of the lease granted by the dean to H. . . which lease continued to subsist until June 18, 1828, when it was surrendered contemporaneously with & in consideration of the grant of the new lease of that date. On that surrender, a right of

action to recover the premises of which S. was then in possession accrued to the dean (*LORD SELBORNE C.*).—*ECCLESIASTICAL COMRS. OF ENGLAND & WALES v. ROWE* (1880), 5 App. Cas. 736; 49 L. J. Q. B. 771; 43 L. T. 353; 45 J. P. 36; 29 W. R. 159, H. L.

Annotations:—*Consd.* *Irish Church Commission v. Grant* (1884), 10 App. Cas. 14; *Ecc. Comrs. for England v. Tremer*, [1893] 1 Ch. 166. *Reid*. *East Stonehouse U. C. v. Willoughby*, [1902] 2 K. B. 318.

SECT. 14.—PRESENTATIONS AND ADVOWSONS.

See, generally, *ECCLESIASTICAL LAW*, Vol. XIX., pp. 370 *et seq.*

Loss of right to presentation—Lapse.—*See* *ECCLESIASTICAL LAW*, Vol. XIX., pp. 229, 230, Nos. 65–80, pp. 394, 395.

1458. Usurpation of right by stranger—Time within which action must be brought—Quare impedit.—*EVERWIK* (ABBOT) *v. DE LA ROCHE* (1347), Y. B. 21 Edw. 3, fo. 55, pl. 8.

Annotations:—*Mentd.* *Garnon's Case* (1598), 5 Co. Rep. 88 a; *Foster's Case* (1614), 11 Co. Rep. 56 b; *Thomas v. Sorrel* (1673), 3 Keb. 233.

1459. ——— ——— ———.]—(1) That a *quare impedit* cannot be sued out after six months, where a parson has been presented to a living by one who has not a right, is a rule very proper to be adopted in equity, because it is the general one, that equity follows the law, be it originally a resolution of the common law, or introduced by statute.

(2) A person who has taken a conveyance from a trustee cannot shelter himself under a plea of Statute of Limitations.

(3) Statute of Westminster II was intended to secure the peace of the church, & being considered as a statute of limitation, is a bar of an equitable as well as a legal right, & therefore deft.'s plea of a plenarty of six months & upwards was allowed.—*BOTELER v. ALLINGTON* (1746), 3 Atk. 453; 26 E. R. 1061, L. C.

Annotations:—*Generally*, *Reid*. *Mutter v. Chauvel* (1816), 1 Mer. 475. *Mentd.* *Sloman v. Kelly* (1840), 4 Y. & C. Ex. 169.

1460. ——— ——— By mortgagor against mortgagee presenting before foreclosure.—If an advowson only be mortgaged & becomes void, it seems in this case the mtgee. is to present, especially if in the deed the agreement be that the mtgee. shall present.

One mortgages a manor with an advowson appendant, & the church becomes void, mtgee., though in possession, shall not present to the church till the mtge. is foreclosed.

Mtgee. of an advowson presents; bill by mtgor. must be brought within six months, in the same manner as a *quare impedit*.—*GARDINER v. GRIFFITH* (1726), 2 P. Wms. 404; 24 E. R. 787; *sub nom.* *GARDINER v. COOK*, Mos. 16, L. C.; *affd. sub nom.* *GARDINER v. COOK* (1729), Mos. 21, n., H. L.

Annotations:—*Consd.* *Boteler v. Allington* (1746), 3 Atk. 453. *Reid*. *Mackenzie v. Robinson* (1747), 3 Atk. 559; *Mutter v. Chauvel* (1816), 1 Mer. 475.

Quare impedit generally, *see* *ECCLESIASTICAL LAW*, Vol. XIX., pp. 388 *et seq.*

SECT. 15.—TITLE EXTINGUISHED BY DISPOSSESSION.

SUB-SECT. 1.—IN GENERAL.

1461. Effect of Real Property Limitation Act, 1833 (c. 27)—General rule.—*Re* *FOX, BROOKS v. MARSTON*, No. 1035, *ante*.

1462. ——— Copyhold—Right of re-admittance barred.—Where it is clear that by above Act,

Sect. 15.—Title extinguished by dispossession: Subsects. 1 & 2, A.]

a claimant's title to a copyhold is barred by lapse of time, the ct. will not compel the lord by *mandamus* to admit him.—*R. v. AGARSDLEY* (1836), 5 Dowl. 19.

1463. — Transfer of title to property.]—Pltf. by his statement of claim alleged that J., who died in 1782, devised estates to R. & the heirs of his body, but upon special trust & confidence that in case R. should have no issue he would not do or suffer any act in law or otherwise to prevent certain subsequent devises taking effect; that R. entered & remained in possession till his death without issue in 1808; that G., who was entitled under the will of J. to an estate for life in remainder thereupon entered & remained in possession till his death in 1840; that H. thereupon became entitled to the estates as tenant for life; that H. died in 1852, whereupon pltf.'s father became entitled as tenant in tail in possession; that deft. entered upon the death of G. & had ever since remained in possession of the estates, claiming to be entitled under the wills of R. & G. Pltf. further stated that deft. claimed that R. acquired the fee simple by virtue of a common recovery, alleged to have been suffered by him in the year 1782. Deft. demurred on the ground that pltf.'s claim was barred by the recovery, & at the hearing of the demurrer relied also on the Statute of Limitations:—*Held*: (1) the defence of the Statute of Limitations is well raised by demurrer in cases which fall within the operation of Real Property Limitation Act, 1833 (c. 27), s. 34; since in such cases not merely the right to recover property by action is taken away, but the title to the property itself is transferred; (2) a party demurring may rely upon the statute, though not mentioned in the demurrer itself as a ground; (3) the words "upon special trust," etc., were a mere invalid prohibition against barring an estate tail, & did not create an express trust, so as to take the case out of the Statute of Limitations.—*DAWKINS v. PENRHYN* (LORD) (1878), 4 App. Cas. 51; 48 L. J. Ch. 304; 39 L. T. 583; 27 W. R. 173, H. L. *Annotations*:—*As to* (1) *Refd.* *Tichborne v. Weir* (1892), 8 T. L. R. 713. *As to* (2) *Consd.* *Noyes v. Crawley* (1878), 10 Ch. D. 31. *Refd.* *Futcher v. Futcher* (1881), 50 L. J. Ch. 735; *Odams v. Brunning* (1896), 74 L. T. 370. *Generally*, *Mentd.* *Cooper v. Macdonald* (1879), 7 Ch. D. 288.

1464. — Bar against remedy on personal covenant—& remedy against land.]—SUTTON v. SUTTON, No. 757, *ante*.

1465. — — —.]—SHAW v. CROMPTON, No. 758, *ante*.

1466. — Leasehold—Lessee's title barred.]—WILLIAMS v. ALLEN (1889), 5 T. L. R. 200.

1467. — Extinguishment of right to unpaid rent—Notwithstanding hotchpot clause in will.]—Testatrix gave her property among her four children & directed that all moneys owing to her at her death by any child for rent or otherwise should be brought into hotchpot in ascertaining the share of such child. One son had, in the lifetime of testatrix, acquired an absolute title, under Real Property Limitation Act, 1874 (c. 57), s. 1, to a freehold farm which had been let to him by her, through non-payment of rent by him to her for more than twelve years. Upon the qu-

tion whether the unpaid rent for the twelve years prior to the extinguishment of the estate of testatrix in the farm ought to be deducted from the son's share:—*Held*: under above Act & Real Property Limitation Act, 1874 (c. 57), all the rights of the reversioner in the farm had become extinguished & therefore the unpaid rent was no longer owing to her estate, & should not be deducted from the son's share.—*Re JOLLY, GATHERCOLE v. NORFOLK*, [1900] 2 Ch. 616; 69 L. J. Ch. 661; 83 L. T. 118; 48 W. R. 657; 16 T. L. R. 521; 44 Sol. Jo. 642, C. A. *

1468. — Bar as to claim to fund subsequently brought into court.]—Testator, who died in 1878, by his will gave the residue of his real & personal estate to trustees upon trust to convert at their discretion, & to divide the proceeds among his four children in equal shares. Part of testator's residuary real estate consisted of an estate *pur autre vie* in a freehold house, which the trustees, in the exercise of their discretion, retained. In 1889 two of the children mortgaged their interests in this property & the proceeds thereof. More than twelve years later, namely, in 1905, the trustees paid into ct. under Trustee Act, 1893 (c. 53), certain sums representing the shares of the mtgors. in the rents & profits of this property. Up to this time no steps had been taken to enforce the mtge., nor had any part of the principal or interest ever been paid, nor had any acknowledgment been given. Subsequently in 1905 the mtgees. applied for payment out of the fund in ct. to them & other incumbrancers or the mtgors. in order of priority; but this summons was dismissed, & no appeal was brought from that dismissal. The mtgors. then applied for payment out of the fund to them:—*Held*: the mtgors. were entitled to have the fund paid out to them without satisfying the mtge. debt, inasmuch as the mtgees. were precluded by the dismissal of their summons from asserting any claim against the fund, & the effect of Real Property Limitation Act, 1833 (c. 27), s. 34, was to extinguish their title to the mtge.—*Re HAZELDINE'S TRUSTS*, [1908] 1 Ch. 34; 77 L. J. Ch. 97; 97 L. T. 818; 52 Sol. Jo. 29, C. A.

Annotations:—*Consd.* *Re Fox, Brooks v. Marston*, [1913] 2 Ch. 75; *Re Witham, Chadburn v. Winfield*, [1922] 2 Ch. 413.

1469. Whether title can re-vest—By re-entry.]—The effect of Real Property Limitation Act, 1833 (c. 27), ss. 2, 34, as to land, is that, after twenty years' possession adverse to a title, it is extinguished, so that it cannot be revived or re-vested by a re-entry after that period, upon the doctrine of remitter; because such an application of that doctrine requires that the former title should be in existence at the time of the re-entry; & the express provision in the statute that no person shall be deemed in possession of lands merely by reason of an entry thereon, applies to cases of such re-entry.—*BRASSINGTON v. LLEWELLYN* (1858), 27 L. J. Ex. 297.

Annotation:—*Refd.* *Sanders v. Sanders* (1881), 19 Ch. D. 373.

1470. — — —.]—One whose title to real estate is barred by Real Property Limitation Act, 1833 (c. 27), if he subsequently made an entry, is not thereby remitted to his former title.—*BRYAN v. COWDAL* (1873), 21 W. R. 693.

PART V. SECT. 15, SUB-SECT. 1.

14631. Effect of Real Property Limitation Act, 1833 (c. 27)—Transfer of title to property.]—JACK v. WALSH (1842), 4 L. L. R. 254.—*IR*.

c. Right to declaration of

A person producing evidence of twenty years' continuous & undisturbed possession of lands is entitled to a declaration from the ct. that he is entitled thereto in fee.—*Re LOEWEN & ERB* (1892), 2 B. C. R. 135.—*CAN*.

1. — Extinguishment of title of

registered owner.]—Upon the title of the registered owner becoming extinguished by continuous possession for twelve years under the statutory limitation, the occupant is entitled to ask the ct., in the exercise of its ordinary jurisdiction, to declare his

By subsequent acknowledgment.]—**SANDERS v. SANDERS**, No. 1250, *ante*.

1472. ———.]—(1) Where the title of a reversioner to land subject either to a tenancy at will within Real Property Limitation Act, 1833 (c. 27), s. 7, or to a tenancy from year to year within sect. 8, has been extinguished by reason of his having received no acknowledgment thereof by payment of rent or otherwise during the statutory period from the expiration of a year after the commencement of the tenancy, that title cannot be revived by a subsequent payment in respect of rent.

(2) *Seemle*: in Real Property Limitation Act, 1833 (c. 27), s. 8, the words defining the second alternative time for the accrual of the reversioner's right of action, namely, "the last time when any rent payable in respect of such tenancy shall have been received," do not apply to a tenancy in respect of which, since the determination of the first year thereof, the statutory period has expired without any acknowledgment of the reversioner's title by payment of rent or otherwise.—**NICHOLSON v. ENGLAND**, [1926] 2 K. B. 93; 95 L. J. K. B. 505; 134 L. T. 702, D. C.

1473. Whose title may be extinguished—Attorned tenant of copyhold.]—Where a tenant attorned in 1801, but the person then claiming title never entered into possession nor received rent; & the estate was, between 1801 & 1834, sold in several portions, & purchased by the tenant's wife, who continued in possession till nearly 1834, when ejectment was brought against her:—*Held*: this possession was sufficiently adverse to justify the judge in nonsuiting pltf. in that ejectment.—**DOE d. LINSEY v. EDWARDS** (1836), 5 Ad. & El. 95; 2 Har. & W. 139; 6 Nev. & M. K. B. 633; 5 L. J. K. B. 238; 111 E. R. 1102.

Annotation:—**Mentd.** Doe d. Wright v. Smith (1838), 8 Ad. & El. 255.

1474. ——— Railway company—Superfluous land.]—**NORTON v. LONDON & NORTH WESTERN RY. CO.**, No. 1075, *ante*.

1475. ——— Commissioners under inclosure scheme.]—Pltfs. brought an action for the recovery of certain land as representatives of a person to whom the land had been allotted in severalty by an award of partition made under the Inclosure Acts in 1880. Defts. were in possession of the land, & at the date of the award had acquired a good title thereto under the Statute of Limitations, having been in undisturbed possession since 1851. The partition was not made under any inclosure scheme. None of the parties to the partition proceedings had any interest whatever in the land, & it was by mere mistake included in the schedule to their application & dealt with in the award:—*Held*: the effect of Inclosure Act, 1845 (c. 118), s. 165, was not to make the award conclusive as to the title of the allottee, & the award, not having been made on the application of persons interested in the land within Inclosure Act, 1848 (c. 99), s. 13, had been made without jurisdiction, & defts. were therefore entitled to judgment.—**JACOMB v. TURNER**, [1892] 1 Q. B. 47; 8 T. L. R. 21.

Annotations:—**Consd.** Blackett v. Ridout, [1915] 2 K. B. 415; Collis v. Amphlett, [1918] 1 Ch. 232.

title &, upon a judgment to that effect, procure himself to be registered as the owner of the land.—**BROGDEN v. BROGDEN** (Alta.), [1920] 2 W. W. R. 803; 53 D. L. R. 362; 15 Alta. L. R. 499.—**CAN.**

PART V. SECT. 15, SUB-SECT. 2.—A.

g. No greater title than person dispossessed.]—**NOLAN v. FOX** (1865), 15 C. P. 565.—**CAN.**

h. ———.]—**VITHOBA BIN CHABU v.**

SUB-SECT. 2.—NATURE OF TITLE ACQUIRED.

A. In General.

1476. Right to demand conveyance.]—**ANON.** (*circa* 1675), Freem. Ch. 313; 22 E. R. 1234.

1477. Right to eject trespasser.]—Pltf. proved twenty years' possession. Deft. ten years following the twenty:—*Held*: pltf. was entitled to recover.—**DOE d. HARDING v. COOKE** (1831), 7 Bing. 346; 5 Moo. & P. 181; 9 L. J. O. S. C. P. 118; 131 E. R. 134.

Annotations:—**Consd.** Whale v. Hitchcock (1876), 34 L. T. 136. **Refd.** Doe d. Carter v. Barnard (1849), 13 Q. B. 945. **Mentd.** A.-G. v. Murdoch (1852), 1 De G. M. & G. 86.

1478. Whether person in possession has Parliamentary conveyance of land.]—Real Property Limitation Act, 1833 (c. 27), s. 8, applies to tenancies from year to year created before & existing at the passing of the Act.

The effect of the Act is to make a Parliamentary conveyance of the land to the person in possession after that period of twenty years has elapsed (**PARKE, B.**).—**DOE d. JUKES v. SUMNER** (1845), 14 M. & W. 39; 14 L. J. Ex. 337; 9 Jur. 413; 153 E. R. 380.

Annotations:—**Consd.** Tichborne v. Weir (1892), 67 L. T. 735. **Refd.** Doe d. Angell v. Angell (1846), 9 Q. B. 328; Doe d. Goody v. Carter (1847), 11 Jur. 285.

1479. Property vested in person in possession.]—**ST. LEONARDS (LORD) v. ASHBURNER**, No. 1014, *ante*.

1480. ——— Whether includes right to way of necessity.]—The parties have admitted, though upon what facts or what view of the law we do not know, that deft. has acquired a title in fee simple in possession, under Statutes of Limitations, to the two plots of land. The one point argued before us has been whether, assuming the premises to have passed to deft. by virtue of Statute of Limitations, a right of way over this approach inevitably came into existence over pltf.'s remaining land as a way of necessity & as distinct from any other way. There is nothing in Statute of Limitations to create ways of necessity. The statute does not expressly convey any title to the possessor. Its provisions are negative only. We cannot import into such negative provisions doctrines of implication that would naturally arise where title is created either by express grant or by statutory enactment. The doctrine of a way of necessity is only applied to a title by grant, personal or Parliamentary. Upon the hypotheses we are obliged to assume the title to the right of way can only be maintained if the statute gives it, which statute, however, does not apply to a right of way. It is not contended that the statutory enactment as to easements applies (**ESHER, M.R.**).—**WILKES v. GREENWAY** (1890), 6 T. L. R. 449, C. A.

1481. ——— Subject to restrictive covenants.]—(1) A negative covenant validly created, entered into by an owner of land with an adjoining owner, such as a covenant restricting the user of the land, binds the land in equity, as being in the nature of a negative easement; & it can, therefore, be enforced against any subsequent owner of the land not being a *bona fide* purchaser for value of the legal estate without notice. Such a covenant is equally binding in equity upon land to which a squatter has subsequently acquired a statutory title by adverse possession against the owner &

GANGARAM BIN BIRAMJI (1875), 12 Bom. 180.—**IND.**

k. Right of action conferred.]—Title acquired by prescription confers on the person acquiring it a right of action

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sect. 2, A., B., C., D., E. & F.]*

covenantor for twelve years under Real Property Limitation Act, 1833 (c. 27), s. 34, as amended by Real Property Limitation Act, 1874 (c. 57), ss. 1, 9; for the statutory "extinguishment" of the title of the dispossessed owner of the land has not the effect of destroying the covenant, the equitable right of the covenantee not being in any way affected by the statute, & consequently the covenantee can enforce the covenant against the squatter both before & after he has acquired his possessory title, & also against any subsequent owner of the land not being a *bonâ fide* purchaser for value without notice.

(2) Neither a squatter who has acquired a good title by possession, nor a purchaser from him, is exempt from liability arising through his not insisting on & obtaining a full forty years' title. Therefore, if any purchaser under the squatter's possessory title chooses to accept less than a forty years' title, he is fixed with constructive notice of all such equities affecting the land as he would have discovered by reasonable inquiries under a title for the full period.

On a purchase for value of freehold land, the purchaser agreed to accept a title commencing with a possessory or squatting title acquired within forty years prior to the purchase:—*Held*: he had constructive notice of restrictive covenants affecting the land entered into within the forty years by an owner before the squatter took possession.—*Re NISBET & POTTS' CONTRACT*, [1906] 1 Ch. 386; 75 L. J. Ch. 238; 94 L. T. 297; 54 W. R. 286; 22 T. L. R. 233; 50 Sol. Jo. 191, C. A.

Annotations:—*Generally*, *Mentd.* *Abbey v. Gutierrez* (1911), 55 Sol. Jo. 364; *Wilkes v. Spooner*, [1911] 2 K. B. 473; *Long v. Gray* (1913), 58 Sol. Jo. 46; *L. C. C. v. Allen*, [1914] 3 K. B. 642; *Meyer v. Charters* (1918), 34 T. L. R. 589.

1482. Right to surface & support—As against owner by compulsory purchase.—A stranger may by exclusive possession for the statutory period acquire a title to the surface of land situate vertically over a tunnel forming part of a railway co.'s undertaking, even although not superfluous land, together with so much of what is beneath the surface as is necessary to the enjoyment of such surface, subject to the right of the railway co. to the tunnel & to so much of the underlying & superincumbent strata as is necessary for its proper enjoyment as a railway tunnel. He may also acquire a title to the space above the surface by the exercise of rights of ownership in such space, such as leasing the right to the railway co. to carry their telegraph wires over the land, where it is not shown that the occupation of the surface is necessary, although it may be convenient for the purpose of carrying such wires.—*MIDLAND RY. CO. v. WRIGHT*, [1901] 1 Ch. 738; 70 L. J. Ch. 411;

as well as a ground of defence.—*JONES v. CAPE TOWN TOWN COUNCIL* (1896), 13 S. C. 43.—S. AF.

PART V. SECT. 15, SUB-SECT. 2.—B.

1483 i. Joint tenancy.—*Re BROWN, COYLE v. M'FADDEN*, [1901] 1 I. R. 298.—IR.

1483 ii. —.—*MARTEN v. KEARNEY* (1902), 36 I. L. T. 117.—IR.

1483 iii. —.—*SMITH v. SAVAGE*, [1906] 1 I. R. 469.—IR.

1483 iv. —.—Two of the next-of-kin of the yearly tenant of a farm, who died intestate, acquired a title under Statute of Limitations to the shares of the other next-of-kin. A question arose in the administration, viz.,

whether the farms were held by the two as tenants in common, or as joint tenants:—*Held*: the original farm was held as to the original shares of the two next-of-kin by pltf. & deft. as tenants in common, & as to the acquired shares by them as joint tenants.—*Re CHRISTIE, CHRISTIE v. CHRISTIE*, [1917] 1 I. R. 17.—IR.

PART V. SECT. 15, SUB-SECT. 2.—C.

1485 i. Whether liability incurred as to covenants—No liability incurred as to covenants.—The effect of Statute of Limitations upon the position of a person in possession of leaseholds, not an assignee, is not to transfer to him the interest of the lessee, & make him

84 L. T. 225; 49 W. R. 474; 17 T. L. R. 261; 45 Sol. Jo. 311.

B. Joint Possession.

1483. Joint tenancy.—Testator devised a copyhold in 1796 to W. for life, with remainder to her children as tenants in common, without words of limitation. W., who had three children, let the property to her two sons, L. & B., & after the death of L. to his son R. & B., who occupied the estate together till the death of W. in 1841. On W.'s death the property, subject, as to one-third, to B.'s life estate, belonged in moieties to R. & X., as the co-heirs of testator. R. & B. continued to occupy the whole property as owners, & farmed it at their equal expense, till the death of B. in 1862, after which it was similarly farmed by B.'s son & R. till 1869, when B.'s son died. The devisee of B.'s son afterwards filed a bill for a partition:—*Held*: R. & B., as regarded that third share, of which their possession became wrongful on the death of W., must be considered as joint tenants; & as B. had died first, his interest in the estate had determined, & pltf. had no title.—*WARD v. WARD* (1871), 6 Ch. App. 789, L. C.

Annotation:—*Apld.* *Bolling v. Hobday* (1882), 31 W. R. 9.

1484. —.—*BOLLING v. HOBDAY*, No. 1196, ante.

C. Leaseholds.

1485. Whether liability incurred as to covenants—No liability incurred as to covenants.—In 1802 D., pltf.'s predecessor in title, granted a lease of a house to B. for eighty-nine years. In 1836 G. took possession of the house & remained in possession till 1876, paying to D. the rent agreed on in D.'s lease to B. In 1876 G. by deed assigned all his estate & interest in the lease to deft., who continued in possession, paying the same rent to D. & pltf. till 1891, when he delivered up possession to pltf. Pltf. sued deft. for a breach of a covenant to repair contained in the lease granted to B.:—*Held*: the right & title of B. was not transferred by Real Property Limitation Act, 1833 (c. 27), s. 34, to G., & therefore deft. was not liable on the covenants running with the land contained in the lease to B.—*TICHBORNE v. WEIR* (1892), 67 L. T. 735; 8 T. L. R. 713; 4 R. 26, C. A.

Annotations:—*Apld.* *Re Jolly, Gathercole v. Norfolk*, [1900] 1 Ch. 292. *Distd.* *Re Nisbet & Potts' Contract*, [1905] 1 Ch. 391. *Refd.* *Re Atkinson & Horsell's Contract*, [1912] 2 Ch. 1.

1486. Whether possession affected by surrender of lease—Lessor's right of re-entry at end of term.—*WALTER v. YALDEN*, No. 1140, ante.

D. Copyholds.

1487. Freehold interest acquired.—In 1808 the lord of the manor of W. granted to M., the governor of a fort, a licence to inclose a piece of waste adjoining some copyholds of the manor, & to occupy for life if he remained governor. In 1809

bound by the covenants in the lease, but merely to give him the right of possession during the remainder of the lease against the lessee or those claiming under him.—*O'CONNOR v. FOLEY*, [1905] 1 I. R. 1.—IR.

1. Whether person in possession has Parliamentary conveyance of tenancy.—*MULCAIRE v. LANE-JOYNT* (1893), 32 L. R. Ir. 683.—IR.

m. Right to be registered as owner.—Where the Statute of Limitations runs against a middle-man, the occupying tenant, in whose favour the statute has run, acquires the middle interest, & is entitled to be registered as owner thereof.—*Re HAYDEN*, [1904] 1 I. R. 1.—IR.

the said copyholds were surrendered to a trustee for the Crown for military purposes. In 1811 M. ceased to be governor, having made the piece of waste into close L. Afterwards there were repeated admittances of trustees for the Crown to the said copyholds, which were described by bounds not including close L. There was nothing further on the title except that in 1874 the Crown had been in possession of close L. & the copyholds for forty years. In 1874 the lord of the manor, without the consent of the Crown, granted a licence to get coprolites out of close L. at a royalty, & received £222. The Crown sued for an injunction & damages against the lord of the manor:—*Held*: the Crown had acquired a freehold title to close L. under Statute of Limitations.—*A.-G. v. TOMLINE* (1880), 15 Ch. D. 150; 43 L. T. 486, C. A.

Annotations:—*Reid. Beighton v. Beighton* (1895), 13 R. 743; *East Stonehouse District L. B. v. Willoughby* (1902), 50 W. R. 698.

1488. Presumption of enfranchisement—What is evidence of enfranchisement.—The enfranchisement of a copyhold may, upon proper evidence, be presumed, even against the Crown.

A surrender had been made to churchwardens & their successors in 1636, without naming any rent, but in 1649 the Parliamentary survey charged the churchwardens with 6d. rent under the head of "freehold rents," & there was no evidence of any different rent having been paid since that time, & receipts had been given for it, as for a freehold rent, by the steward of the manor:—*Held*: this was evidence to be submitted to a jury, on which they might presume a grant of enfranchisement.—*ROE d. JOHNSON v. IRELAND* (1809), 11 East, 280; 103 E. R. 1011.

Annotations:—*Distd. Turner v. West Bromwich Union Grdns.* (1860), 3 L. T. 662. *Reid. Goodtitle v. Baldwin* (1809), 11 East, 488. *Mentd. Harrison v. Powell* (1894), 10 T. L. R. 271; *A.-G. v. Horner* (No. 2), [1913] 2 Ch. 140.

1489. — Extinction of one service—Whether other services presumed extinguished.—*CHICHESTER (EARL) v. HALL*, No. 1042, *ante*.

1490. — Neglect to collect acknowledgment.—In the absence of evidence adverse to the rights of the lord the ct. will not presume an enfranchisement of land shown to have been copyhold in 1717 from mere negligence by the lords of the manor in exacting the small acknowledgments for which the fines, etc., were then commuted.

That any enfranchisement of this property, which was clearly shown to have been copyhold in 1717, was to be presumed from the mere negligence of the lords of the manor in exacting the small acknowledgment, 10s. in every seven years, would be a point very doubtful in law. All that could be relied upon during all this period was that the lord of the manor had been excessively negligent in receiving the 10s. acknowledgment. The lord of the manor might consider, now that the property was parted with, that the time had arrived for asserting his rights, as to which no adverse act had been made out, while it was not a case to which any Statute of Limitations applied (*WOOD, V.-C.*).—*TURNER v. WEST BROMWICH UNION GUARDIANS* (1860), 3 L. T. 662; 9 W. R. 155.

1491. — Land treated as freehold.—Land anciently copyhold was for upwards of a hundred years treated as freehold without any claim being made on the part of the lord of the manor, & the only intimation that the land was copyhold was

in recitals to that effect & a covenant to surrender contained in deeds of recent date to which the lord was neither party nor privy. A contract having been entered into for sale of the land as freehold:—*Held*: under the circumstances, an enfranchisement must be presumed, & the purchaser was therefore not entitled to require the vendors to obtain the enfranchisement of the land. *Semble*: the lord's right of entry was barred by Statute of Limitations.—*Re LIDIARD & JACKSON'S & BROADLEY'S CONTRACT* (1889), 42 Ch. D. 254; 58 L. J. Ch. 785; 61 L. T. 322; 37 W. R. 793.

Annotations:—*Consd. Eccl. Comrs. for England v. Parr*, [1894] 2 Q. B. 420. *Distd. Beighton v. Beighton* (1895), 64 L. J. Ch. 796.

E. Purchase-Money of Lands Compulsorily Purchased.

Lands Clauses Consolidation Act, 1845 (c. 18)—Persons claiming under possessory title.—*See COMPULSORY PURCHASE OF LAND*, Vol. XI., pp. 242, 243, Nos. 1378–1384.

F. Title May be Forced on Purchaser.

1492. General rule.—*SANDS TO THOMPSON*, No. 1350, *ante*.

1493. ——A twelve years' possessory title can be forced on a purchaser though the vendor had no title at the date of the contract.—*GAMES v. BONNOR* (1884), 54 L. J. Ch. 517; 33 W. R. 64, C. A.

Annotations:—*Expld. & Folld. Re Atkinson & Horsell's Contract*, [1912] 2 Ch. 1. *Reid. Re Nisbet & Potts' Contract*, [1905] 1 Ch. 391.

1494. ——Where a vendor contracts to give a title commencing with a certain instrument, & it afterwards appears that he cannot give such a title, but can give a good possessory title from a later date the possessory title will be forced upon the purchaser.

A contract for the sale of land in 1911 provided that the title should commence with a general devise contained in the will of testator who died in 1842 & whose seisin was to be assumed. The vendor in fact derived title from a disseisor who, in 1874, under a mutual mistake as to the effect of the will, was allowed by the true owner, who was under no disability, to take possession of the land & title deeds. The disseisor & those claiming under her down to the vendor remained in uninterrupted possession to the date of the contract. The mistake was not realised at the date of the contract, so the fact that the title was partly possessory was not mentioned therein. The purchaser took out a summons for a declaration that the vendor had not shown a good title in accordance with the contract. The vendor claimed to have shown a good title up to 1874, & a good possessory title since that date:—*Held*: the vendor had shown a good title, & it could be forced on the purchaser.—*Re ATKINSON & HORSELL'S CONTRACT*, [1912] 2 Ch. 1; 81 L. J. Ch. 588; 106 L. T. 548; 56 Sol. Jo. 324, C. A.

Annotation:—*Reid. Re Halles & Hutchinson's Contract*, [1920] 1 Ch. 233.

1495. Necessity to show state of title at commencement of possession—Open contract for purchase.—*MOULTON v. EDMONDS* (1859), 1 De G. F. & J. 246; 29 L. J. Ch. 181; 1 L. T. 391; 6 Jur. N. S. 305; 8 W. R. 153; 45 E. R. 352, L. C.

Annotations:—*Expld. Re Halifax Commercial Banking Co. & Wood* (1898), 79 L. T. 536. *Reid. Re Nisbet & Potts' Contract*, [1905] 1 Ch. 391.

years of vacant land taken under the Lands for Public Purposes Acquisition Act were, in the absence of any claim by the documentary owner, deemed to be the owners of the land & entitled

PART V. SECT. 15, SUB-SECT. 2.—F. [1920] 1 L. R. 159. IR

1492 i. General rule.—*TUTHILL v. ROGERS* (1844), 1 Jo. & Lat. 36.—IR.

1492 ii. ——

n. Proof of title—Compulsory purchase.—Persons showing title by adverse possession for twenty-six

Sect. 15.—Title extinguished by dispossession: Sub-sect. 2, F.; sub-sects. 3 & 4, A., B. & C.; sub-sect. 5. Sect. 16.]

1496. ———.]—Defts. sold by auction to pltf. a freehold property described in the particulars of sale as containing 5 acres, 26 poles, & as bordering on a lake on S. Common, the sale being subject to conditions of sale, one of which was as follows: "The property is believed & shall be taken to be correctly described in the particulars as to quantity & otherwise . . . & if any error, misstatement, or omission in the particulars be discovered, the same shall not annul the sale, nor shall any compensation be allowed by the vendors to the purchaser in respect thereof." The only part of the property to which a good title was shown contained 4 acres, 3 roods. Another part of the property offered for sale bordered on the lake, & as to this the only title offered was what purported to be a title by possession for less than forty years. Pltf. claimed rescission of the contract & a return of the deposit paid by him, & defts. counterclaimed for specific performance:—*Held*: even if defts. had established a possessory title to the border land for twelve years, that would not have been sufficient, as the contract, so far as it related to that land, was an open one, in which case a forty years' title by possession was required; defts. were not entitled to specific performance in respect of the part of the property to which a good title had been shown; & pltf. was entitled to rescission of the contract & the return of his deposit.—**JACOBS v. REVELL**, [1900] 2 Ch. 858; 69 L. J. Ch. 879; 83 L. T. 629; 49 W. R. 109.

Annotations:—*Re* Nisbet & Potts' Contract, [1905] 1 Ch. 391. *Mentd.* Lee v. Rayson, [1917] 1 Ch. 613.

1497. Effect of not requiring forty years title—Constructive notice of equities—Restrictive covenants in nature of negative easements.]—*Re* NISBET & POTTS' CONTRACT, No. 1481, *ante*.

SUB-SECT. 3.—TITLE ACQUIRED BY SUCCESSIVE TRESPASSERS.

1498. Transmissibility of statutory title—By will.]—A person in possession of land without other title has a devisable interest; & the heir of his devisee can maintain ejectment against a person who has entered upon the land, & cannot show title or possession in any one prior to testator.

W. in 1842 inclosed some waste land; in 1850 he inclosed more land adjoining, & built a cottage; he occupied the whole till 1860, when he died, having devised it to his wife, so long as she remained unmarried, with remainder to his daughter in fee. On his death, the widow & daughter continued to reside on the property, & in 1861 deft. married the widow, & came to reside with them. Early in 1863 the daughter died, aged eighteen years, & the mother died soon after. Deft. continued to occupy the property, & in 1865 the daughter's heir-at-law brought ejectment against him:—*Held*: pltf. was entitled to recover the whole property.—**ASHER v. WHITLOCK** (1865), L. R. 1 Q. B. 1; 35 L. J. Q. B. 17; 13

L. T. 254; 30 J. P. 6; 11 Jur. N. S. 925; 14 W. R. 26.

Annotations:—*Expld.* Paine v. Jones (1874), L. R. 18 Eq. 320. *Consd.* Mussammat Sundar v. Mussammat Parbati (1889), 5 T. L. R. 683. *Appld.* Calder v. Alexander (1900), 16 T. L. R. 294. *Re* Perry v. Clissold, [1907] A. C. 73.

1499. ———.]—CALDER v. ALEXANDER (1900), 16 T. L. R. 294.

1500. ——— To heir-at-law.]—ASHER v. WHITLOCK, No. 1498, *ante*.

1501. Necessity for possession by same person—Or by persons claiming one from another.]—In ejectment it appeared that the lessor of pltf.'s husband had been in possession as tenant at will for eighteen years, ending in 1834, when he died leaving a son, not a party to the action, & that she then became possessed & remained in possession for thirteen years:—*Held*: pltf. could not rely on the husband's possession except as *prima facie* evidence of a seisin in fee on which supposition it was also evidence of title in his heir, which defeated the title of the lessor of pltf.; & she who could not insist on her own possession for thirteen years as it was not derived from the husband's possession; although the possession by herself & her husband for more than twenty years consecutively would have entitled her to a verdict if she had been deft. in an ejectment brought by the real owner. *Semble*: the effect of Real Property Limitation Act, 1833 (c. 27), s. 34, is to give title by possession for twenty years, but such twenty years' possession must be either by the same persons or several persons claiming one from another.—**DOE d. CARTER v. BARNARD** (1849), 13 Q. B. 945; 18 L. J. Q. B. 306; 14 L. T. O. S. 83; 13 Jur. 915; 116 E. R. 1524.

Annotations:—*Expld.* Humphrey v. Nowland (1862), 15 Moo. P. C. C. 343. *Consd.* Perry v. Clissold, [1907] A. C. 73. *Re* Asher v. Whitlock (1865), L. R. 1 Q. B. 1; *Solling v. Broughton*, [1893] A. C. 556.

1502. ———.]—(1) Though by Real Property Limitation Act, 1833 (c. 27), s. 34, the right is extinguished at the end of twenty years, still adverse possession by a succession of independent trespassers, for a period exceeding twenty years, confers no right on any one of them who has not himself had twenty years' uninterrupted possession, except as furnishing a defence to a trespasser in possession against an action by the rightful owner.

After both the trustee & *cestui que trust* had been out of possession more than twenty years, an ejectment was brought by A., the heir of the trespasser, in the name of the trustee, & he obtained judgment. The trustee, who, disclaiming all personal interest, then instituted a suit, seeking to have the rights declared as between the rightful owner & the heir of the trespasser, & the ct., by its receiver, took possession. A. afterwards instituted a suit against the trustee & the rightful owner to recover the property:—*Held*: the ct. being in possession, Real Property Limitation Act, 1833 (c. 27), had conferred no right, & did not apply.

(2) A. wrongfully entered & died intestate; his widow entered:—*Held*: the possession of a widow was not a continuance of that of her husband, it not being shown that she was entitled

(1839), 1 Dr. & Wal. 700.—**IR.**

r. Nature of possession—Equivalent of possession.]—A person seeking to invoke the aid of the statute against a claim in respect of lands must show that he, & those under whom he claims, have been in possession of the land, or what in law is equivalent to possession.—**ARNER v. MCKENNA** (1862), 9 Gr. 226.—**CAN.**

t. ——— Actual possession.]—A person claiming title by possession to

to the purchase-money, although they were unable to establish that the title of the true owner was barred by such possession.—*Re* CLISSOLD (1907), 7 S. R. N. S. W. 638.—**AUS.**

PART V. SECT. 15, SUB-SECT. 3.

o. General rule.]—Continuous possession for twenty years, by a trespasser & those deriving under him, bars the right of the true owner.—**KEEFFE v. KIRBY** (1857), 6 I. C. L. R.

1498 i. Transmissibility of statutory title—By will.]—CLARKE v. CLARKE (1868), 1 R. 2 C. L. 395.—**IR.**

p. What is sufficient continuance of possession—Possession by nephew of trespasser insufficient.]—SOLLING v. BROUGHTON (1891), 12 N. S. W. L. R. 189; 10 N. S. W. W. N. 99.—**AUS.**

q. ——— Possession by daughters of trespasser.]—BROWNE v. CORK (BP.)

to dower, & such a right not entitling her to enter into the whole estate.

(3) A suit, dismissed as against the principal debt., & which, though pending as against the others, has yet been practically abandoned, does not prevent the operation of Real Property Limitation Act, 1833 (c. 27).—*DIXON v. GAYFERE* (No. 1), *FLUKER v. GORDON* (1853), 17 Beav. 421; 23 L. J. Ch. 60; 22 L. T. O. S. 15; 51 E. R. 1097.

Annotation:—*As to* (1) *Consd. Asher v. Whitelock* (1865), 35 L. J. Q. B. 17.

1503. What is sufficient continuance of possession—Possession by husband of trespasser.—A., thirty years ago, died seised of a cottage, having a son B. & a daughter C. At his death C., his daughter, then unmarried, took possession of it, & afterwards married D., & after his death W. After her death, W. remained in possession sixteen years:—*Held*: the son of B. who was the heir of C., as well as being the heir of A. & B., might recover in ejectment, although W., including the term he had occupied the cottage with his wife, had had more than twenty years' possession of it.—*DOE d. TRANTER v. WING* (1834), 6 C. & P. 538, N. P.

1504. — Possession by widow of trespasser.—R. was let into possession of premises under a contract of purchase, not completed for several years. In Dec. 1824, the conveyance was executed; but in the meantime R. had let his son J. into possession of part, as tenant at will, without payment of rent. In Mar. 1829, R. mortgaged the whole for a term, vested in the lessor of pltf. J. continued in possession of the same part without payment of rent. On ejectment brought against J.'s wife, in Jan. 1845:—*Held*: assuming J.'s tenancy at will to have been determined either by the execution of the conveyance in 1824 or the mtge. in 1829, still his possession for twenty years as tenant at sufferance after the determination of the tenancy at will, there being no evidence of the creation of any new tenancy, was a complete bar to the action under Real Property Limitation Act, 1833 (c. 27), s. 7; but the execution of the conveyance in 1824 did not determine the tenancy at will between the father & son.—*DOE d. GOODY v. CARTER* (1847), 9 Q. B. 863; 18 L. J. Q. B. 305; 8 L. T. O. S. 409; 11 Jur. 285; 115 E. R. 1505.

Annotations:—*Reid. Doe d. Carter v. Barnard* (1849), 18 L. J. Q. B. 306; *Doe d. Palmer v. Eyre* (1851), 17 Q. B. 366; *Randall v. Stevens* (1853), 2 E. & B. 641; *Wimbledon & Putney Commons Conservators v. Nicol* (1894), 10 T. L. R. 247.

1505. — — — — ——*DOE d. CARTER v. BARNARD*, No. 1501, *ante*.

1506. — — — — ——*DIXON v. GAYFERE* (No. 1), *FLUKER v. GORDON*, No. 1502, *ante*.

1507. — Possession by mother of successive trespassers.—*WILLIS v. HOWE* (EARL), No. 1828, *post*.

1508. Effect of court taking possession—After series of trespassers—Where no title acquired.—

land derived through prior trespassers, & by his own possession, can only acquire a title to the land of which there has been actual possession for the statutory period.—*BROOKE v. GIBSON* (1896), 27 O. R. 218.—*CAN.*

PART V. SECT. 15, SUB-SECT. 4.—A.
1510 i. Whether statutory title acquired—By tenant for life.—*HAMILTON v. LIGHTBODY* (1870), 21 C. P. 126.—*CAN.*

a. — By widow.—*STEPHENS v. SIMPSON* (1866), 12 Gr. 493; *affd.* (1869), 15 Gr. 594.—*CAN.*

—Where the widow enters under the will to carry out its intentions she cannot rely upon Statute of Limitations.—*MOLONY v. MOLONY*, [1894] 2 I. R. 1.—*IR.*

PART V. SECT. 15, SUB-SECT. 5.
c. Whether limitation applies.—With regard to British Honduras Consolidated Laws of 1887, Limitation Act (c. 19) applies to lands held under a title registered under Lands Titles Registry Act (c. 106); consequently twenty years' adverse possession ex-

DIXON v. GAYFERE (No. 1), *FLUKER v. GORDON*, No. 1502, *ante*.

1509. Effect of abandonment—Before title acquired.—*TRUSTEES, EXECUTORS & AGENCY CO., LTD. v. SHORT*, No. 1065, *ante*.

SUB-SECT. 4.—POSSESSION UNDER WILL, SETTLEMENT, OR LEASE.

A. Will.

1510. Whether statutory title acquired — By tenant for life.—*Semble*: if a person to whom a particular estate is given by will for his life takes possession, & is allowed to keep as part of that estate something not strictly belonging to it, he cannot set up a title as gained by adverse possession against the remainderman.—*ANSTEE v. NELMS* (1856), 1 H. & N. 225; 26 L. J. Ex. 5; 27 L. T. O. S. 190; 4 W. R. 612; 156 E. R. 1186.

Annotations:—*Apprvd. Board v. Board* (1873), L. R. 9 Q. B. 48; *Dalton v. Fitzgerald*, [1897] 2 Ch. 86. *Reid. Paine v. Jones* (1874), L. R. 18 Eq. 320.

1511. — By executor entering.—*PELLEY v. BASCOMBE*, No. 1749, *post*.

—*See, also, ESTOPPEL*, Vol. XXI., pp. 329–331, Nos. 1241–1246.

B. Settlement.

1512. Settlor without title—Tenant for life acquiring possessory title as against real owner—Estopped from denying validity of settlement as against remainderman.—Where a grantor, who has no title, purports by deed to convey a piece of land to A. for life with remainders over & A. enters upon the land under the deed, & afterwards acquires a good title by possession against the true owner, A., & his privies are respectively estopped as against the remaindermen from disputing the validity of the deed.—*DALTON v. FITZGERALD*, [1897] 2 Ch. 86; 66 L. J. Ch. 604; 76 L. T. 700; 45 W. R. 685; 13 T. L. R. 456; 41 Sol. Jo. 560, C. A.

Annotations:—*Reid. Re Coole, Coole v. Flight*, [1920] 2 Ch. 536. *Mentd. Re Anderson, Pegler v. Gillatt*, [1905] 2 Ch. 70.

C. Lease.

Encroachment by tenant—On adjoining land—Waste.—*See COMMONS*, Vol. XI., pp. 55–57, Nos. 836–853.

—**On other land of landlord.**—*See LANDLORD & TENANT*, Vol. XXXI., pp. 554, 555.

SUB-SECT. 5.—REGISTERED LAND.

See REAL PROPERTY.

SECT. 16.—RIGHTS OF THE CROWN.

See Crown Suits Act, 1769 (c. 16); *Duchy of Cornwall Act, 1844* (c. 105); *Duchy of Cornwall Act, 1860* (c. 53); *Crown Suits Act, 1861* (c. 62).

1513. Period of limitation—To claim by Crown—Crown Suits Act, 1769 (c. 16).—A possession of

tinguishes by force of sect. 5 of the former Act a title registered under the latter Act.—*BELIZE ESTATE & PRODUCE CO., LTD. v. QUILTER*, [1897] A. C. 367.—*BRITISH HONDURAS.*

d. Unregistered conveyance — Unregistered owner in possession—Time runs from conveyance to subsequent registered purchaser.—*M'VITY v. TRANOUTH* (1907), 77 L. J. P. C. 37.—*CAN.*

PART V. SECT. 16.

1513 i. Period of limitation—To claim by Crown—Crown Suits Act, 1769

Sect. 16.—Rights of the Crown. Part VI. Sect. 1:
Sub-sect. 1, A. (a).]

Crown land commencing at least fifty-five years ago by encroachment on the Crown in the time of the lessor of pltf.'s father, maintained by the father till his death nineteen years ago, & afterwards continued for two years by his widow, when deft. obtained the possession, would be sufficient evidence for the jury to presume a grant from the Crown to the lessor's father, if the Crown were capable of making such a grant, in order to support a demise in ejectment from the eldest son & heir of such first possessor, against deft., who had no apparent title, & whose possession was not defended by the Crown, nor found to be by licence from it. But it appearing upon a second trial, that by 19 & 20 Car. 2, c. 8, all future grants of land by the Crown in the Forest of Dean, within which the land in question lay, were avoided, & consequently no presumption could be made of a valid grant; the lessor of pltf., who can only recover in ejectment by the strength of his own title, was held not entitled to recover even against a stranger, whose possession, adverse to him, was not defended by the Crown; & this, notwithstanding a part of the premises was first held by the lessor's father sixty years ago; & by above Act, the suit of the Crown is barred after a continuing adverse possession for sixty years under the criminal trespasser; for from the death of the father nineteen years ago the possession was adverse to his heir, the lessor of pltf., or at least deft.'s possession, for the last seventeen years was adverse; & the above Act does not give a title to the first wrongful possessor & those claiming under him, but only bars the remedy of the Crown against them after sixty years continuing adverse possession by them. As it does not repeal 19 & 20 Car. 2, c. 8, no presumption of a grant to legalise the possession of the lessor's father for the first forty-one years, on which alone the lessor's claim could be founded, can be made against that statute; & the jury, it seems, may presume that the possession of the lessor's father, for the first forty-one years, & that of deft., adverse to the heir, for the last seventeen years, were not legally holden by the licence of the Crown.—**GOODTITLE d. PARKER v. BALDWIN** (1809), 11 East, 488; 103 E. R. 1092.

Annotations:—**Reid.** Doe d. Devine v. Wilson (1855), 10 Moo. P. C. C. 502; Mill v. New Forest Comr. in Charge (1856), 2 Jur. N. S. 520.

1514. ————.]—In an information of intrusion relating to land in British Honduras:—**Held:** defts. having shown sixty years' adverse possession there from before 1817, by themselves

& their predecessors in title, without disturbance or effectual claim by the Crown, such information must be dismissed.—**A.-G. FOR BRITISH HONDURAS v. BRISTOWE** (1880), 6 App. Cas. 143; 50 L. J. P. C. 15; 44 L. T. 1, P. C.

1515. ————.]—(1) Occupation against the Crown for any period less than the sixty years required by above Act is of no avail against the title & legal possession of the Crown, & still less against its grantee in actual possession.

In an action of ejectment it appeared that the land belonged to the Crown, & was in peaceable possession of its grantee, deft., but that pltf. & his predecessors in title had enjoyed uninterrupted occupation thereof for a period of fifty-six years down to a date about seven years prior to date of action:—**Held:** judgment was rightly entered for deft.

(2) 21 Jac. 1, c. 14, only regulates procedure, & its effect is that if an information of intrusion is filed & the Crown has been out of possession for twenty years deft. is allowed to retain possession till the Crown has established its title. Where no information has been filed there is nothing to prevent the Crown or its grantee from making a peaceable entry & then holding possession by virtue of title.—**EMMERSON v. MADDISON**, [1906] A. C. 569; 75 L. J. P. C. 109; 95 L. T. 568; 22 T. L. R. 748, P. C.

1516. ————.]—Application to advowsons.]—**Qu.:** whether above Act applies to advowsons.—**GIBSON v. CLARK** (1819), 1 Jac. & W. 159; 37 E. R. 336.

Annotation:—**Mentd.** A.-G. v. Murdoch (1852), 1 De G. M. & G. 86.

1517. ————.]—To claim by grantee of Crown.]—**EMMERSON v. MADDISON**, No. 1515, *ante*.

1518. Putting rent in charge to the Crown—Effect of.]—If the auditors make due returns to the office of comrs. for auditing the public accounts of the rents & other profits of lands, etc., forming part of the Crown revenue, those returns constitute a putting in charge within Crown Suits Act, 1769 (c. 16), so as to save the right of the Crown from the operation of that Act; although for more than sixty years the auditors have received nothing in respect of such revenue, & although the Crown within that time have not instituted any suit or proceeding to recover any part of it.—**A.-G. v. MAXWELL** (1814), 8 Price, 77; 146 E. R. 1136.

Annotation:—**Consd.** A.-G. v. Eardley (1820), 8 Price, 39.

1519. ————.]—Displacement of Crown's title.]—Where an entire manor or other district has been in charge to the Crown within sixty years, acts done in different parts of it by different persons,

(c. 16).]—**Re ROGERS & BROUGHTON (TILLEY'S GRANT)** (1888), 10 N. S. W. L. R. (L.) 179, n.; 6 N. S. W. W. N. 7.—**AUS.**

1513 ii. ————.]—A.-G. FOR NEW SOUTH WALES v. LOVE, [1898] A. C. 679.—**AUS.**

1513 iii. ————.]—SCOTT v. HENDERSON (1843), 2 Thom. 115.—**CAN.**

1513 iv. ————.]—R. v. MCCORMICK (1859), 18 U. C. R. 131.—**CAN.**

1513 v. ————.]—A.-G. FOR NEWFOUNDLAND v. CUDDILY (1836), C. R. 1 A. C. 88.—**CAN.**

6. ————.]—BELDING v. HALLETT (1847), 3 Kerr, **CAN.**

1518 i. Putting rent in charge to the Crown—Effect of.]—Quit rent is a perpetual charge, vested in the Crown, annually issuing out of an estate in fee. It is a charge which may be enforced

after any period of time. It does not allow of a prescription to discharge it; & being vested in the Crown, is not bound by Statute of Limitations.—**HATTON v. WADDY** (1837), 2 Jo. Ex. Ir. 541.—**IR.**

1518 ii. ————.]—Re MAXWELL'S ESTATE (1891), 28 L. R. Ir. 356.—**IR.**

1. Possession for less than statutory period—Subsequent grant by Crown.]—**JAMIESON v. HARKER** (1859), 18 U. C. R. 590.—**CAN.**

8. ————.]—The Crown granted to pltf. a lot of land in the possession of deft. & of which deft. & his predecessors in title had been in continuous & undisturbed possession for a period little short of sixty years:—**Held:** pltf. could not recover in ejectment against deft. in the absence of a judgment of intrusion.—**WALSH v. SMITH** (1919), 59 N. S. R. 375; 43 D. L. R. 648.—**CAN.**

h. ————.]—Where the Crown

has been out of possession of land for more than twenty years, & then makes a grant of it, the statute 21 Jac. I., cap. 14, giving the person in occupation a right to the possession until the Crown has obtained a judgment against him on an information of intrusion, ceases to apply.—**MUDGWAY v. DAVY & BUICK** (1886), 4 N. Z. L. R. C. A. 192.—**N.Z.**

k. ————.]—Interruption of possession writ of intrusion—Necessity of.]—The Crown cannot grant lands, of which a subject has been in adverse possession for twenty years, without first re-investing itself with the possession by office found.—**SMYTH v. McDONALD** (1863), 5 N. S. R. (1 Old.) 274.—**CAN.**

l. ————.]—A judgment for the Crown in an information of intrusion must be followed up by possession before a statutory title by adverse possession accruing at the time, can be interrupted.—**R. (A.-G.)**

such as the erection & occupation of lime kilns for burning limestone found within the district, & of cottages for the purpose of such occupation, & the sale of the lime so produced do not amount to such an adverse possession as to displace the title of the Crown to the district, although they may have been continued for above sixty years.—*DOE d. WILLIAM IV. v. ROBERTE* (1844), 13 M. & W. 520; 14 L. J. Ex. 274; 4 L. T. O. S. 174; 153 E. R. 217.

1520. — *What constitutes.*—*A.-G. v. MAXWELL*, No. 1518, *ante*.

1521. — *—*—*A.-G. v. EARDLEY* (LORD) (1820), Dan. 271; 8 Price, 39; 146 E. R. 1124.

Annotation:—*Mentd. Chapman v. Gatecombe* (1836), 2 Scott, 738.

— *To what applicable—Rentcharges.*—*See Crown Suits Act, 1861 (c. 62), s. 1.*

1522. Possession for less than statutory period—Rights acquired as against stranger.—*GOODTITLE d. PARKER v. BALDWIN*, No. 1513, *ante*.

1523. — *—*—*EMMERSON v. MADDISON*, No. 1515, *ante*.

1524. Effect of entering on Crown lessee.—If a stranger enters upon the King's lessee, he gains a possession without taking the reversion from the Crown. But by Crown Suits Act, 1769 (c. 16), a possession of sixty years except to liberties & franchises will be a bar even to the King's prerogative in this respect.—*LEE v. NORRIS* (1594), Cro. Eliz. 331; 78 E. R. 381.

1525. Prerogative as to Duchy of Cornwall.—*A.-G. v. PLYMOUTH CORPN.* (1754), Wight. 134; 145 E. R. 1202.

Annotation:—*Refd. A.-G. to Prince of Wales v. Crossman* (1866), L. R. 1 Exch. 381.

Part VI.—Actions against Trustees.

SECT. 1.—WHETHER TRUSTEES ENTITLED TO PLEAD STATUTE.

SUB-SECT. 1.—UNDER TRUSTEE ACT, 1888.

A. In What Circumstances.

(a) In General.

See Trustee Act, 1888 (c. 59), s. 8 (1).

1526. Effect of sect. 8 (1).—The effect of above sect. is that except in the three following cases, fraud by the trustee, retention of trust property by him, or receipt by him & conversion of it to his own use, a trustee who has committed a breach of trust is entitled to the protection of the several statutes of Limitation as if actions or proceedings for breaches of trust were enumerated in them.

Under a will, *pltf.*, on the expiration of a term of fourteen years from the death of testatrix, who died on May 20, 1875, became entitled to an annuity for her life. During the term it was the duty of *deft.*, as trustee under the will, to receive the rents of certain devised estates, & after payment of some immediate annuities, to accumulate the surplus rents & invest the accumulations in the purchase of lands. *Pltf.*'s annuity was charged upon the accumulations & the lands to be purchased therewith, as well as upon the devised estates. Without any fraudulent intent *deft.*, instead of accumulating the surplus rents, applied them in keeping down interest on incumbrances & in necessary repairs. The term expired on May 20, 1889, *pltf.*'s annuity fell into arrear in Nov. 1894,

& on Aug. 9, 1895, she brought this action for an account. *Deft.* had no trust moneys in his hands at the issue of the writ, & had never converted any trust moneys to his own use; & he relied on above sect., but admitted that within six years before the issue of the writ he had rents in his hands which he ought to have accumulated & invested:—*Held*: (1) *pltf.* was entitled to an account of the moneys in the hands of *deft.* six years before the issue of the writ & liable to the trust for accumulation, & also to an account of the rents which ought afterwards to have been accumulated, but not to an account from the death of testatrix; (2) the case fell either within clause (a) or clause (b) of above sect., but (*RIGBY, L.J.*) preferably within clause (a); & whichever clause was applicable, *deft.* was protected from demands more than six years before the issue of the writ.—*HOW v. WINTERTON (EARL)*, [1896] 2 Ch. 626; 65 L. J. Ch. 832; 75 L. T. 40; 45 W. R. 103; 12 T. L. R. 541; 40 Sol. Jo. 684, C. A.

Annotations:—*As to (1) Refd. Re Davies, Ellis v. Roberts*, [1898] 2 Ch. 142. *As to (2) Consd. Re Blow, St. Bartholomew's Hospital v. Camden*, [1914] 1 Ch. 233. *Refd. Re Croyden, Hincks v. Roberts* (1911), 55 Sol. Jo. 632; *Re Allsop, Whittaker v. Bamford*, [1914] 1 Ch. 1; *Re Richardson, Pole v. Pattenden*, [1920] 1 Ch. 423. *Generally, Mentd. How v. Winterton* (No. 4) (1904), 91 L. T. 763; *Jones v. Stott* (1910), 102 L. T. 670.

What actions within sect. 8—Where existing statute applicable.—*See Sub-sect. 1, C. (a), post.*

— *“Actions for recovery of money or other*

FOR CANADA) *v. HAMILTON* (Ont.) (1915), 16 Exch. C. R. 67; 35 D. L. R. 226; *reversd.* (1917), 54 S. C. R. 331.—CAN.

m. — *—*—*JOHNS v. RIVERS* (1873), 2 C. A. 344.—N.Z.

n. — *Nature of possession.*—*LOUISBURG LAND CO. v. TUTTY* (1882), 16 N. S. R. (4 R. & G.) 401.—CAN.

o. Conflagration by Crown—Interruption of possession.—*DOE d. HOWARD v. McDONNELL* (1831), Dra. 374.—CAN.

p. Grantee of Crown—Time runs from date of grant.—The possession of land by a person deriving title from the Crown, which will enable the statute to run against him, must be a possession after the patent has issued.—*STEWART v. MURPHY* (1858), 16 U. C. R. 224.—CAN.

q. — *—*—*DOWSETT v. COX* (1859), 18 U. C. R. 594.—CAN.

— *Re RAYCROFT* (1910), 20 O. L. R. 437; 15 O. W. R. 438; 1 O. W. N. 509.—CAN.

t. — *—*—The period that one adversely holds Crown lands will not enure against the grantee of the Crown; & the possessory claim of one seeking to establish title by adverse possession will not begin to run until the date of the grant to the Crown's grantee.—*OUELLET v. JALBERT* (1915), 43 N. B. R. 599.—CAN.

a. The Crown as trustee—Whether time runs.—Statute of Limitations does not run against the Crown, & it makes no difference that the land is vested in the Crown as trustee.—*R. v. WILLIAMS* (1875), 39 U. C. R. 397.—CAN.

b. — *—*—*A.-G. v. MIDLAND RY. CO.* (1883), 3 O. R. 511.—CAN.

c. Nature of possession.—To bar the Crown & give a possessory title under Statute of Limitations the fact

of actual possession is the material thing, & this possession must be of a continuous character by successive occupants claiming in some sufficient way under each other.—*MCGIBBON v. MCGIBBON* (1913), 12 E. L. R. 241; 9 D. L. R. 308; 46 N. S. R. 552.—CAN.

d. Crown as lessor—Possession against tenant—No right of action in the Crown.—*A.-G. FOR CANADA v. GONZALVES*, [1926] 1 D. L. R. 51; *reversd.*, [1924] 4 D. L. R. 474; [1925] 1 D. L. R. 605; [1925] 1 W. W. R. 180; 34 B. C. R. 360.—CAN.

e. Inalienable lands.—Such public domains as are inalienable cannot be acquired by prescription, but land which is capable of alienation although subject to the consent of a person or corpn. other than the owner, may be so acquired, provided only the adverse occupation has been peaceful, open, & as of right.—*JONES v. CAPE TOWN TOWN COUNCIL* (1895), 12 S. C. 19.—S. AF.

Sect. 1.—Whether trustees entitled to plead statute:
Sub-sect. 1, A. (a), (b), (c) & (d), & B. (a), (b) & (c) i.]

property ”—“ No existing statute applicable.”—
See Sub-sect. 1, C. (b), post.

1527. Action for account before operation of Act
Second beneficiary taking benefit of judgment—
After operation of Act.]—*Re HARRISON, ALLEN v.*
CORT (1892), 37 Sol. Jo. 9.

1528. Action against trustees protected by Act—
Form of order.]—Form of order for account by
 trustees entitled to the protection given by above
 Act, s. 8, against liability to render accounts
 extending beyond six years from the commence-
 ment of the action.—*Re DAVIES, ELLIS v. ROBERTS,*
[1898] 2 Ch. 142; 67 L. J. Ch. 507; 79 L. T. 344.

*Annotation:—*Consd. *Re Blow, St. Bartholomew's Hospital*
v. Camlden (1913), 83 L. J. Ch. 185.

1529. — Time for pleading statute.]—Where
 an originating summons for accounts is issued
 against trustees or exors. entitled under above
 Act, s. 8, to limit their liability to six years before
 the date of the summons, the defence of the statute
 must be raised at the time the order to account
 is made, so that it may be qualified by a reference
 to the statute or the point may be reserved for
 the ct. on the further consideration. Otherwise
 it will be too late to set up the statute for the first
 time on the hearing on further consideration or
 even when the accounts are being vouched before
 the master.—*Re WILLIAMS, JONES v. WILLIAMS,*
[1916] 2 Ch. 38; 85 L. J. Ch. 498; 114 L. T. 992;
60 Sol. Jo. 495.

Legacies subject to trust.]—*See Part IV., Sect.*
1, sub-sect. 1, D. (a) ii.

Express trusts affecting real property—Real
Property Limitation Act, 1833 (c. 27), s. 25.]—
See Part V., Sect. 10, ante.

(b) *Fraud by Trustee.*

See Trustee Act, 1888 (c. 59), s. 8 (1).

1530. Bar to relief.]—*Re SALE HOTEL &*
BOTANICAL GARDENS CO., LTD., HESKETH'S CASE,
No. 1552, post.

1531. —.]—*NORTH AMERICAN LAND & TIMBER*
CO., LTD. v. WATKINS, No. 1538, post.

1532. What amounts to fraud—Misrepresenta-
tion in directors' report.]—Representations in the
 directors' report that bad & doubtful debts have
 been provided for constitute, if untrue, fraud so
 as to prevent the directors setting up the Statute
 of Limitations as applied by above Act, in answer to
 an action for payment of dividends out of capital.

A letter by a director to shareholders referring
 to “the continued attention of the directors to
 every detail of the working of the bank”:—*Held:*
 to have the same effect.—*Re NATIONAL BANK OF*
WALES, LTD., [1899] 2 Ch. 629; sub nom. Re
NATIONAL BANK OF WALES, LTD., CORY'S CASE,
79 L. T. 667; 15 T. L. R. 88; 5 Mans. 373; on
appeal, [1899] 2 Ch. 651, C. A.; sub nom. DOVEY
v. CORY, [1901] A. C. 477, H. L.

*Annotations:—*Mentd. *Merchants' Fire Office v. Armstrong*
(1901), 17 T. L. R. 709; Bond v. Barrow Haematite
Steel Co., [1902] 1 Ch. 353; Re Crichton's Oil Co., [1902]
2 Ch. 86; Lucas v. Fitzgerald (1903), 20 T. L. R. 16; Re
Welsbach Incandescent Gas Light Co., [1904] 1 Ch. 87;
Re Land & Minerals Co. v. Kolckmann (1905), 94
T. L. R. 101; Profontaine v. Grenier, [1907] A. C. 101;
Ammonia Soda Co. v. Chamberlain, [1918] 1 Ch. 266;
Atherton v. British Insulated & Helsby Cables, [1925]
1 K. B. 421; Re City Equitable Fire Insce., [1925] Ch.

1533. — Misrepresentation by director—In
letter to shareholder.]—*Re NATIONAL BANK OF*
WALES, LTD., No. 1532, ante.

1534. — Fraud by partner.]—The decision in
Blair v. Bromley, No. 1790, post, is vested on

principles of the law of partnership, not on those
 of the law of trusts, & is not affected by above
 Act, s. 8.

Money of pltf. came into the hands of a firm of
 solrs. for investment, & was converted to the use
 of the firm. Owing to misrepresentations attri-
 butable to the firm pltf. was prevented from dis-
 covering the fraud until more than six years after
 the cause of action arose. In an action to recover
 the money, a partner, innocent of the fraud,
 claimed that under above Act, s. 8, he was entitled
 to the benefit of the Statute of Limitations:—
Held: the principle of *Blair v. Bromley* applied,
 & he was deprived of the benefit of the statute by
 the misrepresentations, which bound him as a
 partner. *Qu.*: whether the case did not fall within
 the exception in above Act, s. 8 (1).—*MOORE v.*
KNIGHT, [1891] 1 Ch. 547; 60 L. J. Ch. 271; 63
L. T. 831; 39 W. R. 312.

*Annotations:—*Consd. *Thorne v. Heard, [1894] 1 Ch. 599.*
Reid. Mara v. Browne, [1895] 2 Ch. 69; Whitwam v.
Watkin (1898), 78 L. T. 188; Palmer v. S. (1905), 51 Sol.
Jo. 653; Re Fountaine, Fountaine v. Amherst (1909),
78 L. J. Ch. 648.

1535. — Fraud of mortgagee's solicitor.]—
 In 1878 defts., the first mtgees. of property, sold
 under their power of sale, & employed S., a solr.,
 to conduct the sale for them. S. received the sale
 moneys, & after satisfying defts.' mtge. debt,
 retained the surplus sale moneys, falsely repre-
 senting to defts. that he, S., had the authority of
 pltf., the second mtgee., to receive the same. S.
 applied the surplus to his own use, & until Mar.
 1891, concealed his fraud by continuing to pay
 pltf. interest on the second mtge. as though it were
 still existing. In Feb. 1892, S. became bkpt.,
 when the true facts were discovered; whereupon
 pltf. brought an action against defts. for an account
 of the sale moneys, & payment of what was due
 to him on his second mtge.:—*Held:* (1) pltf.'s
 claim was barred by Statute of Limitations &
 above Act, sect. 8, on the ground that his cause
 of action first accrued in 1878, when defts. com-
 mitted an innocent breach of trust in allowing S.
 to receive the surplus sale moneys instead of hand-
 ing them over to pltf., & not in 1892, when pltf.
 discovered S.'s fraud; (2) & defts. were not liable
 under the exception in above Act, sect. 8, either
 as having been “party or privy” to the fraud of S.,
 or as having “still retained” the money sought
 to be recovered, the money not having been
 actually in their hands or under their control at
 the commencement of the action; (3) the fraud of
 S. could not be regarded as the fraud of defts.,
 that is, as a fraud committed by S. as agent for
 them or for their benefit, so as to render them
 responsible notwithstanding they were innocent
 of fraud; (4) above Act has in no way altered the
 principles which determine the time at which a
 cause of action for breach of trust or concealed
 fraud accrues; the exception in above Act, sect. 8,
 as to property “still retained” by the trustee,
 applies & is confined to cases in which at the date
 of the writ the trustee still retains, that is, has
 actually in his hands or under his control, the
 trust property, or the proceeds thereof, sought to
 be recovered.—*THORNE v. HEARD, [1894] 1 Ch.*
599; 63 L. J. Ch. 356; 70 L. T. 541; 42 W. R.
274; 10 T. L. R. 216; 7 R. 100, C. A.; affd.,
[1895] A. C. 495, H. L.

*Annotations:—*As to (1) *Reid. Whitwam v. Watkin (1898),*
78 L. T. 188; Re McCallum, McCallum v. McCallum, [1901]
1 Ch. 143. As to (2) Reid. How v. Winterton, [1896] 2
Ch. 626; Re Fountaine, Fountaine v. Amherst (1909),
78 L. J. Ch. 648; Re Allsopp, Whittaker v. Bamford,
[1911] 1 Ch. 1. Generally, Reid. Mara v. Browne, [1895]
2 Ch. 69. Mentd. Hambro v. Burnand, [1903] 2 K. B. 399;
Ruben v. Great Fingall Consolidated, [1904] 2 K. B. 712;
Lloyd v. Grace, Smith (1912), 81 L. J. K. B. 1140.

(c) Retention of Property by Trustees.

See Trustee Act, 1888 (c. 59), s. 8 (1).

1536. Bar to relief.]—SOAR *v.* ASHWELL, No. 1677, *post.*

1537. —.]—WASSELL *v.* LEGGATT, No. 1554, *post.*

1538. —.]—The Statute of Limitations is no bar to an action by a principal against his agent in respect of moneys remitted to the agent for an express purpose & retained by him, where such agent is either in the position of an express trustee or guilty of fraudulent concealment in his accounts.—NORTH AMERICAN LAND & TIMBER CO., LTD. *v.* WATKINS, [1904] 2 Ch. 233; 73 L. J. Ch. 626; 91 L. T. 425; 20 T. L. R. 642; 48 Sol. Jo. 640, C. A.

1539. —.]—S. by will gave his real & personal estate to trustees upon trust to convert & invest, to pay certain annuities out of the income, & accumulate the residue of the income until the capital became divisible, or for twenty-one years, & subject thereto to hold capital & income in trust for his grandchildren in equal shares. The trustees invested the funds in such a manner that the income tax was always deducted before the income was paid to them. The successive trustees for over twenty years paid all the annuities in full without deducting income tax. Some of the trustees were also annuitants:—*Held*: above Act, sect. 8, applied, & the liability of the trustees was limited to payments made within six years, except in the case of sums retained for their own annuities.—*Re* SHARP, RICKETT *v.* RICKETT, [1906] 1 Ch. 793; 75 L. J. Ch. 458; 95 L. T. 522; 22 T. L. R. 368; 50 Sol. Jo. 390.

1540. What amounts to retention—Funds must be in hands of trustee at date of writ.]—THORNE *v.* HEARD, No. 1535, *ante.*

1541. —.]—HOW *v.* WINTERTON (EARL), No. 1526, *ante.*

1542. —.]—*Re* TIMMIS, NIXON *v.* SMITH, No. 1568, *post.*

1543. —.]—*Re* TUFNELL, BYNG *v.* TUFNELL (1902), 18 T. L. R. 705.

(d) Conversion of Property by Trustee.

Bar to relief.]—*See* Trustee Act, 1888 (c. 59), s. 8 (1).

1544. What amounts to conversion.]—The exception in Trustee Act, 1888 (c. 59), s. 8 (1), which prevents a trustee relying on the Statute of Limitations as a defence to an action to recover the proceeds of trust property "received by the trustee & converted to his use," does not, in the absence of fraud, apply where trust funds advanced on mtge. are, with the concurrence of the mtgor., applied in payment of a debt previously charged on the mtged. property in favour of a bank in which the trustee is a partner.—*Re* GURNEY, MASON *v.* MERCER, [1893] 1 Ch. 590; 68 L. T. 289; 41 W. R. 443; 3 R. 148.

*B. To Whom Plea Available.**(a) In General.*

Express trustees.]—*See* Trustee Act, 1888 (c. 59), s. 1.

Constructive trustees.]—*See* Trustee Act, 1888 (c. 59), s. 1; Sub-sect. 1, B. (c) & (d), *post.*; Sub-sect. 2, B. (a), *post.*

Liability of trustee's estate.]—*See* EXECUTORS, Vol. XXIV., p. 630, Nos. 6573, 6574.

Mortgagees as trustees.]—*See* Part V., Sect. 12, sub-sect. 3, *ante.*

1545. Trustee under a liquidation.]—The provisions of above Act, s. 8, have no application to a trustee under a liquidation.—*Re* CORNISH, *Ex p.*

BOARD OF TRADE, [1896] 1 Q. B. 99; 65 L. J. Q. B. 106; 73 L. T. 602; 44 W. R. 161; 12 T. L. R. 69; 40 Sol. Jo. 100; 3 Mans. 48, C. A.

1546. Limited company—Unclaimed dividends.]

(1) Statute of Limitations commences to run in favour of a co. against its shareholders in respect of a dividend from the date fixed for payment.

(2) A co. is not a trustee of a dividend for its shareholders.—*Re* SEVERN & WYE & SEVERN BRIDGE RY. CO., [1896] 1 Ch. 559; 65 L. J. Ch. 400; 74 L. T. 219; 44 W. R. 347; 12 T. L. R. 262; 40 Sol. Jo. 337; 3 Mans. 90.

*Annotation:—As to (2) Re*id. *Re* Artisans' Land & Mortgage Corp., [1904] 1 Ch. 796.

(b) Executors.

See Trustee Act, 1888 (c. 59), s. 1.

When plea available.]—*See* EXECUTORS, Vol. XXIV., p. 671, Nos. 6983 *et seq.*

Setting up own devastavit—In order to plead statute.]—*See* EXECUTORS, Vol. XXIV., p. 673, Nos. 6991–6995.

Under Real Property Limitation Act, 1833 (c. 27).]

—*See* Part IV., Sect. 1, sub-sect. 1, D. (a) ii., *ante.*
See, also, Sub-sect. 2, B. (b), *post.*

*(c) Persons in Fiduciary Position.**i. Officers of Companies.*

1547. Director—Misfeasance.]—SOVEREIGN LIFE ASSURANCE CO. *v.* WILMOT (1893), 9 T. L. R. 525; 37 Sol. Jo. 581.

*Annotation:—Re*id. *Re* Lands Allotment Co., [1894] 1 Ch. 616.

1548. —.]—Directors of a co. are trustees as to moneys of the co. which have come to their hands or are under their control within the meaning of the Trustee Act, 1888 (c. 59), s. 1 (3), & therefore can, in the absence of fraud, take advantage of the Statute of Limitations in proceedings against them for misapplication of the funds of the co.

The directors of the L. A. co., which had no power to invest its capital in the shares of other cos., in Mar. 1885, accepted fully paid-up shares in the B. S. co. to the amount of £35,000 in discharge of a debt. This was referred to in the balance-sheet of the L. A. co. as "Assets. By B. S. co.," & the entry was explained by the chairman at the general meeting in Apr. 1885, to mean that it represented the amount due from the B. S. co. for an estate purchased from the L. A. co. The same item was repeated in successive balance-sheets till 1889. The investment was made without any fraudulent intent. The L. A. co. was wound up in 1893:—*Held*: assuming that the directors had been guilty of a breach of trust in investing the money in shares of the B. S. co., they were protected by the Statute of Limitations; & there had been no such fraudulent concealment on their part, notwithstanding the false statement by the chairman at the meeting, to prevent time from running under the statute.—*Re* LANDS ALLOTMENT CO., [1894] 1 Ch. 616; 63 L. J. Ch. 291; 70 L. T. 286; 42 W. R. 404; 10 T. L. R. 234; 38 Sol. Jo. 235; 1 Mans. 107; 7 R. 115, C. A.

Annotations:—Consd. Whitwam *v.* Watkin (1898) 78 L. T. 188. *Re*id. Mara *v.* Browne, [1895] 2 Ch. 69; *Re* Severn & Wye & Severn Bridge Ry., [1896] 1 Ch. 559; *Re* National Bank of Wales, [1899] 2 Ch. 629; Percival *v.* Wright, [1902] 2 Ch. 421; Young *v.* Naval, Military & Civil Service Co-op. Soc. of South Africa, [1905] 1 K. B. 687; *Re* Macfadyen, *Ex p.* Vizianagaram Mining Co., [1908] 2 K. B. 817. *Mentd.* Lucas *v.* Fitzgerald (1903), 20 T. L. R. 16.

1549. —.]—In July, 1890, pl'tfs. contracted with the Railways & General Co., Ltd., for the sale of certain stock in the Wrexham, Mold, & Connah's Quay Railway. The real

Sect. 1.—Whether trustees entitled to plead statute:
Sub-sect. 1, B. (c) i. & ii., (d) & (e), & C. (a) & (b).]

purchaser, however, was the Manchester, Sheffield, & Lincoln Railway, & the money was paid by that co. in two sums, the larger on Aug. 5, & the smaller on Oct. 10, 1890. These payments were then *ultra vires*. But by their Act of 1891 they were authorised to subscribe towards the undertaking of the Wrexham co., & to hold shares therein, & a resolution authorising the Manchester co. to subscribe was agreed to the day after the Act passed. The books of the Manchester co. did not accurately represent the facts. The writ was issued on Aug. 6, 1896, claiming against three of the directors repayment to the co. of these sums:—*Held*: as to the larger sum, the writ not having been issued within six years & no fraud being alleged, the Statute of Limitations afforded a good defence.—*WHITWAM v. WATKIN* (1898), 78 L. T. 188; 14 T. L. R. 288.

1550. ———.]—*Re NATIONAL BANK OF WALES, LTD.*, No. 1532, *ante*.

———.]—*See COMPANIES*, Vol. IX., p. 515, Nos. 3375–3383.

1551. Retired director.—*Re NATIONAL BANK OF WALES, LTD.*, [1899] 2 Ch. 629; *sub nom. Re NATIONAL BANK OF WALES, LTD., CORY'S CASE*, 68 L. J. Ch. 634; 81 L. T. 363; 48 W. R. 99; 15 T. L. R. 517, C. A.; *on appeal, sub nom. DOVEY v. CORY*, [1901] A. C. 477, H. L.

Annotations:—*Mentd. Merchants' Fire Office v. Armstrong* (1901), 17 T. L. R. 709; *Bond v. Barrow Hematite Steel Co.*, [1902] 1 Ch. 353; *Re Crichton's Oil Co.*, [1902] 2 Ch. 86; *Lucas v. Fitzgerald* (1903), 20 T. L. R. 16; *Re Welsbach Incandescent Gas Light Co.*, [1904] 1 Ch. 87; *Exploring Land & Minerals Co. v. Kolckmann* (1905), 94 L. T. 234; *Prefontaine v. Grenier*, [1907] A. C. 101; *Schulze v. Bensted* (1915), 7 Tax Cas. 30; *Ammonia Soda Co. v. Chamberlain*, [1918] 1 Ch. 266; *Atherton v. British Insulated & Helsby Cables*, [1925] 1 K. B. 421; *Re City Equitable Fire Insce.*, [1925] Ch. 407.

1552. Promoter—Secret profit.—It is not a sufficient disclosure of an agreement which relate to the benefits to be given to the promoters of a co. to refer to it in the prospectus by a reference to the date & parties to it, & by stating where it may be inspected. Such benefits so insufficiently disclosed are secret profits of the promoters so far as the shareholders of the co. are concerned, & therefore the promoters receiving them are guilty of a misfeasance or breach of trust within Companies (Winding-up) Act, 1890 (c. 63), s. 59. A promoter, therefore, who has received such a secret profit cannot avail himself of the Statutes of Limitation under above Act, sect. 8, because receiving this secret profit is a "fraud or fraudulent breach of trust" within the exception of that sect.—*Re SALE HOTEL & BOTANICAL GARDENS CO., LTD., HESKETH'S CASE* (1897), 77 L. T. 681; 46 W. R. 314; *reversd. on other grounds, sub nom. Re SALE HOTEL & BOTANICAL GARDENS, LTD., Ex p. HESKETH* (1898), 78 L. T. 368, C. A.

Annotation:—*Mentd. Re Olympia* (1898), 78 L. T. 159.

See, also, Sub-sect. 3, B. (e) iv., post.

ii. Solicitors.

1553. Fraud by partnership firm—Plea by innocent partner.—*MOORE v. KNIGHT*, No. 1534, *ante*.

See, also, Sub-sect. 3, B. (e) iv., ante, & Sub-sect. 3, B. (f) iv., post.

(d) Persons with Knowledge of Trust.

1554. Husband of beneficiary—Wife forcibly deprived of legacy for separate use.—A woman who

was married in 1854 received in 1876 a legacy of £300, given for her separate use, but was forcibly deprived of the money by her husband, who knew that it was a legacy. During the husband's lifetime the wife frequently asked him for the money; but no proceedings to recover it were taken until after his death, which occurred in 1894:—*Held*: the husband was affected with notice of the separate use, & was a trustee of the money for his wife, the Statute of Limitations was no defence to proceedings by her against his exors., & the wife was entitled to be paid the amount of the legacy, with interest at 4 per cent. from the date of her husband's death.—*WASSELL v. LEGGATT*, [1896] 1 Ch. 554; 65 L. J. Ch. 240; *sub nom. Re WASSELL, WASSELL v. LEGGATT*, 74 L. T. 99; 44 W. R. 298; 12 T. L. R. 208; 40 Sol. Jo. 276.

See, also, Sub-sect. 2, B. (f), post.

(e) Persons Claiming Through Trustee.

See Trustee Act, 1888 (c. 59), s. 8 (1) (a).

C. In What Actions.

(a) Where Existing Statute Applicable.

See Trustee Act, 1888 (c. 59), s. 8 (1) (a).

1555. General rule.—Testatrix, who died in 1887, bequeathed her residuary personal estate to trustees upon trust to pay the income in equal third parts to her two nephews & her niece during their respective lives & subject thereto to hold the capital & income of the whole in trust for the children of her said nephews & niece who might be living at the time of the failure of the trust thereinbefore contained. Upon the death in 1896 of one of the nephews leaving a widow & children, the trustees acting upon the erroneous advice of their solr. as to the effect of the will, paid the income of the deceased nephew's share to his widow for the maintenance of his children. In 1910 it was declared by the ct. that the period of distribution was at the death of the survivor of testatrix's nephews & niece, that there was an implied trust for accumulation of the income until the period of distribution, but that under the Thellusson Act that trust came to an end in 1908, twenty-one years from the death of testatrix.

In an action by the testatrix's sole next of kin to recover from the trustees the income of the deceased nephew's share as from 1908, & the interest arising from accumulations of income which ought to have been made between 1896 & 1908, defts. pleaded the Statute of Limitations, relying upon above Act, s. 8, & also claimed relief under Judicial Trustees Act, 1896 (c. 35), s. 8:—*Held*: the case fell within above Act, s. 8 (1) (b), as being one where no existing statute of limitations applied, & by virtue of the proviso at the end of par. (b) time did not begin to run against pltf. until 1908 when her interest fell into possession, so that the statute was no bar to her claim. *Semble*: the proviso applied to par. (a) as well as to par. (b) of above Act, s. 8 (1).

Clause (a) applies to cases where an existing statute of limitations would have applied if the trustee had not occupied that fiduciary position. It embraces cases where a remedy existed, & the Statute of Limitations could have been pleaded as a defence, but for the fiduciary position. . . . Contract & trust might co-exist & the trust prevent the plea of the statute. Clause (a) allows, in cases coming within it, the statute as a defence

PART VI. SECT. 1. SUB-SECT. 1.—B. (e).

1. Residuary legatee.—Residuary legatees are not persons "claiming through a trustee" within Trustee Act, 1888 (c. 59), s. 8.—*LEAHY v. DE MOLEYNES*, [1896] 1 I. R. 206, 225.—*IR.*

(SWINFEN EADY, L.J.).—*Re ALLSOP, WHITTAKER v. BAMFORD*, [1914] 1 Ch. 1; 83 L. J. Ch. 42; 109 L. T. 641; 30 T. L. R. 18; 58 Sol. Jo. 9, C. A.

Annotation:—*Reid. Re Claridge's Patent Asphalte Co.*, [1921] 1 Ch. 543.

1556. ———.] — *Re RICHARDSON, POLE v. PATTENDEN*, No. 1569, *post*.

1557. Action against trustee—For breach of trust.]—*Re BOWDEN, ANDREW v. COOPER*, No. 1563, *post*.

1558. ———.]—*HOW v. WINTERTON (EARL)*, No. 1526, *ante*.

1559. ——— For account.]—Under the will of testatrix an infant was entitled to the residue of her estate, which was to be held by the trustees of the will in trust for him, to be paid & transferred to him on his attaining twenty-one. Testatrix died in May, 1875. The infant attained twenty-one in Dec. 1880. In May, 1892, he took out a summons against the two trustees & exors. of the will, claiming an order for the administration of the estate of testatrix. One of defts. did not appear. Other deft., who had been the acting trustee & exor., deposed that he had expended the whole of the residue during pltf.'s minority in maintaining & educating him. He admitted that he had never rendered any account to pltf., but said that he had told him during his minority how the fund had been applied. Pltf. did not allege that deft. had been party or privy to any fraud or fraudulent breach of trust, & there was no evidence that deft. had converted any part of the trust fund to his own use, or that he retained any part of it:—*Held*: above Act, s. 8, applied, & the summons must be dismissed.—*Re PAGE, JONES v. MORGAN*, [1893] 1 Ch. 304; 62 L. J. Ch. 592; 41 W. R. 357; 3 R. 171.

Annotations:—*Reid. Re Somerset, Somerset v. Poulett*, [1894] 1 Ch. 231; *Re Timmis, Nixon v. Smith*, [1902] 1 Ch. 176; *Re Blow, St. Bartholomew's Hospital v. Cambden*, [1914] 1 Ch. 233; *Re Richardson, Pole v. Pattenden*, [1919] 2 Ch. 50.

1560. ———.]—*HOW v. WINTERTON (EARL)*, No. 1526, *ante*.

1561. Action against executor—For legacy.]—*Re RICHARDSON, POLE v. PATTENDEN*, No. 1569, *post*.

(b) Actions for Recovery of Money or Other Property—No Existing Statute Applicable.

See Trustee Act, 1888 (c. 59), s. 8 (1) (b).

1562. General rule—Claim arising out of relation of trustee & cestui que trust.]—*Re RICHARDSON, POLE v. PATTENDEN*, No. 1569, *post*.

1563. Against trustee—For breach of trust.]—A newly appointed trustee of a will brought an action against an old trustee & the representatives of two deceased trustees to compel them to make good losses arising from investments negligently made on insufficient security more than six years before the action. R., the exor. of D, one of deceased trustees, had after D's death issued the proper statutory advertisements & administered the estate, retaining in hand two legacies which had been bequeathed to him on trust. By leave of the ct. at the trial the statement of claim was amended to make it a claim against R. as trustee of the legacies & to follow the legacies into his hands, R. to be at liberty to claim the benefit of any statutes of limitation:—*Held*: above Act, s. 8 (1) (a), did not apply to the case, but that s. 8, sub-sect. 1 (b), did apply; under it R. was entitled to plead the lapse of time

as he might have done in an action of debt, & as the cause of action had accrued more than six years before the action, R. had a good defence.—*Re BOWDEN, ANDREW v. COOPER* (1890), 45 Ch. D. 444; 59 L. J. Ch. 815; 39 W. R. 219.

Annotations:—*Consd. How v. Winterton*, [1896] 2 Ch. 626. *Reid. Re Somerset, Somerset v. Poulett*, [1894] 1 Ch. 231; *Mara v. Browne*, [1895] 2 Ch. 69; *Re Allsop, Whittaker v. Bamford*, [1914] 1 Ch. 1.

1564. ———.]—*Re SOMERSET, SOMERSET v. POULETT (EARL)*, No. 1571, *post*.

1565. ———.]—*HOW v. WINTERTON (EARL)*, No. 1526, *ante*.

1566. ———.]—*Re ALLSOP, WHITTAKER v. BAMFORD*, No. 1555, *ante*.

1567. Against executor—As trustee—For breach of trust.]—In an action by residuary legatees against an exor. & trustee for a legacy, in respect of which a breach of trust had been committed, deft. pleaded Statute of Limitations as more than six years had elapsed since the action might have been brought:—*Held*: as the action was against a trustee for breach of trust, & was therefore one to which no existing Statute of Limitations applied within Trustee Act, 1888 (c. 59), s. 8 (1) (b), the Statute of Limitations could now be pleaded & was a bar to the action.—*Re SWAIN, SWAIN v. BRINGEMAN*, [1891] 3 Ch. 233; 61 L. J. Ch. 20; 65 L. T. 296.

Annotations:—*Consd. Re Timmis, Nixon v. Smith*, [1902] 1 Ch. 176. *Reid. Re Somerset, Somerset v. Poulett*, [1894] 1 Ch. 231; *Thorne v. Heard*, [1894] 1 Ch. 599; *Re Blow, St. Bartholomew's Hospital v. Cambden*, [1914] 1 Ch. 233.

1568. ———.]—Testator bequeathed his personal estate to three trustees & exors. upon trust for conversion & investment to provide an annuity to be paid to his wife during her life, & to divide the residue, & also the annuity fund at his wife's decease, into four shares, one of which was settled on a niece of testator for life with remainder to her children, & the other three were divisible between the three exors. equally. After the death of the widow exors. & trustees divided the fund set apart to answer the annuity, & instead of retaining the settled share, paid it away to the tenant for life. More than six years, & less than twelve years, after the death of the tenant for life, one of her children brought an action against the representatives of the three exors. & trustees for an account of the settled share, & payment of what should be found due to pltf.:—*Held*: (1) must be assumed that the exors. & trustees of the will acted duly in the administration of the estate, & became trustees of the fund upon the expressed trusts declared by the will, & the action was not an action for a legacy within the Real Property Limitation Act, 1874 (c. 57), but was brought against defts. in the character of trustees & not of exors. & was "one to which no existing Statute of Limitations" applied within above Act, s. 8 (1) (b); (2) as each of the exors. & trustees received only the share which was payable to him by the terms of the will, it could not be held that a part of the settled share was received by him & "converted to his use" within the meaning of the exception contained in the earlier part of above Act, s. 8 (1), therefore the action was barred under above Act, s. 8, by the lapse of six years from the time when the right of action accrued.—*Re TIMMIS, NIXON v. SMITH*, [1902] 1 Ch. 176; 71 L. J. Ch. 118; 85 L. T. 672; 50 W. R. 164; 46 Sol. Jo. 122.

Annotation:—As to (1) *Consd. Re Richardson, Pole v. Pattenden*, [1919] 2 Ch. 50.

PART VI. SECT. 1, SUB-SECT. 1.—C. (a).

1567 i. Action against trustee—For breach of trust.]—*COLLINGS v. WADE*, [1896] 1 I. R. 340.—IR.

Sect. 1.—Whether trustees entitled to plead statute : Sub-sect. 1, C. (b), D., E. & F.; sub-sect. 2.]

1569. — For legacy.]—(1) The real & personal estate of a testator who died in 1909 was administered by his widow & deft. as exors. of his will, & their functions came to an end in 1910. Under the will the widow was absolutely entitled to the whole of the residuary estate. No formal accounts were delivered to the widow by deft., who was a solr., but he informed her of all that was done, & about the end of 1910 prepared & gave to her a book containing all the particulars of her property. She died in 1917, & in 1918 beneficiaries under her will, of which deft. was also exor., brought an action against him for the administration of the original testator's estate & for an account of his dealings therewith, but did not allege that any part of the estate had been misapplied. Deft. relied upon Trustee Act, 1888 (c. 59), s. 8, as a defence to the action:—*Held*: the action was one to recover a legacy within Real Property Limitation Act, 1874 (c. 57), s. 8, & as there was thus an existing Statute of Limitation applicable, Trustee Act, 1888 (c. 59), s. 8 (1) (b), did not apply, & the period of twelve years limited by Real Property Limitation Act, 1874 (c. 57), not having expired when the action was brought that Act was no defence to the action.

The second sub-sect. [Trustee Act, 1888 (c. 59), s. 8 (1) (b)] deals with cases in which there is a claim against a trustee arising directly out of the relation of trustee & *cestui que trust*, & to which no existing Statute of Limitations applies & is applicable only to an action or other proceeding to recover money or other property (WARRINGTON, L.J.).

(2) PETERSON, J., had held that Trustee Act, 1888 (c. 59), s. 8 (1) (a), applied to an action against an exor. for an account, & that the claim was barred by the lapse of six years as to all items in the account not falling within any of the exceptions in Trustee Act, 1888 (c. 59), s. 8 (1); but, nevertheless, he had directed the usual accounts against deft. as exor. in order to ascertain the facts:—*Held*: Trustee Act, 1888 (c. 59), did not apply at all, & pl'tfs. were entitled to an account.

Sub-sect. 1 (a) [of Trustee Act, 1888 (c. 59)] I take to mean this: If a person has committed a breach of duty which, whether he were a trustee or not, would give rise to an action against him, & there is in existence a Statute which would be in those circumstances an answer to that action, then the person against whom the action is brought shall not be debarred from that defence because he is a trustee or exor., exor. being included in the word "trustee," but he shall be able, so to speak, to put off the character of trustee altogether & avail himself of the defence just as though he were not a trustee & were only an ordinary person who had committed that breach of duty (LORD STERNDALE, M.R.).

(3) An action by a residuary legatee against an exor. for the administration of testator's estate is none the less an action to recover a legacy within Real Property Limitation Act, 1874 (c. 57), s. 8, by reason of there being no allegation by pl'tf. that deft. had, at the date of action brought, assets of testator in his hands.—*Re RICHARDSON, POLE v. PATTENDEN*, [1920] 1 Ch. 423; 89 L. J. Ch. 258; 122 L. T. 714; 36 T. L. R. 205; 64 Sol. Jo. 290, C. A.

— **Plea of devastavit in administration action.]**
— *See* EXECUTION, Vol. XXIV., p. 674, Nos. 6994, 6995.

1570. Against legal personal representative—Assets wrongly distributed.]—A legal personal representative handed over assets to the wrong person more than six years before the commencement of proceedings by the person entitled to recover the same:—*Held*: the claim was barred.—*Re CROYDEN, HINCKS v. ROBERTS* (1911), 55 Sol. Jo. 632.

Annotations:—*Consd.* *Re Blow, Bartholomew's Hospital v. Camlden*, [1914] 1 Ch. 233. *Obtd.* *Re Richardson, Pole v. Pattenden*, [1920] 1 Ch. 423.

D. When Time Begins to Run.

See Trustee Act, 1888 (c. 59), s. 8 (1) (b).

1571. Interest in possession—Date of breach of trust.]—The effect of above Act, s. 8, is that any action or proceeding to recover money or other property from trustees, being one to which no Statute of Limitations existing at the passing of the Act applies, is to be brought within six years from the time when the right of recovery accrued.

In Aug. 1878, the trustees of a settlement committed an innocent breach of trust by investing trust money upon mtge. of property of insufficient value. The mtgor. paid the interest on the money advanced direct to the tenant for life until 1890.

In 1892 the tenant for life & the infant remaindermen brought an action against the trustees to compel them to make good the amount of the investment. It was conceded that so far as the infant pl'tfs. were concerned the trustees were liable to make good the loss to the estate:—*Held*: the right of action by the tenant for life against the trustees was barred after six years from the time when the investment was made; & although the payment of interest by the mtgor. direct to the tenant for life amounted in law to a payment by him to the trustees, & by them to the tenant for life, it was not an admission or acknowledgment which would take the case out of the statute.—*Re SOMERSET, SOMERSET v. POULETT (EARL)*, [1894] 1 Ch. 231; 63 L. J. Ch. 41; 69 L. T. 744; 42 W. R. 145; 10 T. L. R. 46; 38 Sol. Jo. 39; 7 R. 34, C. A.

Annotations:—*Consd.* *Mara v. Browne*, [1895] 2 Ch. 69. *Refd.* *Re Dive, Dive v. Roebuck*, [1909] 1 Ch. 328; *Re Fountaine, Re Dowler, Fountaine v. Amherst*, [1909] 2 Ch. 382. *Mentd.* *Fletcher v. Collis*, [1905] 2 Ch. 24.

1572. — — — No alteration made by Trustee Act, 1888 (c. 59).]—*THORNE v. HEARD*, No. 1535, *ante*.

1573. — — — Trustees not affected by fraud of solicitors.]—*THORNE v. HEARD*, No. 1535, *ante*.

1574. Interest not in possession—Time when interest falls into possession—Remainderman not barred.]—*WANT v. CAMPAIN* (1893), 9 T. L. R. 254.

Annotation:—*Folld.* *Re Somerset, Somerset v. Poulett*, [1894] 1 Ch. 231.

1575. — — — .]—*Re SOMERSET, SOMERSET v. POULETT (EARL)*, No. 1571, *ante*.

1576. — — — .]—Action by tenant for life & remaindermen against the trustee of a will to make good an alleged breach of trust by the investment of £2,000 of the trust estate upon a contributory mtge.

The security when realised, reduced the trust funds to between £100 & £200. The investment was made by the trustee upon the advice of his solr. & the report of a surveyor as to the value of the property. The will directed that an investment by the trustee should be "in his name or under his legal control":—*Held*: the right of the tenant for life to sue was barred by the Statute of Limitations, & deft. was entitled to receive the income of the trust fund during the life of the life tenant; but the investment on contributory

mtge. was a clear breach of trust, & in the circumstances deft. had not "acted reasonably" & "ought" not "fairly to be excused for the breach of trust" within Judicial Trustees Act, 1896 (c. 35), s. 3, & he must make good the amount of the loss to the estate for the benefit of those entitled in remainder.—*Re DIVE, DIVE v. ROEBUCK*, [1909] 1 Ch. 328; 78 L. J. Ch. 248; 100 L. T. 190.

1577. ———. **Accrual of greater interest at subsequent date.**—By a marriage settlement made in 1875, money of the wife was vested in trustees upon trust to pay the income to her during the joint lives of herself & her husband for her separate use without power of anticipation, & after her death, in case he should survive her, to pay the income to him during his life, & after the death of the survivor to hold the trust funds upon trust for the children of the marriage. No express life estate was given to the wife in case she should survive her husband. The husband died in 1885, & in 1890 the wife & her infant children commenced an action for breaches of trust committed in 1884, to which defts. set up the defence of the Statute of Limitations under above Act, s. 8 (1) (b):—*Held*: the wife took by resulting trust an estate for her life in remainder, which was a different estate from the estate for the joint lives limited to her by the settlement; the life estate did not become an interest in possession until the death of the husband, & consequently, the statute did not begin to run against the wife till then, & was not a bar to her action.—*MARA v. BROWNE*, [1895] 2 Ch. 69; 64 L. J. Ch. 594; 72 L. T. 765; 11 T. L. R. 352; *on appeal*, [1896] 1 Ch. 199, C. A.

Annotations:—*Reid. Re Taylor, Atkinson v. Lord* (1900), 81 L. T. 812. *Mentd. Plaskitt v. Eddis* (1898), 79 L. T. 136; *Re Stanley's Settltmt., Maddocks v. Andrews*, [1916] 2 Ch. 50.

1578. ———. ———.]—By his will testator, who died in 1862, left his residuary estate to G. & others upon trust for his daughter A. for life for her separate use, with remainder in the events which happened as she should appoint. G., who survived the other trustees, died in 1879, having by his will appointed J. & W. exors. thereof. J. resided in England & W. in America. Part of testator's estate consisted of American securities, which J. when in America delivered into the custody of W., who regularly paid the income thereof to A., then the wife of B. In 1883 new trustees of testator's will were appointed in England. Mrs. B. died in 1892, having by her will given her property to her husband. They both recognised W. as the American trustee. W. was then pressed to transfer these securities to the new trustees here, which he refused to do, & it then transpired that he had recently made away with them & was insolvent. In an action by the new trustees & B. against J. & W. to render J. liable for the loss:—*Held*: (1) as against the trustees, above Act, s. 8, was a good defence; (2) as to B. inasmuch as he might at any time since 1883, when the securities were intact, have brought an action in the name of his wife for the purpose of transferring the securities to the new trustees, & neglected to do so, he was guilty of laches, & could not now recover against J.—*Re TAYLOR, ATKINSON v. LORD* (1900), 81 L. T. 812.

1579. ———. ———.]—*Re ALLSOP, WHITTAKER v. BAMFORD*, No. 1555, *ante*.

1580. **Trustee Act, 1888 (c. 59), s. 8 (1) (b)—Who are beneficiaries within proviso—Misfeasance by**

directors of insurance company—Creditors & policy holders.—*SOVEREIGN LIFE ASSURANCE CO. v. WILMOT* (1893), 9 T. L. R. 525; 37 Sol. Jo. 581. *Annotation*:—*Reid. Re Lands Allotment Co.*, [1894] 1 Ch. 616.

Contribution between co-trustees—Establishment of cestui que trust's claim.—*See GUARANTEE*, Vol. XXVI., pp. 146, 147, Nos. 1099–1103.

E. Period of Limitation.

1581. **Under Trustee Act, 1888 (c. 59), s. 8 (1) (b)—Six years.**—*Re SOMERSET, SOMERSET v. POULETT (EARL)*, No. 1571, *ante*.

F. Acknowledgment and Acquiescence.

See, also, Part II., Sects. 8, 9, *ante*.

1582. **Acknowledgment—Improper investment by trustee—Payment of interest to tenant for life.**—*WANT v. CAMPAIN* (1893), 9 T. L. R. 254.

Annotation:—*Folld. Re Somerset, Somerset v. Poulett*, [1894] 1 Ch. 231.

1583. ———. ———.]—*Re SOMERSET, SOMERSET v. POULETT (EARL)*, No. 1571, *ante*.

1584. ———. ———.]—Two beneficiaries under a will, a mother & son, of whom the son was absolutely entitled to the corpus of certain trust funds subject to the mother's beneficial life interest therein, sought to render a trustee liable to make good to the trust estate certain sums come to his hands & not invested. The trustee employed C. or his firm as solrs. in the execution of the trusts of the will & had allowed the trust funds in question to remain under the control of C., who misappropriated them. The fraud was discovered on C.'s death shortly before the action. The funds sought to be recovered consisted of a specific sum of £31,000, which had been misappropriated by C. more than six years before the commencement of the action, & certain uninvested balances extending over a period of ten years as to which an account was asked. The trustee pleaded above Act, s. 8, as a defence to the action as against the mother, in reply to which the mother pleaded an acknowledgment by the trustee by payment to her of interest on the capital sums sought to be recovered within six years of the commencement of the action. At the trial no evidence was tendered in support of this replication except the capital & income accounts of C.'s firm with the trustee, which showed that interest on a portion of the £31,000, & on the general balance of capital had been credited by the firm to the trustee:—*Held*: a payment of interest by a trustee of a settled fund to a tenant for life within the six years did not constitute an admission by the trustee of the existence of the trust capital which would enure for the benefit of the tenant for life, so as to take the case out of above Act, s. 8, therefore, as against the mother the defence of above Act, s. 8, prevailed as to all moneys come to the trustee's hands & not invested more than six years before the commencement of the action.—*Re FOUNTAINE, Re DOWLER, FOUNTAINE v. AMHERST (LORD)*, [1909] 2 Ch. 382; 78 L. J. Ch. 648; 101 L. T. 83; 25 T. L. R. 689, C. A.

1585. **Acquiescence—Seizure of wife's separate property by husband—Retention of possession against wife's will.**—*WASSELL v. LEGGATT*, No. 1554, *ante*.

SUB-SECT. 2.—UNDER COLONIAL STATUTES.

See cases infra.

See Real Property Limitation Act, 1833 (c. 27),

Sect. 1.—Whether trustees entitled to plead statute:
Sub-sects. 2 & 3, A.]

s. 25; Real Property Limitation Act, 1874 (c. 57);
 Jud. Act, 1873 (c. 66), s. 25 (2).

**SUB-SECT. 3.—APART FROM STATUTE—RELIEF
 IN EQUITY.**

A. Express Trustees.

1586. No benefit from statutes.]—An original trust is not barred by the Statute of Limitations; but for other actions, which are within the statute, there is no remedy in equity.—ANON. (undated), Freem. Ch. 300; 22 E. R. 1223.

1587. —.]—Statute of Limitations no good plea, where the estate in law is in trustees.—LAWLY v. LAWLY (1723), 9 Mod. Rep. 32; 88 E. R. 296.

Annotation:—Expld. Cholmondeley v. Clinton (1820), 2 Jac. & W. 1.

1588. —.]—No analogy, in cases of trust, to the Statute of Limitations.—A.-G. v. BREWERS' Co. (1816), 1 Mer. 495; 35 E. R. 755.

Annotations:—Mentd. A.-G. v. Exeter Corpn. (1822), Jac. 443; A.-G. v. Stafford Corpn. (1826), 1 Russ. 547; Ludlow Corpn. v. Greenhouse (1827), 1 Bli. N. S. 17; A.-G. v. Newbury Corpn. (Cowslad's Charity) (1831), Coop. Pr. Cas. 72; A.-G. v. Newbury Corpn. (1834), 3 My. & K. 647.

1589. —.]—Estates being devised to trustees to be sold for payment of debts, & subject thereto for testator's infant children, the surviving trustee retained possession of one of the estates, in satisfaction of debts, which he alleged himself to have paid, testator being insolvent. On a bill for an account & conveyance of this estate by one of the children, & the representatives of another, forty-five years after testator's death, stating that they had recently discovered the facts, special inquiries directed to ascertain whether they had any notice of the circumstances; whether they had in any manner released; & whether the trustee had advanced to the amount of the value of the estate.

I feel, too, that we are here dealing between trustee & *cestui que trust*; & the strong ground I have for my doubts is, that till the relation is determined, the possession of the trustee is the possession of the *cestui que trust*. If the estate be given him in trust to sell, it remains in him for that purpose, till something is done to put an end to the character in which he stands, & he continues liable for ever, or, at least, for a considerable period

of time, the ct. considering the trustee bound to protect the interest of the *cestui que trust* without his interposition; & the length of time during which the trustee had omitted to discharge his trust is not a bar to its performance. Again, if this trustee advanced money for the payment of debts, he could not by his own act, if nothing had passed with the *cestui que trusts*, keep the estate unsold & make it his own; he would only have a right to hold it as a security (PLUMER, M.R.).—CHALMER v. BRADLEY (1819), 1 Jac. & W. 51; 37 E. R. 294.

Annotations:—Refd. Wedderburn v. Wedderburn (1838), 4 My. & Cr. 41. Mentd. Hearn v. Wells (1844), 1 Coll. 323; A.-G. v. Murdoch (1852), 1 De G. M. & G. 86; Soar v. Ashwell, [1893] 2 Q. B. 390.

1590. —.]—Deft. having been in receipt of the rents of the estate in his character of trustee, & having acted in that character, he was not allowed to take advantage of the Statute of Limitations.—MAN v. RICKETTS (1844), 7 Beav. 93; 13 L. J. Ch. 194; 2 L. T. O. S. 456; 8 Jur. 159; 49 E. R. 998; *on appeal, sub nom.* RICKETTS v. TURQUAND (1848), 1 H. L. Cas. 472, H. L.

Annotations:—Mentd. Boyse v. Coldclough, Boyse v. Rossborough (1854), 1 K. & J. 124; Andrew v. Andrew (1855), 25 L. T. O. S. 30; Evans v. Angell (1858), 26 Beav. 202; Josh v. Josh (1858), 5 C. B. N. S. 454; Orange v. Pickford (1858), 4 Jur. N. S. 649; Stacey v. Spratley (1858), 2 De G. & J. 94.

1591. —.]—Legacies charged on real estate held, under the circumstances of the case to be payable notwithstanding the lapse of more than forty years from testator's death to the filing of the bill; Real Property Limitation Act, 1833 (c. 27), not being applicable.

The payment of the legacies is provided for by means of a trust which trust has been decreed to be executed. It is not necessary to consider the Statute [of Limitations] (KNIGHT BRUCE, V.-C.).—RAVENSCROFT v. FRISBY (1844), 1 Coll. 16; 13 L. J. Ch. 153; 63 E. R. 302.

Annotation:—Refd. Carey v. Cuthbert (1873), 22 W. R. 249.

1592. —.]—Testatrix directed her trustees to levy & raise, out of the interest, dividends & annual produce of certain trust funds, an annual sum of £100, & pay the same to R. during his life; & "subject & without prejudice to the payment of the said annuity," to pay the income of the trust funds to F. for life, & after his decease, "subject & without prejudice, as aforesaid" to stand possessed of the trust funds for other persons. The income of the fund was insufficient to pay the annuity:—*Held*: the claim for arrears beyond six years was not barred by the statute, there being a trust for the payment.—PLAYFAIR v. COOPER,

for relief under the Trustee Act, & debts. were entitled to avail themselves of the protection of the Statute of Limitations.—CAIRNS v. MURRAY (1905), 37 N. S. R. 451.—CAN.

k. To whom plea available —
Persons in fiduciary position.—REID-NEWFOUNDLAND Co. v. ANGLO AMERICAN TELEGRAPH CO., LTD., [1912] A. C. 555.—NFLD.

l. In what actions.]—A trustee against whom an action is brought can avail himself of any statute of limitations as though he was not a trustee, except in, amongst other cases, that of a claim to recover trust property, or the proceeds thereof, still retained by the trustee.—TAYLOR v. DAVIES, [1920] A. C. 636.—CAN.

m. —.]—ARUNCHALA PILLAI v. RAMASAMYA PILLAI (1883), 1 L. R. 6 Mad. 402.—IND.

n. —.]—COWASJI NOWROJI POCHKHANAWALLA v. RUSTOMJI DOSS-ABHOY SETNA (1896), 1 L. R. 20 Bom. 511.—IND.

o. Period of limitation.]—SARODA

PERSHAD CHATTOPADHYA v. BROJO NATH BHUTTACHARJEE (1880), 1 L. R. 5 Calc. 910; 6 C. L. R. 195.—IND.

PART VI. SECT. 1, SUB-SECT. 3.—A.

1586 i. No benefit from statutes.]—TIFFANY v. THOMPSON (1862), 9 Gr. 244.—CAN.

1586 ii. —.]—FISH v. FRASER (1875), 9 N. S. R. 514.—CAN.

1586 iii. —.]—Where G. was a trustee for pltf. under an express trust:—*Held*: the Statute of Limitations would not constitute a bar to the claim.—COOK v. GRANT (1882), 32 C. P. 511.—CAN.

1586 iv. —.]—JOHNSON v. KRÄEMER (1884), 8 O. R. 193.—CAN.

1586 v. —.]—HICKEY v. STOVER (1885), 11 O. R. 106.—CAN.

1586 vi. —.]—FAULDS v. HARPER (1886), 11 S. C. R. 639.—CAN.

1586 vii. —.]—SMITH v. HALIFAX PILOT COMMISSION (1917), 51 N. S. R. 241.—CAN.

1586 viii. —.]—VIZIARAMARAZU v.

SECRETARY OF STATE FOR INDIA (1885), 1 L. R. 8 Mad. 525; L. R. 12 Ind. App. 120.—IND.

1586 ix. —.]—HOVENDEN v. ANNESLEY (LORD) (1806), 2 Sch. & Lef. 607.—IR.

1586 x. —.]—SALTER v. CAVANAGH (1838), 1 Dr. & Wal. 668.—IR.

1586 xi. —.]—NEWPORT v. BRYAN (1856), 5 I. Ch. R. 119.—IR.

1586 xii. —.]—An exor. who has, under the terms of the will, active duties as a trustee to perform in respect to the raising & investment of a legacy bequeathed upon trust for a minor, by assenting to it becomes an express trustee, so as to save the bar of the Statute of Limitations.—O'REILLY v. WALSH (1872), 6 I. R. Eq. 555; *affd.*, 7 I. R. Eq. 167.—IR.

1586 xiii. —.]—SMITH v. SMITH (1876), 1 L. R. Ir. 206.—IR.

1586 xiv. —.]—NUGENT v. NUGENT (1884), 15 L. R. Ir. 321.—IR.

1586 xv. —.]—DOYLE v. FOLEY, [1903] 2 I. R. 95.—IR.

PRINCE v. COOPER (1853), 17 Beav. 187; 23 L. J. Ch. 341; 21 L. T. O. S. 40; 1 W. R. 216; 51

Annotations:—*Folld. Obee v. Bishop* (1859), 1 De G. F. & J. 137. *Mentd. Edgar v. Reynolds* (1858), 4 Jur. N. S. 399; *Wheatly v. Davies* (1876), 35 L. T. 306; *Re Croxon, Ferrers v. Croxon*, [1915] 2 Ch. 290.

1593. —.]—A covenant to settle money to be paid in twelve months after decease of settlor is a satisfaction of all claims, under an appointment where the appointee joins in conveying to a purchaser, & the Statute of Limitations is not a bar to the covenant.—*HARDINGHAM v. THOMAS* (1854), as reported in 2 W. R. 547.

Annotation:—*Mentd. Crichton v. Crichton* (1895), 65 L. J. Ch. 13.

1594. —.]—Applts. had relied upon the lapse of time, but where the ct. was satisfied that a breach of trust had been committed, that was no defence (*KNIGHT BRUCE, L.J.*).—*A.-G. v. BEVERLEY CORPN.* (1854), 6 De G. M. & G. 256; 3 Eq. Rep. 549; 24 L. J. Ch. 374; 24 L. T. O. S. 225; 19 J. P. 86; 1 Jur. N. S. 763; 3 W. R. 186; 43 E. R. 1231, L. J.; *on appeal, sub nom. BEVERLEY CORPN. v. A.-G.* (1857), 6 H. L. Cas. 310, H. L.

Annotations:—*Mentd. A.-G. v. Trinity College, Cambridge* (1856), 24 Beav. 383; *A.-G. v. Windsor (Dean & Canons)* (1860), 8 H. L. Cas. 369; *Conybeare v. New Brunswick* (1860), 1 De G. F. & J. 578; *A.-G. v. Wax Chandlers' Co.* (1870), 5 Ch. App. 503; *Merchant Taylors' Co. v. A.-G.* (1871), 6 Ch. App. 512.

1595. —.]—*KNIGHT v. BOWYER*, No. 1319, *ante*.

1596. —.]—Testator D. gave the residue of his estate to trustees in trust for R., one of the next of kin, for life, & after his death to R.'s children; & in case there should be no children of R. "then to such persons of the blood or next of kin of me D., as would by virtue of the Statute of Distributions have become & been then entitled thereto in case I had died intestate":—*Held*: there being a trust *ex facie*, the Statute of Limitations did not apply.—*BULLOCK v. DOWNES* (1860), 9 H. L. Cas. 1; 3 L. T. 194; 11 E. R. 627, H. L.; *affg. S. C. sub nom. DOWNES v. BULLOCK* (1858), 25 Beav. 54.

Annotations:—*Mentd. Chalmers v. North* (1860), 28 Beav. 175; *Lees v. Massey* (1861), 3 De G. F. & J. 113; *Royds v. Royds* (1863), 1 New Rep. 516; *Mitchell v. Bridges* (1864), 11 L. T. 727; *Travis v. Taylor* (1866), 12 Jur. N. S. 791; *Stockdale v. Nicholson* (1867), L. R. 4 Eq. 359; *Re Ranking's Settltmt. Trusts* (1868), L. R. 6 Eq. 601; *White v. Springett* (1869), 4 Ch. App. 300; *Day v. Day* (1870), 18 W. R. 417; *Cusack v. Rood* (1876), 24 W. R. 391; *Re Morley's Trusts* (1877), 25 W. R. 825; *Mortimer v. Slater* (1877), 7 Ch. D. 322; *Mortimore v. Mortimore* (1879), 4 App. Cas. 448; *Sturge & G. W. Ry.* (1881), 19 Ch. D. 444; *Clark v. Hayne* (1889), 37 W. R. 667; *Hood v. Murray* (1889), 14 App. Cas. 124; *Re King's Settltmt.*, *Gibson v. Wright* (1889), 60 L. T. 745; *Re Rees, Williams v. Davies* (1890), 44 Ch. D. 484; *Re Nash, Prall v. Bevan* (1894), 71 L. T. 5; *Re Ford, Patten v. Sparks* (1895), 72 L. T. 5; *Re Wilson, Wilson v. Batchelor*, [1907] 2 Ch. 572; *Re Roby, Howlett v. Newington*, [1908] 1 Ch. 71; *Re Nightingale, Bowden v. Griffiths*, [1909] 1 Ch. 385; *Re Winn, Brook v. Whitton*, [1910] 1 Ch. 278; *Re Helsby, Neate v. Bozie* (1914), 84 L. J. Ch. 682; *Re Mellish, Day v. Withers*, [1916] 1 Ch. 562; *Hutchinson v. National Refuges for Homeless & Destitute Children*, [1920] A. C. 795.

1597. —.]—A sum of money settled upon certain members of a family was invested on mtge. of a trust term of the family estates. In 1829, on a resettlement of the estates, the subsistence of the term & the charge was acknowledged. No interest having been paid in the meantime, a family arrangement was executed in 1851, by which the tenant for life under the resettlement of 1829, acknowledged the subsistence of the term & the charge, & afterwards paid interest thereon. The tenant in tail was not a party, being an infant:—*Held*: as against the tenant in tail, the term & the charge were subsisting, & the Statute of Limitations did not apply.

It is perfectly plain that if you have a subsisting

& unsatisfied term limited by a deed of family arrangement the trusts of that term are not affected by the Statute of Limitations (*STUART, V.-C.*).—*LAWTON v. FORD* (1866), L. R. 2 Eq. 97; 14 L. T. 320; 14 W. R. 575.

Annotation:—*Reid. Williams v. Williams* (1899), 69 L. J. Ch. 77.

1598. — Equally as regards real & personal property—*Judicature Act, 1873 (c. 66), s. 25 (2).*—*BANNER v. BERRIDGE*, No. 1650, *post*.

1599. —.]—It is the recognised doctrine of equity that as between a trustee & his *cestui que trust*, no time will operate as a bar to the equitable claim of the latter in respect of a breach of an express trust.—*Re CROSS, HARSTON v. TENISON* (1882), 20 Ch. D. 109; 51 L. J. Ch. 645; 45 L. T. 777; 30 W. R. 376, C. A.

Annotations:—*Reid. Soar v. Ashwell*, [1893] 2 Q. B. 390; *Rocheffoucauld v. Boustead*, [1897] 1 Ch. 196.

—.]—*See, now, Trustee Act, 1888 (c. 59), s. 8, & Sub-sect. 1, ante.*

1600. — Where Trustee Act, 1888 (c. 59), s. 8, is inapplicable.—*ROCHEFFOUCAULD v. BOUSTEAD*, No. 1329, *ante*.

1601. — Personal representative—In respect of real estate—*Land Transfer Act, 1897 (c. 65), ss. 1 & 2.*—The effect of above sects. is to impose an "express trust" within *Jud. Act, 1873 (c. 66), s. 25 (2)*, on the personal representatives of the deceased person in respect of real estate, & so to prevent *Real Property Limitation Act, 1874 (c. 57)*, from running in their favour.—*TOATES v. TOATES*, [1926] 2 K. B. 30; 95 L. J. K. B. 526; 135 L. T. 25; 90 J. P. 103, D. C.

1602. — Rule confined to suits between cestui que trust & trustee.—*LLEVELLYN v. MACKWORTH* (1740), Barn. Ch. 445; 27 E. R. 714; *sub nom. LEWELLIN v. MACKWORTH*, 2 Eq. Cas. Abr. 579, L. C.

Annotation:—*Mentd. Codrington v. Lindsay* (1873), 8 Ch. App. 578.

1603. — —.]—*PETRE v. PETRE*, No. 1345, *ante*.

1604. — —.]—*Re CROSS, HARSTON v. TENISON*, No. 1599, *ante*.

1605. — Action against trustee's estate.—A trustee, having committed a breach of trust, died in 1847, leaving real & personal property to his widow for life, with remainder to his two sons. The widow proved the will, but refused to make good the breach of trust. She died in 1865, & her sons took out administration to her, & entered into possession of the property given & devised by their father. On citation of them, an administrator *ad litem* was appointed to their father:—*Held*: the sons were liable to make good the breach of trust out of their father's assets received by them, lapse of time was no defence, & the father's estate was sufficiently represented in the suit.—*WOODHOUSE v. WOODHOUSE* (1869), L. R. 8 Eq. 514; 38 L. J. Ch. 481; 20 L. T. 209; 17 W. R. 583.

Annotation:—*Reid. British Mutual Investment Co. v. Smart* (1875), 10 Ch. App. 569.

—.]—*See EXECUTORS*, Vol. XXIV., pp. 629, 630, Nos. 6565–6574.

1606. — Property retained by trustee—To which heir subsequently proved to be entitled.—Testator died in 1821 having devised & bequeathed his real & personal estate to trustees upon certain trusts. In 1826 a bill was filed for the execution of the trusts as to the personal estate. In 1847 a supplemental bill was filed raising questions on the will as to the real estate in which the heir, who was then unknown, was interested; & in 1849 another supplemental bill was filed to bring the heir, who was then ascertained, before the ct.:—*Held*: the heir was barred by lapse of time from claiming the

**Sect. 1.—Whether trustees entitled to plead statute :
Sub-sect. 3, A. & B. (a), (b), (c) & (d).]**

real estate adversely to the trustees; but he was not barred from claiming part of the real estate as being, in the events that had happened, undisposed of & held by the trustees in trust for him.—**SIMMONS v. RUDALL** (1851), 1 Sim. N. S. 115; 15 Jur. 162; 61 E. R. 45.

Annotations:—**Mentd.** *Greville v. Tylce* (1851), 7 Moo. P. C. C. 320; *Re Judkin's Trusts* (1884), 25 Ch. D. 743; *Boaler v. Brodhurst* (1892), 8 T. L. R. 398; *Re Whitrod, Burrows v. Bax*, [1926] Ch. 118.

Legacies subject to trust.—See Part IV., Sect. 1, sub-sect. 1, D. (a) ii., *ante*.

Express trusts affecting real property—Real Property Limitation Act, 1833 (c. 27), s. 25.—See Part V., Sect. 10, *ante*.

B. Constructive Trustees.

(a) In General.

1607. Constructive trustees generally protected.—**TOWNSEND v. TOWNSEND**, No. 1330, *ante*.

1608. —.]—Though no time bars a direct trust, as between *cestui que trust* & trustee, a constructive trust barred by long acquiescence; though the true state of the fact may be easily ascertained & the ground of original relief was clear & even arising out of fraud.—**BECKFORD v. WADE** (1805), 17 Ves. 87; 34 E. R. 34.

Annotations:—**Consd.** *Toft v. Stevenson* (1848), 7 Hare, 1; *Taylor v. Davies*, [1920] A. C. 636. **Reid.** *Cholmondeley v. Clinton* (1820), 2 Jac. & W. 1; *A.-G. v. Aspinall* (1837), 1 Jur. 812; *Wedderburn v. Wedderburn* (1838), 4 My. & Cr. 41; *Ex p. Hasell* (1839), 3 Y. & C. Ex. 617; *Portlock v. Gardner* (1842), 6 Jur. 795; *Eager v. Barnes & Bridger* (1862), 7 L. T. 408; *Smallcombe's Case* (1867), L. R. 3 Eq. 769; *Drummond v. Sant* (1871), L. R. 6 Q. B. 763; *Soar v. Ashwell*, [1893] 2 Q. B. 390. **Mentd.** *A.-G. v. Murdoch* (1852), 1 De G. M. & G. 86; *Phillips v. Eyre* (1870), L. R. 6 Q. B. 1.

1609. —.]—*Re MANCHESTER GAS ACT, Ex p. HASSELL*, No. 1241, *ante*.

1610. —.]—*SOAR v. ASHWELL*, No. 1677, *post*.

1611. Classes of constructive trustees not protected.—*SOAR v. ASHWELL*, No. 1677, *post*.

(b) Executors.

1612. Executor made trustee by the will—Trust for sale.—Gift of a leasehold house to exors. with a direction to sell it, & out of the proceeds to pay £50 to A.:—**Held**: there being a trust for sale, the gift to A. was not barred by the Statute of Limitations.—**LOW v. NASH** (1852), 20 L. T. O. S. 123; 1 W. R. 63.

1613. —.]—Testator, who died in 1846, bequeathed to his wife a certain annuity or "clear yearly sum" of £400 during her life, "free from all deductions in respect of any present or future taxes, charges, assessments, or impositions, or other matter, cause, or thing whatsoever," & a like annuity of £600 during widowhood; & directed his trustees to appropriate & invest a fund to answer the annuities, which fund, subject to payment of the annuities, was to be considered as part of his residuary personal estate. The trustees from the death of testator until 1878 had deducted income tax from the annuities:—**Held**: the annuities were given free from income tax, which

ought to have been paid by the trustees, & the annuitant was entitled to be repaid the amounts deducted for income tax since the death of testator.

—*Re BANNERMAN'S ESTATE, BANNERMAN v. YOUNG* (1882), 21 Ch. D. 105; 51 L. J. Ch. 449.

Annotations:—**Mentd.** *Gleadow v. Leetham* (1882), 22 Ch. D. 269; *Re Saillard, Pratt v. Gamble*, [1917] 2 Ch. 401; *Re Crosse, Oldham v. Crosse*, [1920] 1 Ch. 240; *Re Shrewsbury Estate Acts, Shrewsbury v. Shrewsbury*, [1924] 1 Ch. 315.

1614. Executor not in terms made trustee by will—Duties as trustee imposed upon them.—*Re GOMPERTZ'S ESTATE, PARKER v. GOMPERTZ*, No. 1620, *post*.

1615. Executor made trustee by his own acts—Severance of fund for specific purpose.—*PHILLIPO v. MUNNINGS*, No. 839, *ante*.

1616. —.]—An exor., in his residuary account, stated that he had retained in trust the amount of B.'s legacy. He afterwards paid over the residue:—**Held**: the exor. had constituted himself a trustee for B., & his remedy for recovery was not barred by Statute of Limitations or the lapse of time.—**TYSON v. JACKSON** (1861), 30 Beav. 384; 54 E. R. 937.

Annotation:—*Folld. Hartford v. Power* (1868), 16 W. R. 822.

1617. —.]—**Whether mere severance sufficient.**—The mere fact that an exor., who is not also appointed a trustee by the will, retains a fund to answer the claim of a particular next of kin, is not enough to turn the exor. into an express trustee of the fund, but if, in addition, he earmarks the fund as the fund of the particular next of kin, & uses express words which show that he intends to hold the fund, not for himself but for the persons entitled to it, he does become an express trustee of the fund.—*Re GOMPERTZ, PARKER v. GOMPERTZ* (1911), 105 L. T. 664; 56 Sol. Jo. 11.

1618. —.]—**Opening of trust account with bankers.**—Testator died in 1818. A., his administrator, received assets & placed them in a bank, to an account—"A.'s trustee," where they still remained. A. died in 1853, & to a suit, instituted by the administrator *de bonis non* of original testator, against the representatives of A. & the bankers, to recover the fund the representatives of A. set up Statute of Limitations, but the bankers were willing to pay the amount:—**Held**: the statute was inapplicable, & a decree was made for pltf.—**SMITH v. ACTON** (1858), 26 Beav. 210; 7 W. R. 159; 53 E. R. 877.

1619. —.]—**Sum retained "to my use & for use of J."**—*Re ROWE, JACOBS v. HIND*, No. 846, *ante*.

1620. —.]—**Sum earmarked as held for or on account of persons interested.**—Exors. who are not also in terms appointed trustees, but who have duties imposed upon them, not as exors. but as trustees, hold the residue as soon as it has been ascertained, & as soon as their duties as exors. have been performed as express trustees within the meaning of Statute of Limitations.

Exors., although not trustees under the provisions of the will by which they are appointed, may become express trustees by reason of entries in their accounts earmarking certain sums as held for or on account of the persons interested.—

**PART VI. SECT. 1, SUB-SECT. 3.—
B. (a).**

1607 i. Constructive trustees generally protected.—*Re TERRY* (1886), 7 L. J. 23; 2 N. S. W.

1607 ii. —.]—Deft. undertook to convey land to pltf., but, instead of conveying as he had agreed, he sold the property more than twelve years

before bill filed:—**Held**: deft. was merely a constructive trustee, & pltf.'s right to call for a conveyance was barred by the Statute of Limitations.—**FERGUSON v. FERGUSON** (1881), 28 Gr. 380.—**CAN.**

1607 iii. —.]—**BUILDING & LOAN ASSOC. v. POAPS** (1895), 27 O. R. 470.—**CAN.**

1607 iv. —.]—*Re M'CAUSLAND'S TRUSTS*, [1908] 1 I. R. 327.—**IR.**

**PART VI. SECT. 1, SUB-SECT. 3.—
B. (b).**

p. Executor made trustee by own acts.—**Held**: where the conduct of the exors. constituted them trustees, the right to recover from them was not barred.—*CAMERON v. CAMPBELL* (1882), 7 A. R. 361.—**CAN.**

q. Property retained as trustee.

Re GOMPERTZ'S ESTATE, PARKER v. GOMPERTZ (1910), 55 Sol. Jo. 76.

1621. Dividends received from bankrupt's estate—Subsequently found to be paid in error.]—In 1806 P. proved a debt against the estate of B. & C., bkpts., on a bill of exchange, & died in 1807 appointing G. his exor. G. became bkpt. in 1816 & obtained his certificate in 1817. But before that time, viz. in the years 1811, 1814, 1815, G. had, as exor., received three dividends on P.'s debt, & in 1817, 1822, & 1828, he received three other dividends. It afterwards turned out that the bill of exchange was paid by another party in 1807, so that no dividend was overdue. On petition by B. & co.'s assignees to expunge the proof & that G. should refund the six dividends:—*Held*: (1) it being in the nature of a trust, the Statute of Limitations did not run in favour of G.; (2) as the first three dividends were paid in error & were a legal debt against G. & might have been proved under his bankruptcy, the claim as to them was barred by G.'s certificate. The other three, received since his bkpcy., were ordered to be refunded.—*Re BAILLIE, Ex p. BOLTON* (1832), 1 Deac. & Ch. 556; 1 Mont. & A. 60; 3 L. J. Bcy. 22.

1622. Beneficiaries deprived of their rights.]—*WOODS v. WOODS* (1836), 1 My. & Cr. 401; *Donnelly*, 61; 40 E. R. 429, L. C.

Annotations:—*Mentd. Gilbert v. Bennett* (1839), 10 Sim. 371; *Hodgson v. Green* (1842), 11 L. J. Ch. 312; *Raikes v. Ward* (1842), 1 Hare, 445; *Longmore v. Elcum* (1843), 2 Y. & C. Ch. Cas. 363; *Thorp v. Owen* (1843), 2 Hare, 607; *Crockett v. Crockett* (1848), 2 Ph. 553; *Parkinson's Trust* (1851), 1 Sim. N. S. 242; *Webb v. Wools* (1852), 2 Sim. N. S. 287; *Greene v. Greene* (1869), 17 W. R. 487; *Lambe v. Eames* (1871), 6 Ch. App. 597.

Whether statute may be pleaded as defence to administration action.]—See *EXECUTORS*, Vol. XXIV., pp. 671–674, Nos. 6983–6995.

(c) *Persons under Control of Court.*

1623. Receiver.]—A bill alleged that deft. had been appointed receiver in a certain suit & that as such receiver he was bound to pay pltf. a certain salary, that deft. ought to have paid pltf. this salary from Jan. 1834, to Jan. 1839, but that he had paid pltf. nothing in respect of it & that deft. had since been discharged from being receiver. The bill prayed for an account of the sum due to pltf. from 1834 to 1839 & for payment by deft.:—*Held*: this bill was open to a general demurrer.

The question is, whether such a case as this is obnoxious to the Statute of Limitations. I think it is (*KNIGHT BRUCE, V.-C.*).—*DUPRE v. DUNCOMBE* (1845), 2 Holt, Eq. 399; 14 L. J. Ch. 403; 5 L. T. O. S. 536; 9 Jur. 770; 71 E. R. 922.

1624. —.]—Money not accounted for & due from a receiver under the ct. is, by his recognisance, made a debt of record, although the balance due has not been ascertained. The receiver is a trustee of such money for the persons entitled thereto, & cannot, as against them, avail himself of the Statute of Limitations, although his final accounts have been passed & the recognisances vacated.—*SEAGRAM v. TUCK* (1881), 18 Ch. D. 296; 50 L. J. Ch. 572; 44 L. T. 800; 29 W. R. 784.

1625. Trustee in Scottish sequestration.]—A sequestration in a foreign country does not suspend the running of the lapse of time prescribed by the

Statute of Limitations; & therefore a creditor under a Scottish sequestration issued in 1836, was not allowed to prove his debt against the estate of his debtor, who had subsequently set up business in London, had become embarrassed, & filed his petition in bkpcy. in 1860. The trustee under the Scottish sequestration could not be considered a trustee of the after acquired property in England.—*Re KIDD, Ex p. KIDD* (1861), 3 De G. F. & J. 640; 4 L. T. 344; 7 Jur. N. S. 613; 45 E. R. 1027, L. C. & L. JJ.

(d) *Persons made Trustees by their own Acts.*

1626. Person not appointed trustee—Taking upon herself to act as trustee.]—*LIFE ASSOCN. OF SCOTLAND v. SIDDAL, COOPER v. GREENE*, No. 1320, ante.

1627. Covenant to settle property—Property never transferred to trustees.]—(1) By a marriage settlement, dated in 1828, A. covenanted to transfer a sum of stock belonging to him to trustees, upon trust to pay the dividends to himself for life, & then upon trusts for the benefit of the intended wife & the issue of the marriage. The stock was not transferred:—*Held*: A. was not a trustee of it within the exception of the Statute of Limitations; but, it was a debt from him, & notwithstanding his life interest, time began to run against this debt from the execution of the settlement.

(2) In 1825, A. borrowed from the exors. in trust of a will, a fund which was thereby bequeathed to them in trust for himself for life & then for other persons, & gave to them a promissory note for the repayment of this sum to them as "exors. in trust," with lawful interest:—*Held*: A. borrowed the fund & promised to repay it as trust money, & therefore that lapse of time was no bar to the claim against him for repayment.—*SPICKER-NELL v. HOTHAM* (1854), Kay, 669; 2 Eq. Rep. 1103; 2 W. R. 638; 69 E. R. 285.

Annotations:—*Fold. Re Dixon, Heynes v. Dixon*, [1900] 2 Ch. 561. *Consd. Re Plumtre's Marriage Settlmt., Underhill v. Plumtre*, [1910] 1 Ch. 609. *Distd. Pullan v. Koe*, [1913] 1 Ch. 9. *Reid. Mills v. Borthwick* (1865), 35 L. J. Ch. 31; *McGuffie v. Burleigh* (1898), 78 L. T. 264. *Mentd. Re Cavendish Browne's Settlmt. Trusts, Horner v. Rawle* (1916), 61 Sol. Jo. 27.

1628. —.]—A settlement was executed by S. in 1814, after his marriage, but in pursuance of an ante-nuptial agreement. This deed contained a recital that S. had paid into the hands of G. a sum of £1,000, & a covenant by G. with S. that G. would stand possessed of the £1,000, & also of such further sum as should be paid to him as thereafter mentioned, upon trust with the approbation of S. in writing to invest the £1,000 in Govt. or real securities in the names of G. & S. & from time to time, if S. should so direct in writing, to change the investments, & to pay the income to S. for life, with remainder to his wife for life, with ultimate remainder as to the capital equally among the children of the marriage. The settlement contained also a covenant by S. with G. to pay to G. twelve months after the execution of the deed, a further sum of £1,000 to be invested by him in the same way, & on the same trusts, as the first £1,000. G. died in 1821; the wife of S. died in 1851; & S. died in 1868. Neither of the sums of £1,000 was invested as provided by

ELLIOTT v. CAMPBELL, [1906] V. L. R. 120.—AUS.

PART VI. SECT. 1, SUB-SECT. 3.—
B. (d).

1626 i. Person not appointed trustee—Taking upon himself to act as trustee.]—

COYNE v. BRODDY (1888), 15 A. R. 159.—CAN.

1626 ii. —.]—Where an absent debtor has obtained moneys from pltf. by false & fraudulent representations, & has so become a trustee for pltf., the debt is one to which the Statute of

Limitations does not apply, & pltf. is entitled to judgment.—*FREEMAN v. DE BLOIS* (1912), 11 E. L. R. 573.—CAN.

1626 iii. —.]—*DURGA PRASAD v. ASA RAM* (1879), I. L. R. 2 All. 361.—IND.

Sect. 1.—Whether trustees entitled to plead statute:
Sub-sect. 3, B. (d) & (e) i. & ii.]

the settlement, & there was no evidence to show that either of them had ever been paid to G. Under these circumstances the two surviving children of S. who were, under the settlement, entitled to the two sums, claimed to have them made good out of the estate of S.:—*Held*: S. had constituted himself, with regard to the first sum of £1,000, a trustee of G.'s covenant, & was bound to do everything necessary to enforce the fulfilment of it. The claim against his estate was consequently not barred by the Statute of Limitations; (2) as to the second sum of £1,000 the liability of S. was only upon a legal covenant, & was barred by the Statute of Limitations.—*STONE v. STONE* (1869), 5 Ch. App. 74; 39 L. J. Ch. 196; 22 L. T. 182; 18 W. R. 225, L. J.

Annotations:—As to (1) *Distd. Re Dixon*, *Heynes v. Dixon*, [1899] 2 Ch. 561. *Generally, Reid. Metropolitan Bank v. Helron* (1880), 5 Ex. D. 319; *Trevor v. Hutchins* (1897), 76 L. T. 183. *Mentd. Re Plumptre's Marriage Settlement*, *Underhill v. Plumptre*, [1910] 1 Ch. 609.

1629. — Property transferred to trustees.]—
BURROWES v. GORE, No. 802, *ante*.

1630. — —.]—*STONE v. STONE*, No. 1628, *ante*.

Executors opening trust accounts.]—See Sub-sect. 2, B. (b), *ante*.

1631. Fraudulent disposition of bankrupt's estate.]—The ct. will not allow a person who has knowingly assisted a trustee in bkpcy. in a fraudulent disposition of the estate to set up lapse of time, by analogy to Statute of Limitations, as a bar to proceedings against him for the fraud, though the person so assisting is a constructive trustee only.—*Re GALLARD, Ex p. GALLARD*, as reported in [1897] 2 Q. B. 8; 66 L. J. Q. B. 484; 4 Mans. 52.

(e) Persons in Fiduciary Position.

i. In General.

1632. Fiduciary relation bars a plea of the statute.]—An agent who stands in a fiduciary relation to his principal cannot set up the Statute of Limitations in bar of a suit for an account by his principal. An agent who was a solr. in London held a power of attorney from his principal in America to sell his property & invest the proceeds in his name. The agent received certain moneys under the power & paid them in to his own bankers to the general account of his firm. The principal died in 1859 intestate. In 1867 his widow took out administration to his estate, & in 1868 she filed a bill against the agent for an account:—*Held*: the agent held the money in trust for his principal, & the Statute of Limitations was no bar to the suit. *Semble*: if there had been no fiduciary relation between the parties, inasmuch as the agency lasted till the death of the principal, the Statute of Limitations would not have begun to run till administration was taken out.—*BURDICK v. GARRICK* (1870), 5 Ch. App. 233; 39 L. J. Ch. 369; 18 W. R. 387, L. C. & L. J.

Annotations:—*Expld. Watson v. Woodman* (1875), L. R. 20 Eq. 721. *Appld. Re Bell, Lake v. Bell* (1886), 34 Ch. D.

PART VI. SECT. 1, SUB-SECT. 3.—
B. (e) i.

1632 i. Fiduciary relation bars a plea of the statute.]—*MAACK v. MAACK* (1893), 23 S. C. R. 146; *affg.*, 26 N. S. R. 24.—*CAN.*

1632 iii. —.]—When a person has assumed, either with or without consent, to act as a trustee of money or

other property, i.e. to act in a fiduciary capacity with regard to it, & has in consequence been in possession of or has exercised command or control over such money or property, he will be charged with all the liabilities of an express trustee & will be classed with & called an express trustee of an express trust; & he must discharge himself by accounting to his *cestui que trust* for all such money or property without regard to lapse of time.—

462. *Consd. Friend v. Young*, [1897] 2 Ch. 421; *North American Land & Timber Co. v. Watkins*, [1904] 1 Ch. 242; *Henry v. Hammond*, [1913] 2 K. B. 515. —*Re Allsop, Whittaker v. Bamford*, [1914] 1 Ch. 1. *Consd. Re Richardson, Pole v. Pattenden*, [1920] 1 Ch. 423. *Reid. Gray v. Bateman* (1872), 21 W. R. 137; *Boatwright v. Boatwright* (1873), 43 L. J. Ch. 12; *Banner v. Berridge* (1881), 18 Ch. D. 254; *Re Exchange Banking Co., Flitcroft's Case* (1882), 21 Ch. D. 519; *Dooby v. Watson* (1888), 39 Ch. D. 178; *Re Sharpe, Re Bennett, Masonic & General Life Assce. v. Sharpe*, [1892] 1 Ch. 154; *Soar v. Ashwell*, [1893] 2 Q. B. 390; *Reid-Newfoundland Co. v. Anglo-American Telegraph Co.*, [1912] A. C. 555; *Nooton v. Ashburton*, [1914] A. C. 932; *Taylor v. Davies*, [1920] A. C. 636. *Mentd. Gilroy v. Stephens* (1882), 51 L. J. Ch. 834; *Charles v. Jones* (1887), 35 W. R. 645; *Lyell v. Kennedy, Kennedy v. Lyell* (1889), 14 App. Cas. 437; *Phillips v. Homfray* (1890), 44 Ch. D. 694; *Silkstone & Haigh Moor Coal Co. v. Edey*, [1900] 1 Ch. 167; *Dominion Coal Co. v. Maskinonge S.S. Co.*, [1922] 2 K. B. 132.

1633. What relationships are fiduciary—Money given for specific purpose.]—*SHELDON v. WELDMAN* (1664), 1 Cas. in Ch. 26; 1 Eq. Cas. Abr. 304; *Freem. Ch.* 156; 22 E. R. 676, L. C.

1634. — Money given to husband by wife.—
“To be disposed of as she should direct.”]—*HOLLIS'S (LORD) CASE* (1680), 2 Vent. 345; 86 E. R. 477.

Annotation:—*Expld. Crawford v. Crawford* (1867), 16 W. R. 411.

1635. — Money given to be repayable on demand—Without specific direction.]—*WARNER v. CONDUIT* (1733), 2 Hov. Supp. 68; 34 E. R. 1000.

1636. — — Entrusted for safety.]—Time does not begin to run under Statute of Limitations, 1623 (c. 16), against a person who has entrusted money to another for safety till demand, though it was contemplated that the bailee might use the money in business.

The testator [the borrower] stood in a fiduciary position to pltf. (*NORTH, J.*).—*Re TIDD, TIDD v. OVERELL*, [1893] 3 Ch. 154; 62 L. J. Ch. 915; 69 L. T. 255; 42 W. R. 25; 9 T. L. R. 550; 37 Sol. Jo. 618; 3 R. 657.

Annotation:—*Reid. Joachimson v. Swiss Bank Corpn.*, [1921] 3 K. B. 110.

1637. — Money given without specific direction—By woman to paramour.]—A woman who cohabited with a man as her husband handed to him sums of money without any specific directions as to their application, & he invested them in purchase of leasehold & other property:—*Held*: the transactions ought to be regarded, not as loans to which Statute of Limitations would be applicable, but in the nature of a trust, & she was entitled to the investments.—*JAMES v. HOLMES* (1862), 4 De G. F. & J. 470; 31 L. J. Ch. 567; 6 L. T. 589; 8 Jur. N. S. 732; 10 W. R. 634; 45 E. R. 1266, L. C.

1638. — Testamentary guardian.]—A. & B. being about to marry surrender their respective copyhold estates to the use of them two & the survivor. The man dies before the marriage, & the woman enters on his land, & after thirty years quiet enjoyment she was decreed to surrender to the heir & account for the profits.—*HAMOND v. HICKS* (1686), 1 Vern. 432; 23 E. R. 568, L. C.

1639. — —.]—A testamentary guardian is a trustee, & therefore the Statute of Limitations is inapplicable to accounts as between him & his

MATTICE v. MATTICE, [1925] 1 D. L. R. 755; [1925] 2 W. W. R. 203; 34 B. C. R. 474.—*CAN.*

1632 iv. —.]—The possession of a person clothed in a fiduciary capacity is not adverse, within the Statute of Limitations, & is no answer to one of the next of kin taking out letters of administration & suing in ejectment.—*MULHERN v. DORIAN* (1883), 17 I. L. T. 74.—*IR.*

ward.—**MATHEW v. BRISE** (1851), 14 Beav. 341; 17 L. T. O. S. 249; 51 E. R. 317.

Annotations:—**Reid**, **Sleeman v. Wilson** (1871), L. R. 13 Eq. 36; **Wall v. Stanwick** (1887), 34 Ch. D. 763.

1640. — Compensation money held by canal company—For unascertained persons.]—A canal co., under the powers of an Act of Parliament, took possession of part of a common in 1802, without paying any compensation money, either to the parties who claimed to be entitled to the soil, or into the Bank of England; the latter being the proper mode of proceeding, where, as in this case, a good title could not be deduced. The co. became unable to pay their debts, & continued so until 1836. In 1837, a bill was filed by the parties claiming the compensation money:—*Held*: they were not barred by lapse of time.

Lapse of time is not, in itself, a bar to the claim of a *cestui que trust*, against a trustee in a ct. of equity, where no laches or acquiescence can be imputed to him.—**CATOR v. CROYDON CANAL CO.** (1843), 4 Y. & C. Ex. 593; 13 L. J. Ch. 89; 2 L. T. O. S. 225; 8 Jur. 277; 160 E. R. 1149, L. C.

1641. — Trustees of annuity fund—Trustees for all entitled to benefit from fund.]—F. died in 1834. In 1843 his widow claimed a pension from the Bombay Civil Fund, on the ground that her income had fallen below £500 a year, but was refused. In 1867 her representative filed a bill against the trustees of the fund, claiming the amount of the pension from 1843 till the death of Mrs. F. in 1863:—*Held*: Statute of Limitations did not apply to bar the claim; for though the widow was not a *cestui que trust* of any specific sum, yet the trustees held the fund in trust for all the persons entitled to receive benefit from it; but, as the delay in asserting the claim was due to the laches of Mrs. F. & her representatives, interest on the amount should not be given.—**EDWARDS v. WARDEN** (1876), 1 App. Cas. 281; 45 L. J. Ch. 713; 35 L. T. 174, H. L.

Annotations:—**Mentd.** **Hughes v. Coles** (1884), 27 Ch. D. 231; **Re Turner**, **Klaftenberger v. Groombridge**, [1917] 1 Ch. 422.

1642. — Lease of telegraph line subject to restrictions—Breach of restrictions.]—Appls. were in possession of their railway under a lease which was subject to a subsisting contract with resps. under which they were entitled to use a special wire erected & maintained by resps. in & about their railway as defined in the contract, but were bound, "not to pass or transmit any commercial messages over the said special wire except for the benefit & account of" resps. They nevertheless used it for all the purposes of their business, including certain new & extended lines of railway & their shipping business, & other commercial undertakings:—*Held*: in regard to the unauthorised user of the special wire apps. were accountable as trustees for the profits so made to resps., & having regard to the Newfoundland Trustee Act, 1898, their plea of limitation must be overruled.—**REID-NEWFOUNDLAND CO. v. ANGLO-AMERICAN TELEGRAPH CO., LTD.**, [1912] A. C. 555; 81 L. J. P. C. 224; 106 L. T. 691; 28 T. L. R. 385, P. C.

Annotations:—**Reid**, **Henry v. Hammond**, [1913] 2 K. B. 515; **Taylor v. Davies**, [1920] A. C. 636.

— Confidential agents.]—See Sub-sect. 3, B. (c) ii., *post*.

— Officers of companies.]—See Sub-sect. 3, B. (e) iv., *post*.

— Solicitors.]—See Sub-sect. 3, B. (e) v., *post*.

— Mortgagees.]—See Sub-sect. 3, B. (e) iii., *post*.

ii. Confidential Agents.

1643. Steward.]—HARDWICKE (EARL) v. VERNON, No. 1770, *post*.

1644. Barrister's clerk.]—B., a clerk of counsel, in 1846, absconded, & it was then discovered that he had received & appropriated to his own use a large amount of fees belonging to pltf., his employer. In 1854, B. died abroad, & after that event a suit for the administration of his estate was instituted, & under the decree made in 1855, pltf. carried in a claim, as a creditor for the amount of the fees retained, before the chief clerk, who disallowed the claim, on the ground of its being barred by Statute of Limitations. Against that decision of the chief clerk an appeal was made: but pltf. in 1857 filed this bill against the legal personal representative of B., praying for a declaration that he might be allowed to stand as a creditor against his estate, & that he might be paid the amount found due:—*Held*: pltf.'s claim against the estate of B., the relationship being of a confidential nature, was not barred by the statute; & pltf.'s remedy against the estate was not barred by the proceedings in the administration suit.

The law of the ct. was, that whenever, in an obligation for a debt, there was the circumstance, that the debt had accrued in consequence of a violation of confidence bestowed in any fiduciary character, length of time was no bar. In such cases the money in respect of which the demand was made was the money of the employer in the hands of his confidential agent. There was therefore possession by the agent: there was no adverse possession: & in such cases, upon principle, the bar arising from adverse possession could not occur (*per* CUR.).—**TEED v. BEERE** (1859), 28 L. J. Ch. 782; 33 L. T. O. S. 26; 5 Jur. N. S. 381; 7 W. R. 394.

Annotation:—**Reid**, **Re Whitehead**, *Ex p. Burnand's Exor.* (1860), 2 L. T. 776.

1645. Conspiracy to defraud principal.]—Where two agents conspire to defraud their principal, the estates of both the agents will be liable in equity to the estate of the principal, in respect of the fraud so committed. In such a case an agent is considered as a trustee for his principal, & lapse of time is no bar.—**WALSHAM v. STANTON** (1863), 1 De G. J. & Sm. 678; 3 New Rep. 56; 32 L. J. Ch. 557; 9 L. T. 357; 9 Jur. N. S. 1261; 12 W. R. 63; 46 E. R. 268, L. JJ.

Annotations:—**Reid**, **Peek v. Gurney** (1873), L. R. 6 H. L. 377. **Mentd.** **Bent v. Yardley** (1865), 2 Hem. & M. 602.

1646. With unrestricted powers of management.]—Deft., B., had acted for testator during the life of the latter, with full & unrestricted powers of management; the other deft., the wife of B., was testator's daughter & sole extrix. Pltf., who was testator's widow, was entitled to a legacy of £1,500 under her husband's will, & also to the furniture, effects, etc., of testator. Testator's will was extremely brief & informal; & pltf. on that ground filed her bill for administration of testator's estate, praying the usual account. Defts. in answer to an interrogatory of pltf., furnished an account of all dealings with testator's property up to the date of suit from a date six years prior to his death, & claimed the benefit of Statute of Limitations as to the period antecedent to these six years:—*Held*: deft. was a trustee, & could not avail himself of Statute of Limitations.—**GRAY v. BATEMAN** (1872), 21 W. R. 137.

Annotation:—**Reid**, **Soar v. Ashwell** [1893] 2 Q. B. 390.

Sect. 1.—Whether trustees entitled to plead statute: Sub-sect. 3, B. (e) ii., iii., iv. & v.

1647. Receipt of rents—On behalf of true owners not then ascertained.]—On the death of the owner of land intestate, deft., who had been her agent, continued to receive the rents, stating to several persons that he was acting on behalf of the heir, whoever he might be. After the expiration of twelve years from the death of the owner, pltf., a purchaser from her heirs, brought an action against deft. to recover the land & for an account of the rents & profits:—*Held*: deft., having assumed a fiduciary character & received the rents in that capacity, Statute of Limitations did not run in his favour as against the true owner, & pltf. was entitled to ratify his acts as agent, & to recover the land & all accumulations of rent.—*LYELL v. KENNEDY, KENNEDY v. LYELL* (1889), 14 App. Cas. 437; 59 L. J. Q. B. 268; 62 L. T. 77; 38 W. R. 353, H. L.

Annotations:—*Consd.* *Henry v. Hammond*, [1913] 2 K. B. 515. *Reid.* *Trevor v. Hutchins* (1897), 76 L. T. 183; *Reid-Newfoundland Co. v. Anglo-American Telegraph Co.*, [1912] A. C. 555. *Mentd.* *Bolton Partners v. Lambert* (1889), 41 Ch. D. 295; *Keighley, Maxsted v. Durant*, [1901] A. C. 240; *Finn v. Shelton Iron, Steel & Coal Co.* (1924), 131 L. T. 213.

1648. Receipt of money for specific investment.]—*NORTH AMERICAN LAND & TIMBER CO., LTD. v. WATKINS*, No. 1538, *ante*.

1649. Acting in ordinary course of business.]—In 1883 a vessel called the *International* was wrecked off the coast of Kent. The vessel & cargo were subsequently salvaged, & pltf., who was an average adjuster carrying on business in Paris & who was acting on behalf of foreign insurers of the cargo, instructed deft., who was a shipping agent at Ramsgate, to sell the cargo & out of the proceeds of the sale to pay all claims & expenses in connection with the cargo. Deft. accordingly sold the cargo, & after paying all claims & expenses there remained in his hands a sum of £96. This sum was not paid over to pltf., nor did pltf. know that there was any money in deft.'s hands representing the balance of the proceeds of the sale. In deft.'s balance-sheets for the years 1884 to 1888 inclusive this sum appeared as a debt due from him, the entry being "*International* £96," but the name of the creditor was not stated. In 1889 this sum was carried to profit & loss account, & it did not appear again in the balance-sheets. In 1912 pltf., having discovered the fact that deft. had received this sum, brought an action to recover it, to which deft. pleaded that the claim was barred by the Statute of Limitations. Pltf., in answer to the plea of the statute, contended that deft. had made himself an express trustee of this sum, & that therefore the statute did not apply:—*Held*: the transaction which deft. was employed by pltf. to carry out was an ordinary commercial transaction in the way of deft.'s business as a shipping agent, that deft. was not bound to keep the moneys coming to his hands in the course of carrying out that transaction separate from his other moneys, & therefore he was not in the position of an express trustee of the sum of £96 for pltf., & the Statute of Limitations was a good defence to the claim.—*HENRY v. HAMMOND*, [1913] 2 K. B. 515; 82 L. J. K. B. 575; 108 L. T. 729; 29 T. L. R. 340; 57 Sol. Jo. 358; 12 Asp. M. L. C. 332, D. C.

iii. Mortgagees.

See Part V., Sect. 12, sub-sect. 3, *ante*.

1650. Mortgage of ship—Sale by first mortgagee—Whether trustee of surplus for second mortgagee]

—(1) The second mtgee. of a ship claimed an account against the first mtgee., who had sold the vessel upon mtgor. becoming bkpt. Deft. offered to pay a specific amount. The action having been commenced more than six years, after the sale, deft. pleaded Statute of Limitations. Pltf. set up an express trust as a bar to the statute:—*Held*: there was no express trust, in case of an ascertained surplus the first mtgee. might be constructively a trustee of the surplus, but after six years, evidence could not be adduced to prove a surplus; but although the statute was not avoided on the ground of express trust, it was in this case avoided by an acknowledgment within six years of an unsettled account pending, which by itself would have sufficed, & also by a promise to pay what should be found due, & pltf. was therefore entitled to an account.

(2) An express trust bars the statute equally, as to personalty & realty by force of Jud. Act, 1873 (c. 66), s. 25 (2).—*BANNER v. BERRIDGE* (1881), 18 Ch. D. 254; 50 L. J. Ch. 630; 44 L. T. 680; 29 W. R. 844; 4 Asp. M. L. C. 420.

Annotations:—*As to* (1) *Reid.* *Dooby v. Watson* (1888), 39 Ch. D. 178; *Firth v. Slingsby* (1888), 58 L. T. 481; *Soar v. Ashwell*, [1893] 2 Q. B. 390; *Price v. Phillips* (1894), 13 R. 191; *Rochevoucauld v. Boustead*, [1897] 1 Ch. 196; *Kessisoglu v. Balli* (1903), 47 Sol. Jo. 738. *Generally.* *Mentd.* *The Benwell Tower* (1895), 72 L. T. 664; *Friend v. Young*, [1897] 2 Ch. 421.

iv. Officers of Companies.

1651. Director—Misfeasance.]—The directors of a limited co. for several years presented to the general meetings of shareholders, reports & balance sheets in which various debts known by the directors to be bad were entered as assets so that an apparent profit was shown, though in fact there was none. The shareholders relying on these documents, passed resolutions declaring dividends, which the directors accordingly paid. An order having been made to wind up the co. the liquidator applied under Cos. Act, 1862 (c. 89), s. 165, for an order on the directors to replace the amount of dividends thus paid out of capital:—*Held*: the claim was for a breach of trust & the Statute of Limitations could not be set up.

It is said they [the directors] are not trustees. . . . They have the direction & management of [the co.'s] property & at the same time they have incurred direct obligation to the persons who have so entrusted them with their money. What difference there can be in principle between the case of *Burdick v. Garrick*, No. 1632, *ante*, & this case I am at a loss to conceive (BACON, V.C.).—*Re EXCHANGE BANKING CO., FLITCROFT'S CASE* (1882), 21 Ch. D. 519; 52 L. J. Ch. 217; 48 L. T. 86; 31 W. R. 174, C. A.

Annotations:—*Folld.* *Municipal Freehold Land Co. v. Pollington* (1890), 2 Meg. 307; *Re Sharpe, Re Bennett, Masonic & General Life Assoc. v. Sharpe*, [1892] 1 Ch. 154. *Reid.* *Re Oxford Benefit Building Investment Soc.* (1886), 35 Ch. D. 502; *Leeds Estate Building & Investment Co. v. Shepherd* (1887), 36 Ch. D. 787; *Re Faure Electric Accumulator Co.* (1888), 40 Ch. D. 141; *Re Kingston Cotton Mill Co. (No. 2)*, [1896] 1 Ch. 331; *Re National Bank of Wales*, [1899] 2 Ch. 629. *Mentd.* *Guinness v. Land Corp'n. of Ireland* (1882), 22 Ch. D. 349; *Re Denham* (1883), 25 Ch. D. 752; *London Financial Assocn. v. Kelk* (1884), 26 Ch. D. 107; *Re Liverpool Household Stores Assocn.* (1890), 59 L. J. Ch. 616; *Verner v. General & Commercial Investment Trust*, [1894] 2 Ch. 239; *Re Bassett, Ex p. Lewis* (1895), 2 Mans. 177; *Moxham v. Grant*, [1900] 1 Q. B. 88; *Lucas v. Fitzgerald* (1903), 20 T. L. R. 16; *Towers v. African Tug Co.*, [1904] 1 Ch. 558.

1652. — — —.]—Cos. Act, 1862 (c. 89), Table A, Art. 73, provides that no dividend shall be payable except out of the profits arising from the business of the co. The directors issued balance-sheets whereby it was made to appear,

contrary to the facts, that profits available for dividends had been earned. No proper valuations of the co.'s property were ever made, but the directors acted on the representations of the secretary. Dividends were declared & paid. The co. brought an action against the directors & the secretary:—*Held*: Statute of Limitations did not apply to limit the liability of the directors, but was applicable in the case of the secretary to limit his liability to acts done within the six years before the issue of the writ.

Directors are managing partners, & co. law is only a phase of partnership law modified by statute. The Statute of Limitations cannot be successfully pleaded to a claim for breach of trust.—*MUNICIPAL FREEHOLD LAND CO., LTD. v. POLLINGTON* (1890), as reported in 63 L. T. 238; 2 Meg. 307.

1653. ———.]—By art. of assocn. of a co. incorporated in 1868, it was provided that interest on the money paid up on the shares should be paid to the shareholders until otherwise determined by the directors; & that no dividend or bonus should be payable except out of the profits. No profits were made by the co.; but the directors paid interest to the shareholders out of the capital of the co. until 1878, when the Board of Trade interfered, & the directors ceased to pay interest. B. was a director from 1869 till his death in 1883. In 1886, the co. was wound up; & in 1889 the liquidator commenced an action against the personal representatives of B., seeking to make his estate liable for the money paid as interest to the shareholders out of capital, while he was a director:—*Held*: the directors being in the position of trustees, the Statute of Limitations was no bar to the action.

The same reasoning which prevents the Statute of Limitations from being a bar, renders it impossible to refuse relief by analogy to it (LINDLEY, L.J.).—*Re SHARPE, Re BENNETT, MASONIC & GENERAL LIFE ASSURANCE CO. v. SHARPE*, [1892] 1 Ch. 154; 61 L. J. Ch. 193; 65 L. T. 806; 40 W. R. 241; 8 T. L. R. 194; 38 Sol. Jo. 151, C. A.

Annotations:—*Consd. Soar v. Ashwell*, [1893] 2 Q. B. 390. *Reid. Lock v. Queensland Investment & Land Mortgage Co.*, [1896] 1 Ch. 397; *Re National Bank of Wales*, [1899] 2 Ch. 629; *Brooks v. Muchmaston*, [1909] 2 Ch. 519; *Taylor v. Davies*, [1920] A. C. 636. *Mentd. Re Claridge's Patent Asphalte Co.*, [1921] 1 Ch. 543.

1654. *Auditor—False balance sheet.*]—The arts. of assocn. of a limited co., formed in 1869 for the purpose of lending money on security, provided that when the co. should pay a dividend of 5 per cent. the directors should receive a fixed sum for each attendance, & a further fixed sum for every additional 1 per cent. of dividend; that the directors might declare dividends upon such estimates of account as they might see proper to recommend, so that no dividend should be payable except out of profits; that they should annually lay before the co. a statement of the income & expenditure of the past year, & a balance sheet containing a summary of the property & expenditure of the co.; that the accounts of the co. should be examined every year with the vouchers relating thereto, & the correctness of the balance ascertained by an auditor who should make a report to the members on the balance sheet & accounts stating whether in his opinion the balance sheet was a full & fair balance sheet, containing the particulars required by the arts., & properly

drawn up so as to exhibit a correct view of the state of the co.'s affairs.

The co. never made any annual profits except in one year when it made a profit of less than 5 per cent., but the directors in every year from 1870, when the co. commenced business, declared & paid a dividend of 5 per cent. & upwards; & they remunerated themselves on the corresponding scale, & under the authority of a resolution of the co., paid bonuses to the manager. Such payments were in fact made out of capital.

The balance sheets on which the dividends were declared were prepared not by the directors, but by the manager. They were delusive, they over-estimated the assets of the co., & were framed with the object of showing a profit available for a dividend. The auditor never looked at the arts. of assocn., but accepted the statements of the manager, & certified from time to time that the accounts submitted to him were true copies of those shown in the books of the co. No proper statement of income & expenditure or auditor's report was ever laid before the co. The directors did not know the true state of the co.'s affairs or that the balance sheets were delusive. They never exercised any judgment with reference to the accounts, but relied entirely on the manager & auditor:—*Held*: as the improper payments by the directors were the natural & immediate consequence of breach of duty on the part of the manager & the auditor, the manager & auditor were liable in damages to the amounts so paid, except, in the case of the auditor, who had pleaded the Statute of Limitations, so much thereof as was covered by the statute.—*LEEDS ESTATE, BUILDING & INVESTMENT CO. v. SHEPHERD* (1887), 36 Ch. D. 787; 57 L. J. Ch. 46; 57 L. T. 684; 36 W. R. 322; 3 T. L. R. 841.

Annotations:—*Reid. Municipal Freehold Land Co. v. Pollington* (1890), 63 L. T. 238; *Re London & General Bank* (No. 2), [1895] 2 Ch. 673; *Re Kingston Cotton Mill Co.* (No. 2), [1896] 1 Ch. 331; *Re National Bank of Wales*, [1899] 2 Ch. 629. *Mentd. Lee v. Neuchatel Asphalte Co.* (1889), 41 Ch. D. 1; *Dovey v. Cory*, [1901] A. C. 477; *Re Republic of Bolivia Exploration Syndicate*, [1914] 1 Ch. 139; *Re City Equitable Fire Insce.*, [1925] Ch. 407.

1655. *Secretary—Dividend paid out of capital.*]—*MUNICIPAL FREEHOLD LAND CO., LTD. v. POLLINGTON*, No. 1652, *ante*.

See, also, Sect. 1, sub-sect. 1, *ante*.

v. Solicitors.

1656. *General rule.*]—(1) A letter written to one by the other of two parties liable to pay a debt to a third, & acknowledging the debt, was held not to be such a promise to pay the debt as would oust the operation of the Statute of Limitations.

(2) The Statute of Limitations, in the absence of fraud applies to an action brought by a client against his solr.—*Re HINDMARSH* (1860), 1 Drew. & Sm. 129; 1 L. T. 475; 8 W. R. 203; 62 E. R. 327.

Annotations:—*As to* (2) *Consd. Burdick v. Garrick* (1870), 5 Ch. App. 233. *Appld. Watson v. Woodman* (1875), L. R. 20 Eq. 721. *Consd. Bean v. Wade* (1885), 2 T. L. R. 157. *Distd. Cheese v. Keen*, [1908] 1 Ch. 245. *Reid. North American Land & Timber Co. v. Watkins*, [1904] 1 Ch. 242. *Generally, Reid. Re Friend, Friend v. Friend* (1897), 66 L. J. Ch. 737; *Henry v. Hammond* (1913), 108 L. T. 729.

1657. ———.]—After a dissolution of partnership, by which the continuing party covenanted (*inter alia*) to pay the debts & to pay the retiring partner a sum equal to half the next half-year's

PART VI. SECT. 1, SUB-SECT. 3.—B. (e) v.

1656 i. *General rule.*]—*POWER v. POWER, MULCAHY'S CLAIM* (1884), 13 L. R. Ir. 281.—IR.

Sect. 1.—Whether trustees entitled to plead statute:
Sub-sect. 3, B. (e) v., & (f) i., ii., iii. & iv.]

profit:—Held: (1) part payment of a debt by the continuing partner during the said half-year could not be set up against the retiring partner as an answer to the Statute of Limitations; (2) though the debt was from solrs. to a client in respect of moneys received, there was no express trust to exclude the operation of the statutes.—**WATSON v. WOODMAN** (1875), L. R. 20 Eq. 721; 45 L. J. Ch. 57; 24 W. R. 47.

Annotations:—As to (1) Distd. Re Tucker, Tucker v. Tucker, [1894] 3 Ch. 429. As to (2) Expld. North American Land & Timber Co. v. Watkins, [1904] 1 Ch. 242. Refd. Friend v. Young, [1897] 2 Ch. 421.

1658. Misapplication of funds—Solicitor to bankrupt's estate.]—The Statute of Limitations will not protect the solr. to a commission, who has misapplied money belonging to the estate; but the ct. will not exercise its jurisdiction over him, on the application of a solvent assignee, who has been guilty of laches.—**Re ROBERTSON, Ex p. GOULD** (1834), 4 L. J. Bcy. 7, Ct. of R.

1659. Client's property to be sold by solicitor—Proceeds to be reinvested for client's benefit.]—**BURDICK v. GARRICK**, No. 1632, *ante*.

1660. Solicitor investing client's money on mortgage—Mortgage chosen or approved by client.]—(1) A mtge. was made through a solr. & proved to be an insufficient security. More than six years afterwards an action was brought by the client against the exor. of the solr. claiming damages as for the wilful default of the solr.:—**Held:** on the facts, the client had approved of the mtge. & the solr. merely did the legal part of the business & was not in the position of trustee, & therefore the Statute of Limitations applied.

(2) A solicitor in advancing money on mtge. may be employed, (a) to invest in a particular mtge.; (b) to find securities to be approved by the client & then invest the money; (c) to find securities & invest the money, the client taking little or no part in the business. In an action for negligence against the solrs., the Statute of Limitations is a good defence in the first case, & also in the second case if the client has approved of the mtge., no relation of trustee & *cestui que trust* then existing between them.—**DOOBY v. WATSON** (1888), 39 Ch. D. 178; 57 L. J. Ch. 865; 58 L. T. 943; 36 W. R. 764; 4 T. L. R. 584.

Annotation:—As to (2) Refd. Hackney v. Knight (1891), 7 T. L. R. 254.

1661. — Client taking no part in business.]—**DOOBY v. WATSON**, No. 1660, *ante*.

1662. — —.]—**SOAR v. ASHWELL**, No. 1677, *post*.

Solicitors dealing with trust funds—With knowledge of trust.]—See Sub-sect. 3, B. (b) iii., *post*.

(f) Persons with Knowledge of Trust.

i. In General.

1663. Loan of trust fund.]—**SPICKERNELL v. HOTHAM**, No. 1627, *ante*.

1664. — In breach of trust.]—Where a trustee lends trust money in breach of the trust, & the borrower, with notice of the trust, applies the money to his own use, he cannot be permitted to separate the loan from the trust, & insist that the loan being barred by the statute, the trust is barred also.—**ERNEST v. CROYSBILL** (1860), 2 De G. F. & J. 175; 29 L. J. Ch. 580; 2 L. T.

616; 6 Jur. N. S. 740; 8 W. R. 736; 45 E. R. 589, L. JJ.

Annotations:—Consd. Re Eyre-Williams, Williams v. Williams (1923), 129 L. T. 218. **Mentd. Ernest v. Weiss** (1862), 2 Drew. & Sm. 561; **Hardy v. Metropolitan Land & Finance Co.** (1872), 41 L. J. Ch. 257.

1665. Beneficiary overpaid by mistake.]—Trustees had, by mistake, paid to A., one of the *cestuis que trust*, a portion of the trust funds to which he was not entitled. In a suit by another party interested against A. to make him refund:—**Held:** the Statute of Limitations was inapplicable, he was bound to repay, though more than six years had elapsed, & all his interest in the trust fund was liable to make good the amount.—**HARRIS v. HARRIS** (No. 2) (1861), 29 Beav. 110; 54 E. R. 568.

Annotations:—Expld. & Distd. Re Robinson, McLaren v. Public Trustee, [1911] 1 Ch. 502. Mentd. Re Horne, Wilson v. Cox Sinclair, [1905] 1 Ch. 76.

1666. Assignment for value by tenants for life—Of dividends upon trust fund.]—Husband & wife by deed assigned to a purchaser for value, the dividends to which they or either of them were entitled in a sum of stock which had been set aside in the names of trustees & exors., to answer a legacy given by will to the wife, with a direction that she & her husband should enjoy the interest during their lives, & at their deaths it should devolve to the surviving children. The assignees received the dividends until the husband's death in 1839, & also after his death during the widow's lifetime, who went to live abroad until the year 1847, when the surviving exor., & trustee of the will died, & his representative refused to continue the payments. The widow died in 1853, in America, & administration was taken out at her estate in 1857. The assignee died in 1855. Bill filed in 1860 by the administrator of the widow against the exor. of the assignee, for repayment of the dividends received by him from 1839 to 1847, on the ground of his being either a purchaser with express notice of a trust in favour of the wife, or at least of a debtor not protected by the Statute of Limitations, dismissed with costs.—**PARKIN v. ROCK** (1860), 3 L. T. 286.

See, also, Sub-sect. 1, B. (d), *ante*.

ii. Bankers.

1667. Fund in trust account—Transferred to account of tenant for life.]—A fund was standing to the account of two trustees in the books of some bankers, who had notice that it was a trust fund. By the direction of the tenant for life alone, they, in 1843, transferred it to his account, & thereby obtained payment of a debt due from him to them:—**Held:** the trustees might sue the bankers in this ct. to have the trust fund replaced, & the Statute of Limitations was inapplicable.—**BRIDGMAN v. GILL** (1857), 24 Beav. 302; 53 E. R. 374.

Annotations:—Consd. Coleman v. Bucks & Oxon Union Bank, [1897] 2 Ch. 243. Refd. Hardy v. Metropolitan Land & Finance Co. (1872), 41 L. J. Ch. 257; Soar v. Ashwell, [1893] 2 Q. B. 390.

1668. — Transferred to trustee's private account.]—Where a sum of money was standing in the books of a banking co. to the credit of "the account of the trustees of the late H.," & the bank, knowing that the trustees, each of whom had an overdrawn account at the bank, were not beneficially entitled, allowed them to transfer sums at different times from the trust account to their respective private accounts:—**Held:** (1) the *cestuis que trust* were entitled to recover from the bank the sums so allowed to be transferred, & it

was immaterial whether or not the bank knew what were the circumstances of the trust, & also whether or not the bank profited by the transfer from the one account to the other, so long as they were aware that the money dealt with was trust money; (2) in such a case the Statute of Limitations, 1623 (c. 16), would not constitute a defence to the action.—**FOXTON v. MANCHESTER & LIVERPOOL DISTRICT BANKING CO.** (1881), 44 L. T. 406.

Annotations:—*As to* (1) **Consd. Coleman v. Bucks & Oxon Union Bank**, [1897] 2 Ch. 243. *Refd. A.-G. v. De Winton*, [1906] 2 Ch. 106; **Bath v. Standard Land Co.**, [1901] 1 Ch. 618.

iii. *Husbands of Beneficiaries.*

1669. Loan of trust money—Under power in settlement.—Bill by a *cestui que trust* under a marriage settlement stated, that in & prior to Sept. 1827, trustees of a marriage settlement, under a power, lent to the husband, deft., on his bond, moneys held in trust for the wife, for life, & after her decease, for her appointees; the death of the wife in 1861; an appointment to plff.; that there were no trustees of the settlement; that no payment either of principal or interest had ever been made by deft.; & prayed an account of principal & interest, & payment. Demurrer, on the ground that the debt was barred by the Statute of Limitations, overruled with costs.—**JENNER v. AKERMAN** (1864), 10 L. T. 328; 10 Jur. N. S. 465.

1670. ———.]—The trustees of a marriage settlement, in exercise of a power contained in the deed, advanced to the husband a portion of the trust fund on the security of his bond made payable to themselves. The husband who never repaid this advance, died intestate, & without assets; the trustees never proved the debt, & there were no other creditors. The trust fund became after the husband's death, the absolute property of the widow, who was appointed intestate's administratrix. A sum of money became many years afterwards payable to intestate's estate, & the widow's right to retain it in part payment of the husband's bond debt to the trustees, was disputed by the husband's next of kin:—*Held*: the money lent to the husband remained trust money, & the debt was, therefore, not barred by Statute of Limitations.—**COXWELL v. FRANKLINSKI** (1864), 11 L. T. 153; 12 W. R. 1072.

1671. ———.]—*Re DIXON, HEYNES v. DIXON*, No. 799, *ante*.

1672. Stock never transferred to trustees—Sale by husband & retention of proceeds.—By a marriage settlement made in 1821, stock belonging to the wife was assigned to B., & another upon trust for the separate use of the wife for life, with remainder for the husband for life, with remainder in default of children of the marriage for B. The trustees neglected to have the stock transferred to them, & it remained in the name of the wife, & in 1822 the husband sold it, & possessed himself of the proceeds. B. died in 1829, the husband in 1858, & the wife in 1864. There were no children. In 1866 B.'s exors. claimed the trust fund from the husband's estate:—*Held*: their claim was not barred by Real Property Limitation Act, 1833 (c. 27), or by acquiescence, or by the fact that B. was one of the trustees whose negligence rendered the misapplication of the trust fund possible.—

BUTLER v. CARTER (1868), L. R. 5 Eq. 276; 37 L. J. Ch. 270; 18 L. T. 11; 16 W. R. 111. *Annotation*:—*Refd. Chillingworth v. Chambers*, [1896] 1 Ch. 685.

1673. Covenant in marriage settlement to settle wife's after-acquired property—After-acquired property retained by husband.—A marriage settlement of 1859 contained the usual covenant by the husband & wife to settle the wife's after-acquired property of the value of £100 or upwards.

In 1879 the wife received £285, & paid it into her husband's banking account, on which she had power to draw. Part of it was shortly after invested in two bearer bonds which remained at the bank till the husband's death in 1909 & were now in his exor.'s possession:—*Held*: the moment the wife received the £285 it was specifically bound by the covenant & was consequently subject in equity to a trust enforceable in favour of all persons within the marriage consideration, & therefore, notwithstanding the lapse of time, the trustees were entitled on behalf of those persons to follow & claim the bonds as trust property, though their legal remedy on the covenant was statute-barred.—**PULLAN v. KOE**, [1913] 1 Ch. 9; 82 L. J. Ch. 37; 107 L. T. 811; 57 Sol. Jo. 97.

Annotations:—*Refd. Re Lind, Industrials Finance Syndicate v. Lind*, [1915] 2 Ch. 345; *Re Pryce, Nevill v. Pryce*, [1917] 1 Ch. 234.

1674. Settled fund received & retained by husband.—Testator, who was entitled to a mtge. debt vested in a trustee for him, assigned the same to the trustees of his marriage settlement in 1886 upon trusts under which he took the first life interest, & his wife a life interest after his death, subject to a restraint upon anticipation, with an ultimate trust in default of children, as happened, for testator absolutely. The trustee of the mtge. debt was neither a party to, nor informed of, the settlement. In 1887 the mtge. money was paid to testator, who never accounted for it to the settlement trustees. He died in 1916, & the trustees & widow now claimed the mtge. money:—*Held*: testator was a constructive trustee who had constituted himself such by receiving trust property with the knowledge that it was trust property & the persons representing his estate were not entitled to avail themselves, by analogy, of the Statute of Limitations, but must make good the mtge. money to the trustees of the settlement.—*Re EYRE-WILLIAMS, WILLIAMS v. WILLIAMS*, [1923] 2 Ch. 533; 92 L. J. Ch. 582; 129 L. T. 218; 67 Sol. Jo. 500.

See, also, Sub-sect. 1, B. (d), ante.

iv. *Solicitors.*

1675. Assuming control of trust fund.—Where a solr. to a trustee after the death of the trustee exercises any acts of control over the trust property, the ct. will permit the *cestui que trust* to prove against his estate for the trust money in his hands at the time of his bkpcy.; & the Statute of Limitations is no bar.—*Re SEABER, Ex p. GOWERS* (1837), 2 Deac. 207; 3 Mont. & A. 172; 6 L. J. Bcy. 49.

Annotation:—*Refd. Re Clendenning* (1859), 33 L. T. O. S. 291.

1676. Entire management of trust fund.—Two solrs., partners, father & son, had the entire management of a trust fund, of which a third person, at their request, had become nominal

PART VI. SECT. 1, SUB-SECT. 3.— B. (f) iii.

t. *Trust assets retained by husband.*—O. retained possession of the

business & trade assets after his wife's death, with full knowledge of the trust attaching thereto, & dealt with the property as if it were his own:—*Held*:

his estate was liable to the estate of the settlor without regard to lapse of time or the Statute of Limitations.—*M'ARDLE v. GAUGHRAN*, [1903] 1 I. R. 106.—*IR.*

*Sect. 1.—Whether trustees entitled to plead statute :
Sub-sect. 3, B. (f) iv. Sect. 2. Part VII. Sect. 1.]*

trustee. The father retired from the business, but within six years previous to his death, was proved to have acted in the trusts. By his will he directed his debts, if necessary, to be raised by sale or mtge. out of his real estates, by a second son, his exor., & then gave a part thereof to his partner. The funds having been misapplied a bill was filed after the father's death, against the trustee, to make good the loss. The trustee then filed a bill to have his remedy over against the son, he having become bkpt., as far as possible, & the balance to be paid him out of the father's real estate. It was referred to the master to take the account as sought though there was only a decree for an account, but no account taken, in the first suit, & so no loss proved, & though several preliminary objections had been taken as to parties, etc., as that the officer of a bank which had advanced money to the son on mtge. of the estates in the names of three persons, this did not appear in the mtge. deed, but only on the record, was not made a party; but persons claiming to be interested in a mtge. made by testator before his will were dismissed, having been made parties, without an offer to redeem.—*BRADSTOCK v. WHATLEY* (1845), 6 L. T. O. S. 117.

1677. Receipt of trust fund—For investment on mortgage.]—(1) A trust fund was held by trustees under a will in trust for two persons in equal shares for their respective lives &, after the death of each, in trust as to his share for his children. The fund was entrusted by the trustees to a solr. employed by them as solr. to the trust & was by him invested together with other moneys belonging to different trusts, on an equitable mtge. by deposit of title deeds, in his own name. The mtge. being paid off in Jan. 1879, the solr. received the money so invested from the mtgor. & distributed one moiety of it, the tenant for life having died, among his children, who by his death had become absolutely entitled to the same. He did not account for the other moiety to the trustees but retained the same in his own hands. On Feb. 21, 1891, an action was brought by the surviving trustee under the will against the personal representative of the solr. who had died in Nov. 1879, claiming an account of the money so retained by him :—*Held* : he must be considered as having been in the position of an express trustee of such money & therefore the lapse of time did not act as a bar to the action.

That time (by analogy to the statute) is no bar in the case of an express trust, but that it will be a bar in the case of a constructive trust, is a doctrine which has been long & clearly established (*BOWEN, L.J.*).

(2) First, the doctrine that time is no bar in the case of express trusts has been extended to cases where a person who is not a direct trustee nevertheless assumes to act as a trustee under the trust. Secondly, the rule . . . has also been thought appropriate to cases where a stranger participates in the fraud of a trustee. Thirdly, a similar extension of the doctrine has been acted on in a case where a person received trust property & dealt with it in a manner inconsistent with trusts of which he was cognisant. . . . A person occupying a fiduciary relation, who has property

deposited with him on the strength of such relation, is to be dealt with as an express, & not merely as a constructive, trustee of such property (*BOWEN, L.J.*).—*SOAR v. ASHWELL*, [1893] 2 Q. B. 390; 69 L. T. 585; 42 W. R. 165; 4 R. 602, C. A.

Annotations :—As to (1) *Reid*, *Rochevoucauld v. Boustead*, [1897] 1 Ch. 196. As to (2) *Appld. Re Gallard, Ex p. Gallard*, [1897] 2 Q. B. 8; *Re Dixon, Heynes v. Dixon*, [1900] 2 Ch. 561; *Henry v. Hammond*, [1913] 2 K. B. 515; *Re Eyre-Williams, Williams v. Williams*, [1923] 2 Ch. 533. *Reid. Re Lands Allotment Co. (1894)*, 63 L. J. Ch. 291; *Price v. Phillips* (1894), 11 T. L. R. 86; *Mara v. Browne*, [1895] 2 Ch. 69; *Re Robinson, McLaren v. Public Trustee*, [1911] 1 Ch. 502; *Taylor v. Davies*, [1920] A. C. 636. *Generally, Reid. Friend v. Young*, [1897] 2 Ch. 421; *Trevor v. Hutchins* (1897), 76 L. T. 183; *North American Land & Timber Co. v. Watkins*, [1904] 1 Ch. 242.

See, also, Sub-sect. 1, B. (c) ii., & Sub-sect. 3, B. (e) v., *ante*.

SECT. 2.—TRUSTS FOR PAYMENT OF DEBTS.

1678. Declared by will—Out of realty.]—S. being indebted by simple contract, which was barred by length of time, made his will, & thereby devised lands in trust for the payment of his debts. *Qu.* : whether this devise revives the debt; & whether to a bill filed by the creditor to have the benefit of this trust, a plea of the statute shall be allowed.—*STRAFFORD (EARL) v. BLAKEWAY* (1727), 6 Bro. Parl. Cas. 630; 2 E. R. 1312, H. L.; *revsg. S. C. sub nom. BLAKEWAY v. STRAFFORD (EARL)* (1726), Dick. 48.

Annotations :—*Consd. Burke v. Jones* (1813), 2 Ves. & B. 275. *Reid. Legastick v. Cowne* (1730), Mos. 391; *Lacon v. Briggs* (1744), 3 Atk. 105.

1679. ———.]—*MORSE v. LANGHAM* (1737), cited 2 Ves. & B. at p. 286; 35 E. R. 327.

Annotation :—*Consd. Burke v. Jones* (1813), 2 Ves. & B. 275.

1680. ———.]—Where real estates are devised in trust for the payment of debts, in aid of the personal estate, the Statute of Limitations does not run in equity after the death of testator.—*HUGHES v. WYNNE* (1823), Turn. & R. 307; 37 E. R. 1117.

Annotations :—*Reid. Crallan v. Oulton* (1840), 3 Beav. 1; *Walker v. Jefferys* (1842), 11 L. J. Ch. 209; *Fordham v. Wallis* (1853), 10 Hare. 217; *Blower v. Blower* (1858), 28 L. J. Ch. 181.

1681. ———.]—Testator charged his real estates with his debts, & he devised his C. plantation in trust to pay his debts. He died in 1834, & the produce of C. being in ct. :—*Held* : in 1859, the creditors were not barred as to the fund in ct., a trust having been created in their favour, but they were barred as to the other real estates, they having a mere charge thereon.—*JACQUET v. JACQUET* (1859), 27 Beav. 332; 54 E. R. 130; *sub nom. JAQUET v. JAQUET*, 7 W. R. 543.

Annotations :—*Folld. Dickinson v. Teasdale* (1862), 31 Beav. 511. *Reid. Proud v. Proud* (1862), 32 Beav. 234; *Cunningham v. Foot* (1878), 3 App. Cas. 974.

1682. ———.]—(1) A charge on real estate for payment of debts with a direction to exors. to raise sufficient, by "mtge. or otherwise," does not create an express trust, within Real Property Limitation Act, 1833 (c. 27), s. 25.

(2) Upon a bill to enforce such a charge it is not necessary to plead Civil Procedure Act, 1833 (c. 42), in addition to Real Property Limitation Act, 1833 (c. 27), although a personal remedy is sought.

(3) A devise of real estate was made to two persons in equal moieties, charged as to each

PART VI. SECT. 2.

1678 i. Declared by will—Out of realty.]
—Where lands are devised in trust for payment of debts, the Statute of Limitations does not run after death

of testator against debts not barred thereby at his death.—*FERGUS' EXECUTORS v. GORE* (1803), 1 Sch. & Lef. 107.—*IR.*

1678 ii. ———.]—*HUNT v. BATE-*

MAN (1848), 10 I. Eq. R. 360, 378.—*IR.*
a. ———.] — *ANUND MOYE DABI v. GRISH CHUNDER MYTI* (1881), I. L. R. 7 Cal. 772; 9 C. L. R. 327.—*IND.*

moiety with the payment of half testator's debts, with a general charge of all testator's real estate for the payment of debts:—*Held*: a payment on account by one devisee did not keep the debt alive as against the devisee of the other moiety.

—*DICKENSON v. TEASDALE* (1862), 1 De G. J. & Sm. 52; 1 New Rep. 141; 7 L. T. 655; 9 Jur. N. S. 237; 46 E. R. 21, L. C.

Annotations:—*As to* (1) *Reid*. *Proud v. Proud* (1862), 32 Beav. 234; *Cunningham v. Foot* (1878), 3 App. Cas. 974; *Re Chant, Bird v. Godfrey*, [1905] 2 Ch. 225. *As to* (3) *Apld.* *Coope v. Cresswell* (1866), 2 Ch. App. 112. *Consd.* *Re Lacey, Howard v. Lightfoot*, [1907] 1 Ch. 330. *Reid.* *Re England, Steward v. England* (1895), 65 L. J. Ch. 21; *Read v. Price*, [1909] 1 K. B. 577.

— — —.]—*See* EXECUTORS, Vol. XXIII., p. 364, Nos. 4322–4329.

— *Out of personal estate.*]—*See* EXECUTORS, Vol. XXIII., p. 364, Nos. 4330–4332.

1683. — *Out of blended estate.*]—A promissory note, dated Oct. 4, 1842, was payable at "six months' notice." An action was brought on it in Oct. 1848, & the indorsement on the writ stated that on payment within four days proceedings would be stayed. The action was abandoned, & a formal notice to pay in six months was given in Jan. 1850. Testator died in Dec. 1850, having devised his real & personal estate to his exors. in trust to sell, & in the first place pay his debts. A creditor's suit was instituted by the payee in 1855, to which the administrators pleaded the Statute of Limitations:—*Held*: the trust for payment of the debts prevented the operation of the statute, both as to the real & personal estate, & neither the action nor the indorsement on the writ were sufficient notice to pay, according to the tenor of the note.—*MOORE v. PETCHELL* (1856), 22 Beav. 172; 52 E. R. 1073.

— — —.]—*See* EXECUTORS, Vol. XXIII., pp. 365, 366, Nos. 4333–4341.

Direction to executor to pay statute-barred debt.

—*See* EXECUTORS, Vol. XXIII., pp. 358 *et seq.*, Nos. 4261 *et seq.*

1684. *Dissolution of friendly society—Trust of property declared for benefit of creditors.*]—A simple contract debt of a friendly society contracted in 1840:—*Held*: not barred by the Statute of Limitations in 1860, a trust of the property having, on its dissolution, been declared for the benefit of its creditors.—*PARE v. CLEGG* (1861), 29 Beav. 589; 30 L. J. Ch. 742; 4 L. T.

669; 26 J. P. 53; 7 Jur. N. S. 1136; 9 W. R. 795; 54 E. R. 756.

Annotation:—*Mentd.* *Bowman v. Secular Soc.*, [1917] A. C. 406.

1685. *Assignment to trustees for payment of debts—Assignment not communicated to creditor.*]—A bond was executed in favour of the Bank of England by B. in 1813. In 1823 B. made a voluntary settlement of his property, giving certain trust funds to trustees in trust, amongst other things, to pay thereout the principal & interest due on the bond when B. should be required to pay the same. B. died in 1828, & the trust funds subsequently became the property of E. E. by her will made in 1869, gave certain funds to trustees in trust to pay the principal & interest due on the bond when, & if, the trustees of the deed of 1823 should be called on to pay the same, & subject thereto as therein mentioned. The bank were unaware of their being entitled till 1870 & no claim was made by them under the bond until now:—*Held*: no trust for the bank was created by the deed or will, & the only person who could call on the trustees to pay was B.; the claim, therefore, was barred by the Statute of Limitations.—*HENRIQUES v. BENSUSAN, BANK OF ENGLAND CLAIM* (1872), 20 W. R. 350.

1686. — *Covenant to get in partner's separate assets—To be applied to partnership debts.*]—By an inspectorship deed executed in 1833, debtors, who were partners, covenanted to collect & get in the partnership assets, & to pay the moneys received into the banking house of the firm & apply them so far as the same would extend in satisfaction of the debts due to their creditors named in the deed; & each of them further covenanted to collect & get in the assets belonging to his separate estate & apply them in payment of his separate debts, & pay the surplus, there being none in the event which happened, into the banking house of the firm, to be applied for the benefit of the creditors of the firm according to the first covenant above mentioned:—*Held*: no express trust was constituted by the deed as regarded the separate assets of the partners; & the period fixed by the Statute of Limitations having expired, the claim was barred.—*TREVOR v. HUTCHINS* (1897), 76 L. T. 636, C. A.

— *How far creditor a cestui que trust.*]—*See* BANKRUPTCY, Vol. V., pp. 1179 *et seq.*, Nos. 9532 *et seq.*

Part VII.—Equity and the Statutes of Limitation.

SECT. 1.—DIRECT APPLICATION OF STATUTES BY COURTS OF EQUITY.

1687. *Court will act in obedience to statutes.*]—(1) Cts. of equity though not within the words of Statute of Limitations, which apply to particular legal remedies, are within the spirit & meaning of them.

(2) Cts. of equity act not by analogy but in obedience to Statutes of Limitation.

(3) Upon all legal titles & legal demands cts. of equity are bound by Statutes of Limitation.

(4) Whenever the Legislature has limited a period for law proceedings, equity will in analogous cases consider itself bound by the same limitation.

—*HOVENDEN v. ANNESLEY (LORD)* (1806), 2 Sch. & Lef. 607.

Annotations:—*As to* (1) *Apprvd.* *Rolph v. Thomson, Griffin v. Richards* (1831), 9 L. J. O. S. Ch. 213. *Reid.* *Allcard v. Skinner* (1887), 36 Ch. D. 145. *As to* (2) *Apprvd.* *Rolph v. Thomson, Griffin v. Richards* (1831), 9 L. J. O. S. Ch. 213. *Consd.* *Foley v. Hill* (1844), 1 Ph. 399; *Knox v. Gye* (1872), L. R. 5 H. L. 656; *Eccl. Comrs. for England v. N. E. Ry.* (1877), 4 Ch. D. 845. *As to* (4) *Consd.* *Knox v. Gye* (1872), L. R. 5 H. L. 656. *Distd.* *Charter v. Watson*, [1899] 1 Ch. 175. *Reid.* *Marshall v. Smith* (1865), 5 Giff. 37. *Generally.* *Consd.* *Gibbs v. Guild* (1882), 9 Q. B. D. 59. *Reid.* *Cholmondeley v. Clinton* (1820), 2 Jac. & W. 1; *Brooksbank v. Smith* (1836), 2 Y. & C. Ex. 58; *Clanricarde v. Henning* (1861), 30 Beav. 175; *Friend v. Young*, [1897] 2 Ch. 421; *Molloy v. Mutual Reserve Life Insce.* (1906), 94 L. T. 756. *Mentd.* *Gwynne v. Gell* (1869), 20 L. T. 508; *Ship v. Crosskill* (1870), L. R. 10 Eq. 73; *Re Cross, Harston v.*

Sect. 1.—Direct application of statutes by courts of equity. Sect. 2: Sub-sect. 1.]

Tenison (1882), 20 Ch. D. 109; Thorne v. Heard, [1894] 1 Ch. 599; *Re* McCallum, *McCallum v. McCallum*, [1901] 1 Ch. 143.

1688. Legal demands.]—HOVENDEN v. ANNESLEY (LORD), No. 1687, ante.

1689. —.]—In the case of a legal demand a ct. of equity acts in obedience & not merely by analogy to Statutes of Limitations.—**FOLEY v. HILL** (1844), 1 Ph. 399; 13 L. J. Ch. 182; 2 L. T. O. S. 513; 8 Jur. 347; 41 E. R. 683, L. C.; *on appeal* (1848), 2 H. L. Cas. 28, H. L.

Annotations:—*Reid. How v. Winterton*, [1896] 2 Ch. 626. **Mentd.** *Harris v. Harris* (1844), 3 Hare, 450; *Re* Gibson & Sturt, *Ex p. St. Alban's Bank* (1850), 15 L. T. O. S. 95; *Pennell v. Duffell* (1853), 4 De G. M. & G. 372; *Padwick v. Hurst* (1854), 18 Beav. 575; *Thomas v. Cooper* (1854), 18 Jur. 688; *Blower v. Blower* (1858), 5 Jur. N. S. 33; *Jackson v. Ogg* (1859), *John*, 397; *Teed v. Beere* (1859), 33 L. T. O. S. 26; *Smith v. Leveaux* (1863), 2 De G. J. & Sm. 1; *Hill v. South Staffordshire Ry.* (1865), 12 L. T. 63; *St. Aubyn v. Smart* (1867), L. R. 5 Eq. 183; *A.-G. v. Edmunds* (1868), L. R. 6 Eq. 381; *Moxon v. Bright* (1869), 4 Ch. App. 292; *South Australian Insee. v. Randell* (1869), L. R. 3 P. C. 101; *Burdick v. Garrick* (1870), 5 Ch. App. 233; *Blyth v. Whiffin* (1872), 27 L. T. 330; *Garnett v. McKewan*, *Public Officer of London & County Banking Co.* (1872), 21 W. R. 57; *Summers v. City Bank* (1874), L. R. 9 C. P. 580; *Banner v. Berridge* (1881), 18 Ch. D. 254; *Seagram v. Tuck* (1881), 44 L. T. 800; *Re* Palmer, *Ex p. Richdale* (1882), 19 Ch. D. 409; *Greenwell v. National Provincial Bank* (1883), *Cab. & El.* 56; *Marten v. Rocke*, *Eyton* (1885), 53 L. T. 946; *Atkinson v. Bradford Third Equitable Benefit Bldg. Soc.* (1890), 25 Q. B. D. 377; *Re* Tidd, *Tidd v. Overell*, [1893] 3 Ch. 154; *Royal Bank of Scotland v. Tottenham*, [1894] 2 Q. B. 715; *Re* Derbyshire, *Webb v. Derbyshire*, [1906] 1 Ch. 135; *Kerrison v. Glyn, Mills, Currie* (1911), 81 L. J. K. B. 465; *London Joint Stock Bank v. Macmillan & Arthur*, [1918] A. C. 777; *Re* Richardson, *Pole v. Pattenden*, [1920] 1 Ch. 423; *Joachimson v. Swiss Bank Corp.*, [1921] 3 K. B. 110.

1690. —.]—Devise of real estate to trustees, for a term of twenty-one years, & subject thereto, & to the trusts thereof, to A. for life, with liberty to cut timber, etc., for buildings & repairs only; remainder to B. for life, with like liberty, etc.; remainder to the sons of B. successively in tail; & after like remainders, to C. & D. & their sons respectively, remainder to E. for life, with like liberty, etc.; remainder to the sons of E. successively in tail, with divers remainders over; remainder to testator's own right heirs, with the declaration that the trustees of the term should receive the rents & profits of the estates, cut, fell & sell the timber at mature growth in due succession, & yearly (until testator's debts & pecuniary legacies should be paid) thereout pay:—(a) a certain annuity, & also a yearly rent-charge of £1,000, to the person entitled to the estates expectant on the determination of the term; (b) the expenses of the trust; (c) his funeral expenses; & (d) the pecuniary legacies & annuities given by his will, or so much as his personal estate should not pay; & after such payment, or the raising of a fund sufficient for the same, to permit the person entitled to the estates expectant on the term to enter into possession thereof, subject to such annuities as should then remain charged, & the term then to cease. Testator empowered the tenants for life, & the respective devisees in possession, to exchange part of the devised lands for others of greater or equal value, & authorised his exors. to preserve the wood, so as to continue a succession in the fall thereof, & he empowered them during & after the term, until some person was entitled to the estates in tail, or for some greater estate, to enter

& cut timber at mature growth for sale, & to apply the proceeds in payment of his funeral expenses, debts & legacies, until the trusts of the term should be satisfied; & then, with the consent of the devisees in possession, to invest the surplus in the purchase of other lands in fee, to be settled to the same uses as the devised estates. Testator died in 1803. The personal estate sufficed to pay his debts & pecuniary legacies, but not to provide for the annuities. B. then the first tenant for life on the death of testator, entered into possession for the estates, & so continued during his life. B. died in 1837 without issue, whereupon E., the next surviving tenant for life, entered into possession. In a suit instituted in 1842, by the first son of E. as tenant in tail expectant on the decease of E. against the representatives of the trustees, & the exors. of B. the deceased tenant for life:—**Held**: the tenant in tail expectant on the decease of E. was not entitled to an account in this ct., as against the estate of B. or of the trustees, of any timber cut during the lifetime of B. the right of pltf., if any, being a legal right, & debts. being entitled to the protection of Statutes of Limitation.

The fact that the legal remedy which existed is obstructed or lost by lapse of time is no ground for the interposition of a ct. of equity.—**FERRAND v. WILSON** (1845), 4 Hare, 344; 15 L. J. Ch. 41; 9 Jur. 860; 67 E. R. 680.

Annotations:—**Mentd.** *Dungannon v. Smith* (1846), 12 Cl. & Fin. 546; *Kekewich v. Marker* (1851), 2 Mac. & G. 311; *Briggs v. Oxford* (1852), 1 De G. M. & G. 363; *Langdale v. Briggs* (1856), 8 De G. M. & G. 391; *Carroll v. Graham* (1865), 11 Jur. N. S. 1012; *Birmingham Canal Co. v. Cartwright* (1879), 11 Ch. D. 421; *Dashwood v. Magniac*, [1891] 3 Ch. 306.

1691. —.]—*Re* **ROBINSON, McLAREN v. PUBLIC TRUSTEE**, No. 1761, *post*.

1692. Proceedings within words of statute.]—**KNOX v. GYE**, No. 1702, *post*.

1693. —.]—In an administration action commenced in Dec. 1878, by one exor. of a testator, who was also a creditor of his testator, against his co-exor., the usual judgment in a creditor's action was pronounced in Dec. 1879, & some time afterwards a claim was brought in by a creditor against the estate upon a promissory note of testator dated in Nov. 1873:—**Held**: the claim was barred by Statute of Limitations, 1623 (c. 16).

In the first place, the Statute of Limitations did not effect cts. of equity, because it only applied to what one commonly called common law actions. If any action is properly described by the statute of James [Statute of Limitations, 1623 (c. 16)], that statute applies to the action now before the ct., whether it is brought in one ct. or another; & the statute is consequently binding upon the High Ct.—there is no question about that—in every case to which it applies. Bills in equity have been abolished, & whenever it is an action to recover a debt upon a contract, the statute is binding upon the High Ct. in every case in which it applies (**JESSEL, M.R.**).—*Re* **GREAVES, BRAY v. TOFIELD** (1881), 18 Ch. D. 551; 50 L. J. Ch. 817; 45 L. T. 464; 30 W. R. 55.

1694. —.]—**GIBBS v. GUILD**, No. 1819, *post*.

SECT. 2.—APPLICATION OF STATUTES BY ANALOGY.

SUB-SECT. 1.—GENERAL RULES.

1695. Court of equity will act by analogy.]—When a person has been ejected at law, & the other

PART VII. SECT. 2, SUB-SECT. 1.

1695 i. Court of equity will act by analogy.]—Though the Statute of Limitations does not apply in terms to proceedings in equity, yet such proceedings are affected by analogy to the statute.—**BOND v. HOPKINS** (1802), 1 Sch. & Lef. 413.—**IR.**

party has been in possession above twenty years, & no account demanded or bill filed in that time, the Statute of Limitations 1623 (c. 16), will bar an account in this ct., as well as an action of trespass for the mesne profits at law; for *jus possessionis* is gone by the statute, & consequently the mesne profits; & if once the statute begins to attach, incapacity, as coverture, etc., will not aid it. This statute does not extend to a trust, but in this case debt. coming in by a recovery at law, & the twenty years elapsed before the bill filed, the bill must be dismissed *quoad* the account of rents & profits (HARCOURT, C.).—NEVARRE v. RUTTON (1714), 2 Eq. Cas. Abr. 9; 22 E. R. 7.

1696. —.]—An exor. of a house steward to B., after an acquiescence of seventeen years, sets up a demand for a large sum due for business done by his testator, to which the representative of Lord B. insisted on Statute of Limitations. Satisfaction to be presumed from the length of time, for it is not to be imagined, if anything was really due to pltf., that he would have been quiet under it.

It is a demand clearly barred by the Statute of Limitations both in law & equity (LORD HARDWICKE, C.).—LACON v. BRIGGS (1744), 3 Atk. 105; 26 E. R. 864.

Annotations:—Mentd. Burke v. Jones (1813), 2 Ves. & B. 275; Scales v. Jacob (1826), 3 Bing. 638; Jones v. Scott (1831), 1 Russ. & M. 255.

1697. —.]—HOVENDEN v. ANNESLEY (LORD), No. 1687, ante.

1698. —.]—An estate subject to a mtge. in fee being in settlement with an ultimate limitation to the right heirs of R. A., on the expiration of the previous estate enters claiming to be entitled under that limitation, & he, & after his death, his son, continue in quiet possession, paying interest on the mtge. for twenty years. The devisee of the person really entitled under the limitation is barred by the length of time.

Cts. of equity of this country . . . have refused relief to state demands, even in cases where no statutable limitation existed, & whenever any statute has fixed the period of limitation by which the claim, if it had been made in a ct. of law, would have been barred, the claim has been by analogy confined to the same period in a ct. of equity (PLUMER, M.R.).—CHOLMONDELEY (MARQUIS) v. CLINTON (LORD) (1820), 2 Jac. & W. 1; 37 E. R. 527; *affd.* (1821), 4 Bli. 1, H. L.

Annotations:—Apld. Cuthbert v. Creasy (1823), 4 Bli. 125; Grenfell v. Girdlestone (1837), 2 Y. & C. Ex. 662; Marshall v. Smith (1865), 5 Giff. 37. *Refd.* Dillon v. Parker (1822), Jac. 505; Bennett v. Colley (1832), 5 Sim. 181; Ashton v. Milne (1833), 6 Sim. 369; Parrott v. Palmer (1834), 3 My. & K. 632; Stone v. Godfrey (1854), 5 De G. M. & G. 76; Penny v. Allen (1857), 7 De G. M. & G. 409. *Mentd.* Doe d. Pilkington v. Spratt (1833), 5 B. & Ad. 731; Leith v. Irvine (1833), 1 My. & K. 277; Bent v. Young (1838), 2 Jur. 202; Sturgis v. Champneys (1839), 5 My. & Cr. 97; Davies v. Quarterman (1840), 4 Y. & C. Ex. 257; Anderson v. Wallis (1842), 12 L. J. Ch. 291; Boidell v. Golightly (1842), 12 L. J. Ch. 187; Sayer v. Wagstaff (1843), 2 Y. & C. Ch. Cas. 230; Farr v. Sheriffe, Dykes v. Farr (1845), 4 Hare, 512; Fulham v. McCarthy (1848), 1 H. L. Cas. 703; Christ's Hospital v. Grainger (1849), 1 H. & Tw. 533; Baboo Kasi Persad Narain v. Mussumat Kawalbasi Kooer (1851), 5 Moo. Ind. App. 146; A.-G. v. Murdoch (1852), 1 De G. M. & G. 86; Cottrell v. Hughes (1855), 3 C. L. R. 496; Robertson v. Norris (1858), 1 Giff. 421; Wing v. Angrave (1860), 8 H. L. Cas. 183; Hornby v. Toxteth Park Burial Board (1862), 31 Beav. 52; Pearce v. Morris (1869), 5 Ch. App. 227; Warner v. Jacob (1882), 20 Ch. D. 220; Charles v. Jones (1887), 35 W. R. 645; Magnus v. Queensland National Bank (1887), 36 Ch. D. 25; Farrar v. Farrars (1888), 40 Ch. D. 396; Bolton v. Salmon, [1891] 2 Ch. 48; Soar v. Ashwell, [1893] 2 Q. B. 390; Turner v. Walsh, [1909] 2 K. B. 484.

1699. —.]—CUTHBERT v. CREASY (1821), 4 Bli. 125; 4 E. R. 765, H. L.

Annotation:—*Refd.* Parrott v. Palmer (1834), 3 My. & K. 632.

1700. —.]—The ct. will not allow a decree made fifty years ago to be appealed from.—ROLPH v. THOMSON, GRIFFIN v. RICHARDS (1831), 9 L. J. O. S. Ch. 213, L. C.

1701. —.]—HICKS v. SALLITT, No. 1729, *post*.

1702. —.]—Where there is a remedy at law & a correspondent remedy in equity, supplementing that of the common law, & the legal remedy is subject by statute to a limit in point of time, a ct. of equity in affording the correspondent remedy will act by analogy to the statute, & impose on the remedy it affords the same limit as to time. Where, therefore, in the matter of enforcement of a legal right, the ct. of common law would, under the provisions of Statute of Limitations, refuse the enforcement after the lapse of six years from the accruing of the right of action, a ct. of equity will, where its power to grant relief is asked for under similar circumstances, adopt the principle of the statute & decline to grant such relief.

T. advanced £12,000 to G. on the terms of partnership. T. made a will, leaving this money equally between K. & G. T. died in Dec. 1854, before old Covent Garden Theatre was burned, which event took place in Mar. 1856. There had been, before Dec. 1854, negotiations between G. & one H. to allow G. the use of Her Majesty's Theatre; but though a sum of £5,000, part of T.'s £12,000, had been paid to H. under these negotiations, he had never performed his contract. G. finally brought an action against H. & recovered judgment for £5,000: but ultimately, after the death of T., yet within six years of the date of a bill filed by K. for an account, consented to accept £2,500 as a compromise. K., in Dec. 1864, filed a bill against G. for an account of profits in the partnership with T., & of what was due to K. in respect thereof, under T.'s will:—*Held*: (1) the title of K. under T.'s will began in Dec. 1854, & was barred in equity, by analogy to Statute of Limitations, the bill not having been filed till 1864; (2) the surviving partner not being a trustee for the exors. of his deceased partner, the payment of the £2,500 from H. within six years from the filing of the bill did not take the case out of the statute.

If any proceeding in equity be included within the words of the statute, there a ct. of equity, like a ct. of law, acts in obedience to the statute (LORD WESTBURY).—KNOX v. GYE (1872), L. R. 5 H. L. 656; 42 L. J. Ch. 234.

Annotations:—As to (1) Apld. Friend v. Young, [1897] 2 Ch. 421. *Refd.* Meyappa Chetty v. Supramanian Chetty, [1916] 1 A. C. 603; Jay v. Jay, [1924] 1 K. B. 826. As to (2) *Consd.* Taylor v. Taylor (1873), 28 L. T. 189. *Distd.* Betjemann v. Betjemann, [1895] 2 Ch. 474. *Expld.* Gopala Chetty v. Vijayaraghavachariar, [1922] 1 A. C. 488. *Refd.* Edwards v. Warden (1874), 9 Ch. App. 495; Noyes v. Crawley (1878), 10 Ch. D. 31; Barton v. North Staffordshire Ry. (1888), 38 Ch. D. 458; *Re* Sharpe, *Re* Bennett, Masonic & General Life Assce. v. Sharpe, [1892] 1 Ch. 154; Piddock v. Burt (1893), 63 L. J. Ch. 246; The Pongola (1895), 73 L. T. 512; How v. Winterton, [1896] 2 Ch. 626; Bulli Coal Mining Co. v. Osborne, [1899] A. C. 351; Henry v. Hammond (1913), 108 L. T. 729. *Generally*, *Mentd.* Parker v. Lewis (1873), 21 W. R. 928; Charles v. Jones (1887), 35 Ch. D. 544; Stamp Duties Comr. v. Salting, [1907] A. C. 449; Gordon v. Holland, Holland v. Gordon (1913), 82 L. J. P. C. 81; Bank of Scotland v. Macleod, [1914] A. C. 311; Stephenson v. Akt. Für Carton-Nagen-Industrie, [1918] A. C. 239; Rodriguez v. Speyer, [1919] A. C. 59.

1703. —.]—BULLI COAL MINING Co. v. OSBORNE, No. 1798, *post*.

1704. — Unless inequitable to do so.]—As cts. of equity will not entertain state demands, they have thought proper to adopt the limit of six years in analogy to the statute [Statute of Limitations]: the pleas of the statute are admitted in these cts. by analogy only. Where the circumstances of a case are such as to make it

Sect. 2.—Application of statutes by analogy: Sub-sects. 1 & 2, A. & B. (a).]

against conscience to apply the rule founded upon this analogy, the ct. will not enforce it (HART, V.-O.).—**STERNDALÉ v. HANKINSON** (1827), 1 Sim. 393; 57 E. R. 625.

Annotations:—Consd. Re Greaves, Bray v. Toffield (1881), 18 Ch. D. 551. **Reid. Berrington v. Evans** (1835), 1 Y. & C. Ex. 434; **St. John v. Boughton** (1838), 9 Sim. 219; **Woodgate v. Field** (1842), 2 Hare, 211; **Watson v. Birch** (1847), 15 Sim. 523; **Bennett v. Bernard** (1848), 11 L. T. O. S. 375; **Manby v. Manby** (1876), 3 Ch. D. 101. **Mentd. Thomas v. Griffith** (1860), 2 De G. F. & J. 555.

1705. ———.]—It may be true that although a ct. of equity may consider itself bound, & may be bound for certain purposes, by the Statute of Limitations, it is not bound to give relief in every case where under analogous circumstances the Statute of Limitations would not have applied at law (KNIGHT-BRUCE, V.-C.).—**SIBBERING v. BALCARRAS (EARL)** (1850), 3 De G. & Sm. 735; 19 L. J. Ch. 252; 15 L. T. O. S. 245; 14 Jur. 753; 64 E. R. 682.

Annotations:—Reid. Harcourt v. White (1860), 28 Beav. 303; **Spackman v. Evans** (1868), L. R. 3 H. L. 171; **Browne v. McClintock** (1873), L. R. 6 H. L. 434; **Carey v. Cuthbert** (1873), 22 W. R. 249.

1706. ———.]—TROTTER v. MACLEAN, No. 1797, *post*.

1707. ———.]—GIBBS v. GUILD, No. 1819, *post*.

1708. ———.]—The limitations imposed by s. 2 of Civil Procedure Act, 1833 (c. 42), are not applicable to an action by remaindermen against the exors. of a deceased tenant for life in respect of damage to the estate during his lifetime by reason of his failure to fulfil his obligation to repair. Such an action is not based on tort, but on the equitable principle that where a person accepts a benefit under a will on condition that he shall discharge a certain liability, he takes the benefit *cum onere*, & a ct. of equity will not apply to the equitable remedy the limitation contained in s. 2 of the Act as to the time within which the action must be brought.—**JAY v. JAY**, [1924] 1 K. B. 826; 93 L. J. K. B. 280; 130 L. T. 667, D. C.

Annotation:—Mentd. Re Field, Sanderson v. Young, [1925] 1 Ch. 636.

1709. ——— Only if cases analogous—Real & personal property.]—No doubt equity, in the case of an equitable debt, follows the simple analogy afforded to it by the law applicable to a legal debt; but I never heard that a ct. of equity is under any obligation to follow as regards personal estate, the analogy of a statute which applies to real estate. That is not an analogy within the application of the rule that equity follows the law (KAY, J.).—**MELLERSH v. BROWN** (1890), 45 Ch. D. 225; 60 L. J. Ch. 43; 63 L. T. 189; 38 W. R. 732.

Annotation:—Reid. Re Stucley, Stucley v. Kekewich, [1906] 1 Ch. 67.

1710. ———.]—Re SHARPE, Re BENNETT, MASONIC & GENERAL LIFE ASSURANCE CO. v. SHARPE, No. 1653, *ante*.

SUB-SECT. 2.—PARTICULAR INSTANCES.

A. In General.

1711. Ejectment.]—Length of time which will not bar an ejectment shall not bar a bill in equity.—**COOK v. ARNHAM** (1734), 3 P. Wms. 283; Cas.

temp. Talb. 35; 2 Eq. Cas. Abr. 235; 24 E. R. 1066, L. C.

Annotations:—Mentd. Chapman v. Gibson (1791), 3 Bro. C. C. 229; **Whiting v. White** (1792), 2 Cox, Eq. Cas. 290; **Kidney v. Coussmaker** (1806), 12 Ves. 136.

1712. Impeachment of annuity.]—An annuity granted on 1790, the grantee of which died in 1794, & the interest of which was regularly paid till 1800 without objection, shall not be impeached for a supposed defect of consideration, which might have been explained by the grantee if living. *Semble*: an annuity paid without objection for more than six years shall be protected by analogy to Statute of Limitation against any such objection *dehors* the memorial, without strong reasons to the contrary.—*Ex p.* **MAXWELL** (1801), 2 East, 85; 102 E. R. 301.

Annotations:—Consd. Faircloth v. Gurney (1833), 9 Bing. 622. **Reid. Williams v. Hockin** (1818), 8 Taunt. 435; **Williamson v. Goold** (1823), 1 Bing. 234.

1713. Recovery of debt.]—A debt, which could not be recovered in an action against a plea of Statute of Limitations, nor in equity by analogy to it, not admitted under a commission of bkpcy.—*Ex p.* **DEWDNEY**, *Ex p.* **SEAMAN** (1809), 15 Ves. 479; 2 Rose, 59, n.; 33 E. R. 836, L. C.

Annotations:—Consd. Burke v. Jones (1813), 2 Ves. & B. 275. **Apprvd. Re Dewdney, Ex p. Roffey** (1815), 2 Rose, 245. **Expld. Mavor v. Pyne** (1825), 3 Bing. 285; **Fuller v. Redman (No. 2)** (1859), 26 Beav. 614. **Consd. Adams v. Waller** (1866), 35 L. J. Ch. 727. **Reid. Jellis v. Mountford** (1821), 4 B. & Ald. 256; **Jones v. Scott** (1831), 1 Russ. & M. 255; **Shewen v. Vanderhorst** (1831), 1 L. J. Ch. 107; **Re Brakenridge** (1847), 10 L. T. O. S. 249; **Briggs v. Wilson** (1854), 5 De G. M. & G. 12; **Midgley v. Midgley**, [1893] 3 Ch. 282; **Re Fleetwood & District Electric Light & Power Syndicate**, [1915] 1 Ch. 486. **Mentd. Re Worsley**, [1901] 1 K. B. 309.

1714. ———.]—Re DEWDNEY, Ex p. ROFFEY (1815), 2 Rose, 245; 19 Ves. 468; 34 E. R. 390. **Annotation:—Mentd. Re Baillie, Ex p. Greenwood** (1834), 3 Deac. & Ch. 398.

1715. Suit for specific performance—Remedy at law barred.]—Statute of Limitations cannot be pleaded to a suit for specific performance.

If there has been such a lapse of time that the ct., proceeding upon a rule adopted by analogy to Statute of Limitations, would refuse to enforce specific performance; these circumstances, if not disclosed in the bill so as to enable deft. to demur, ought to be stated in the plea; & the ct., for the purpose of applying its own rule, will advert to the statute, though not pleaded.—**TALMASH v. MUGLESTON** (1826), 4 L. J. O. S. Ch. 200.

1716. ———.]—By a memorandum, dated Apr. 25, 1874, it was witnessed that deft. deposited with pltf. certain title deeds by way of equitable mtge. for £6,000 & interest. Deft. also agreed to pay to pltf. on demand £6,000 & interest, & to execute a proper mtge. with all the usual powers & authorities usually given to a mtgee. This memorandum was not under seal. No interest was paid under this agreement, & nothing was done until about eleven years after the date of it, when this action was brought for the specific performance of the agreement. At the trial it was declared that pltf. was entitled to a lien on the property comprised in the deeds for the money advanced, & to have the agreement specifically performed, but that was without prejudice to deft.'s right to insist on Statute of Limitations as a defence against any principal sum or interest. The question was, whether pltf. was entitled to have in the mtge. a covenant for principal & interest. The statute was relied on as a bar to any such right. A correspondence had in 1885 passed between the

PART VII. SECT. 2, SUB-SECT. 2.—A.

o. Redemption of mortgage.]—The limitation of time to redeem a mtge. is in equity in analogy to the Statute of Limitations at law.—**BLAKE v. FOSTER** (1813), 2 Ball & B. 387, 402; *reversd.* (1823), 4 Bli. 140; 2 Mol. 357, n.—**IR.**

parties in which pltf. had demanded an account of how matters stood between them. Deft. answered that he was unable to make out the account, but that he should be glad to leave the whole thing entirely in pltf.'s hands, & adopt whatever he suggested. He also wrote: "There is only one thing which gives me uneasiness, which is, that, should I survive you, your exors. might sell the land at a forced sale for little or nothing, & make a claim against me, which I have no funds to meet":—*Held*: deft.'s letters amounted to an admission of his liability to account, & also of his present liability to pltf.; there was nothing in those letters to prevent the admission from carrying with it a promise to pay; & the case was taken out of Statute of Limitations, & pltf. was entitled to have a covenant for the payment of principal & interest.

The agreement is not under seal, therefore the debt thereby referred to is not grounded on any contract, according to the words in the statute of James [Statute of Limitations, 1623 (c. 16)]. Therefore, if at the end of six years an action had been brought either to recover the £6,000 & interest therein mentioned, or for breach of covenant to execute a mtge. at law, the statute of James would have been a complete bar; & it seems to me quite contrary to the principles on which a ct. of equity acts, or to the way in which it obeys or follows the Statute of Limitations, that the remedy at law being barred, the ct. should decree specific performance or give effect to these stipulations (STIRLING, J.).—*FIRTH v. SLINGSBY* (1888), 58 L. T. 481.

Annotations:—*Refd.* *Re Buskin, Ex p. Farlow* (1891), 15 R. 117; *Barnes v. Glenton*, [1899] 1 Q. B. 885.

1717. Specialty debt—Bond collateral to mortgage.—Where a bond is entered into as a collateral security for money secured by mtge., & the interest being in arrear, the mtgee. takes possession & remains in possession upwards of twenty years without taking interest otherwise than by receipt of rents & profits, *qu.*: whether his remedy on the bond is not barred in equity as well as at law by Statute of Limitations.—*WHITE v. HILLACRE* (1839), 3 Y. & C. Ex. 597; 4 Jur. 102; 160 E. R. 839.

Annotations:—*Mentd.* *Maroon v. Bloxam* (1856), 11 Exch. 586; *Bevor v. Luck*, *Bevor v. Lawson* (1867), L. R. 4 Eq. 537; *Jennings v. Jordan* (1881), 6 App. Cas. 698; *Harter v. Colman* (1882), 19 Ch. D. 630; *Pledge v. White* (1896), 65 L. J. Ch. 449.

1718. — Sale of realty for payment of debts.—As a general rule, in the case of sales under power implied from a charge of debts, a period of twenty years from the death of testator is, by analogy to the period of limitation for specialty debts, to be taken as the period within which no purchaser is to be entitled to inquire whether there are debts in existence rendering the sale necessary.—*Re TANQUERAY-WILLAUME & LANDAU* (1882), 20 Ch. D. 465; 51 L. J. Ch. 434; 46 L. T. 542; 30 W. R. 801, C. A.

Annotations:—*Expld.* *Re Whistler* (1887), 35 Ch. D. 561. *Consd.* *Re Venn & Furze's Contract*, [1894] 2 Ch. 101. *Refd.* *Re Verrell's Contract*, [1903] 1 Ch. 65. *Mentd.* *Marshall v. Gingell* (1882), 21 Ch. D. 790; *Re De Burgh Lawson, De Burgh Lawson v. De Burgh Lawson* (1889), 41 Ch. D. 568; *Re Lashmar, Moody v. Penfold* (1890), 60 L. J. Ch. 143; *Re Stokes, Parsons v. Miller* (1892), 67 L. T. 223; *Re Brooke, Brooke v. Brooke* (1893), 63 L. J. Ch. 159; *Re Adams & Perry's Contract* (1899), 80 L. T. 149; *Solomon v. Attenborough*, [1912] 1 Ch. 451.

1719. Action for waste.—Where after legal waste has been committed time has run so as to bar the legal remedy in respect thereof, the remedy in equity is also barred.

In a case of legal waste in cutting timber committed by a tenant for life, the Statute of Limitations begins to run as against the remainderman from the time of the waste being committed, or at all events from the time when the proceeds of the timber became money in the hands of the wrongdoer, & not from the time when the estate in remainder falls into possession.—*HIGGINBOTHAM v. HAWKINS* (1872), 7 Ch. App. 676; 41 L. J. Ch. 828; 27 L. T. 328; 20 W. R. 955, L. JJ.

Annotation:—*Mentd.* *Dashwood v. Magniac*, [1891] 3 Ch. 306.

1720. Arrears of interest—Money in court under Lands Clauses Acts.—*Re STEAD'S MORTGAGED ESTATES*, No. 1008, *ante*.

1721. — On legacy.—*THOMSON v. EASTWOOD*, No. 1342, *ante*.

1722. Partnership claim.—At a meeting of the partners in a cost-book mine held in 1874, it was stated that the mine was £2,003 in debt, & a call of £25 was made upon each of the six shares in the mine. Two of the partners did not pay this call, & were in arrear for other calls. At subsequent meetings in June, 1874, the shares of these partners were declared to be forfeited. These two partners took no steps as to the mine until July, 1879, when they made a claim, & in Sept. 1880, they brought an action, alleging that the shares had not been regularly forfeited, & claiming to be still partners. It appeared that the mine was in debt in 1878:—*Held*: even assuming the shares not to have been regularly forfeited, pltf., under the circumstances, could not, after lying by for more than six years, successfully assert their claim to be partners.

The time during which they lie by being more than six years, I consider the analogy of the Statute of Limitations to be one which is applicable (KAY, J.).—*RULE v. JEWELL* (1881), 18 Ch. D. 660; 29 W. R. 755.

Annotation:—*Mentd.* *Lambert v. Addison* (1882), 46 L. T. 20.

1723. Relief against forfeiture—Non-payment of rent.—Relief against forfeiture for nonpayment of rent is not confined to the case impliedly referred to in the C. L. P. Act, 1852 (c. 76), namely, recovery by process of law, but will extend also to a case where there has been peaceable resumption of possession without such process. Such relief will be given to a mtgee. to whom the trustee in bkpcy. of the lessee has assigned the lease. The time for applying for relief is, however, by analogy to the statute, limited to six months after recovery of possession.

In such a case pltf., an equitable mtgee. to whom a lease had been assigned by the trustee in bkpcy. of the lessee, was declared to be entitled, on payment of the arrears of rent, to enjoy the demised land according to the lease already in existence. But no damages can be awarded to pltf. as compensation in respect of the time during which he has been kept out of possession.—*HOWARD v. FANSHAW*, [1895] 2 Ch. 581; 64 L. J. Ch. 666; 73 L. T. 77; 43 W. R. 645; 39 Sol. Jo. 623; 13 R. 663.

Annotations:—*Mentd.* *Humphreys v. Morten*, [1905] 1 Ch. 739; *Durell v. Gread* (1914), 84 L. J. K. B. 130.

B. Accounts.

(a) In General.

1724. How far account carried back—Master & apprentice.—*FINCHAM v. HOBBS* (1678), Cas. temp. Finch, 370; 23 E. R. 203.

PART VII. SECT. 2, SUB-SECT. 2.—B. (a).

d. *General rule.*—The exception in the Statute of Limitations extends J.—VOL. XXXII.

to actions of account, not to actions of *assumpsit* on open accounts.—*RUSSELL v. ROBERTSON* (1844), 1 U. C. R. 235.—CAN.

e. —.—The statutable bar may

afford an analogy in the case of a decree for payment of money, but to a decree to account no time is a bar.—*ONGE v. TRUELOCK* (1828), 2 Mol. 31.—IR.

Sect. 2.—Application of statutes by analogy: Subsect. 2, B. (a), (b), (c), (d) & (e).]

1725. — Six years—Analogy to action for mesne profits.]—Devise in trust to dispose of the premises unto & amongst the devisee's four children in such manner, shares, etc., as he should by deed or will appoint. One dying in the life of his father, before appointment:—*Held*: entitled to a fourth; the father after that child's death having appointed three-fourths to his three surviving children respectively. Account of rents & profits confined to six years by analogy to the action for mesne profits.—*READE v. READE* (1801), 5 Ves. 744; 31 E. R. 836, L. C.

Annotations:—Mentd. Casterton v. Sutherland (1804), 9 Ves. 445; Butcher v. Butcher, Gooday v. Butcher (1812), 1 Ves. & B. 79; Ricketts v. Loftus (1841), 4 Y. & C. Ex. 519; Fry v. Capper (1853), 2 W. R. 136; Paske v. Haselfoot (1863), 9 L. T. 75.

1726. — Period not obligatory—Claim for tithes.]—Cts. of equity are not bound in tithe causes to any limitation of time; but for convenience it has been usual to confine the account to a period of six years where the ct. sees no reason to depart from such usage.

As to the time from whence the account must be decreed. Notwithstanding cts. of equity are not bound in a tithe cause to any limitation of time, for it is a great mistake to consider the usual period of six years to which the ct. generally confines itself for its own convenience & that of the parties & I should always consider myself bound to observe that limitation unless I saw some reason to the contrary; yet as I do not see any such reason in the present case I shall confine the decree for an account to the period of six years before the filing of the bill (*RICHARDS, C.B.*).—*ST. PAUL'S (WARDEN, ETC.) v. LINCOLN (BP.)* (1817), 4 Price, 65; Wils. Ex. 1; 146 E. R. 395, Ex. Ch.

Annotation:—Mentd. Vivian v. Cochrane (1855), 4 De G. M. & G. 818.

1727. — —.]—*DEAN v. THWAITE*, No. 1796, *post*.

1728. — Claim of client against solicitor.]—The time within which a client must assert his right, as against his solr., to obtain or, in case of error, to open, an account is not limited to six years, or to any other definite period.—*CHEESE v. KEEN*, [1908] 1 Ch. 245; 77 L. J. Ch. 163; 98 L. T. 316; 24 T. L. R. 138.

1729. — Bonâ fide possession—No trust, infancy or fraud—When account taken from filing of bill.]—B., being lady of the manor of W., upon the occasion of her marriage in 1796, conveyed it, together with other property, both real & personal, to trustees, to hold on such trusts as she should by deed or will appoint, & subject thereto, for her for life, with remainders over; & there was a power for the trustees to purchase land with the personal property, which land was to be held upon the same trusts. In 1801 an Act of Parliament was passed for inclosing the common lands of the manors of W. & C., & the comrs. were directed to make allotments to the several parties interested in the common lands situate in W. & C., & to make an allotment to the lord or lords, lady or ladies, of the soil of the said commons, to be a full compensation for his, her, or their right or rights in & to the soil of the said commons & waste lands respectively. Under this Act the comrs. allotted lot No. 1 to the lord of the manor of W. (B.'s trustees) as compensation for his interest in the soil of the manor; & they allotted lots 2, 3, 4, & 5 to certain copyholders of the manor of W. In 1804 the trustees of B.'s settlement purchased, with moneys comprised in the settlement, lots

2, 3, 4, & 5, which were duly surrendered to them. B., by her will or testamentary appointment appointed "all that the manor or lordship, or reputed manor or lordship of W., together with all courts leet, courts baron, fines, quit rents, & profits of courts, & all other the rights, members, privileges, advantages, & appurtenances to the said manor belonging or appertaining," & other property, which she described, to H. for life, remainder to the first & other sons of the body of H. successively, & the heirs male of their bodies; & she gave the residue of her real estate in W. to trustees in fee, upon trust to sell & pay debts. She made several codicils to her will, in one of which she recited (erroneously in point of fact) that she had in the gift of the residue included certain copyhold cottage; & she thereby revoked the residuary gift, so far as it related to that & another copyhold cottage of the manor of W., & appointed them to two of her servants. B. died in 1813, & in 1814 the appointees of the residue, assuming that these lots 1, 2, 3, 4, & 5 were included in the gift of the residue, sold them to D., who remained in possession of them up to the time of his death in 1835; & deft., S., purchased them from D.'s trustees, & had been in possession ever since 1837. Pltf., as heir male of the body of H., became entitled as appointee of the manor, etc., in 1831, but did not attain his majority until 1849:—*Held*: pltf. was entitled to an account of rents & profits from the accruer of his title in 1831.

In cases of a *bonâ fide* adverse possession, where there is no trust, no infancy, no fraud, it is not according to the course of the ct. to carry back the account beyond the filing of the bill. Real Property Limitation Act, 1833 (c. 27), does not apply to this case, as it cannot be considered a suit for the recovery of arrears of rent, but rather a suit by an infant, on attaining twenty-one, against his guardian for an account.

I should be very loath to introduce the application of a different rule to what is technically an equitable estate from that which is applicable to what is technically a legal estate; there is no real difference between the cases, & the same principle ought to be acted on in each (*LORD CRANWORTH, C.*).—*HICKS v. SALLITT* (1854), 3 De G. M. & G. 782; 2 Eq. Rep. 818; 23 L. J. Ch. 571; 22 L. T. O. S. 322; 18 Jur. 915; 2 W. R. 173; 43 E. R. 307, L. C. & L. JJ.

Annotations:—Expld. Hickman v. Upsall (1876), 4 Ch. D. 144. *Refd.* Schroder v. Schroder (1854), Kay, 578; Penny v. Allen (1857), 7 De G. M. & G. 409; Thomson v. Eastwood (1877), 2 App. Cas. 215. *Mentd.* Hope v. Liddell, Liddell v. Norton (1855), 21 Beav. 183; Nanney v. Williams (1856), 22 Beav. 452; Hicks v. Hastings (1857), 3 K. & J. 701; Howard v. Shrewsbury (1874), L. R. 17 Eq. 378; *Re* Rayner, Rayner v. Rayner, [1904] 1 Ch. 176.

1730. — —.]—*HICKMAN v. UPSALL*, No. 952, *ante*.

1731. — From accruer of title.]—*HICKS v. SALLITT*, No. 1729, *ante*.

(b) Charities.

See CHARITIES, Vol. VIII., pp. 381, 382, Nos. 1941, 1962.

(c) Executors.

See EXECUTORS, Vol. XXIV., pp. 686, 687, Nos. 7125–7127.

(d) Infants.

See INFANTS, Vol. XXVIII., pp. 190, 191, 193, Nos. 483–490, 509–511.

(e) Partners.

1732. Whether limitation applicable—After determination of partnership.]—In Mar. 1832, defts. B. & C., who were then in partnership as solrs., were employed by A. to lay out £500 on mtge. They lent the money to L. on the mtge. of certain premises, & retained possession of the mtge. deed. The premises were afterwards sold subject to the mtge., & the purchaser paid C. the £500 & interest, but without the knowledge of B., & the deed was given up to the purchaser by C., but no receipt was indorsed thereon, nor was any reconveyance or receipt executed or signed by A., who was not informed that the money had been paid. In Dec. 1832, C., without the knowledge of B., returned to the purchaser £300, & received back the mtge. deed, & no part of the £500 was paid to A. Interest, at first on the £500, & then upon the £300, was paid to C. by the purchaser; & entries were made in the books of defts., giving credit to A. for interest on the £500, & debiting him with interest paid to his agent. In July, 1838, defts. dissolved partnership. Up to the dissolution, interest on the £500 was regularly paid to the agent of A. by C., by cheques drawn by defts. on their bankers; & after the dissolution, it was paid by C., sometimes in cash & sometimes by cheques on his own banker. In some of the receipts the money was described as interest upon a mtge. A. died in May, 1840. In Dec. 1846, the purchaser paid C. the £300 & interest, & received from him the mtge. deed. B. was ignorant of the receipts & payments subsequent to the investment of the £500, until 1849. In 1848, pltf., the exors. of A., first discovered that the mtge. money had been repaid:—*Held*: under the above circumstances, Statute of Limitations was a bar to the action; also, no action would lie against B., inasmuch as the subsequent receipt of the mtge. money by C. was wholly unauthorised, & not within the scope of the partnership business.—*SIMS v. BRUTTON* (1850), 5 Exch. 802; 20 L. J. Ex. 41; 16 L. T. O. S. 173; 155 E. R. 351.

Annotations:—*Refd.* *Re Somerset, Somerset v. Poulett*, [1891] 1 Ch. 231. *Mentd.* *Gordon v. James* (1885), 53 L. T. 641.

1733. ———.]—On a bill to dissolve a partnership & take the usual accounts, although the partnership had been discontinued more than six years before the filing of the bill, the ct. directed the accounts to be taken, notwithstanding that deft. insisted on Statute of Limitations as a bar.—*MILLER v. MILLER* (1869), L. R. 8 Eq. 499.

Annotation:—*Dttd.* *Noyes v. Crawley* (1878), 10 Ch. D. 31.

1734. ———.]—In 1858 pltf. & deft. entered into partnership transactions which came to a final termination in 1861, when deft. admitted that £787 was due to pltf., but he never subsequently made any admission of the debt, or promise to pay. Pltf. brought an action for an account of the partnership dealings:—*Held*: Statute of Limitations could be set up on demurrer; & was a good defence to a claim for the partnership accounts.—*NOYES v. CRAWLEY* (1878), 10 Ch. D. 31; 48 L. J. Ch. 112; 39 L. T. 267; 43 J. P. 270; 27 W. R. 109.

Annotation:—*Consd.* *The Pongola* (1895), 73 L. T. 512.

PART VII. SECT. 2, SUB-SECT. 2.—
B. (e).

1732 i. Whether limitation applicable—After determination of partnership.]—In partnership suits the defence of the Statute of Limitations is not available unless six years have elapsed before the filing of the bill since the dealings of the partners wholly ceased.—

STORM v. CUMBERLAND (1871), 18 Gr. 245.—*CAN.*

1732 ii. ———.]—*COTTON v. MITCHELL* (1883), 3 O. R. 421.—*CAN.*

1732 iii. ———.]—*FAYE v. ROUMEGOUS* (1918), 42 O. L. R. 435; 14 O. W. N. 50; 42 D. L. R. 533.—*CAN.*

1732 iv. ———.]—Statute of Limitations begins to run from the date of

1735. ———.]—It is settled that after a partnership has ceased any claim on simple contract by one former partner against the others in respect thereof, is, *prima facie*, subject to be barred after the expiration of six years. On the other hand, while a partnership is continuing, there is no authority for suggesting that a claim between the partners is affected by the statute [Statute of Limitations, 1623 (c. 16)]. There is no authority for saying that a partner who does nothing for six years loses all remedies against his co-partners. Time only begins to run against him from an act of exclusion (*KAY, J.*).—*BARTON v. NORTH STAFFORDSHIRE RY. CO.* (1888), 38 Ch. D. 458; 57 L. J. Ch. 800; 58 L. T. 549; 36 W. R. 754; 4 T. L. R. 403.

Annotations:—*Refd.* *The Pongola* (1895), 73 L. T. 512; *Re Severn & Wye & Severn Bridge Rys.*, [1896] 1 Ch. 559. *Mentd.* *Barton v. L. & N. W. Ry.*, *Same v. Scinde, Punjab & Delhi Ry.* (1889), 5 T. L. R. 644; *Oliver v. Bank of England*, [1902] 1 Ch. 610.

1736. ———.]—**Action against representatives of deceased partner.]**—A. & W. were partners in trade. A. (the partnership accounts being unsettled) died, leaving W. one of his exors., & B., an infant, his residuary legatee. On B.'s attaining twenty-one, he executed a general release to A.'s exors., "save & except, nevertheless, & without prejudice to the share & interest late of the testator A. of & in such outstanding creditors of his co-partnership with W. as had not been received & accounted for as aforesaid." After this release was executed W. made several payments to B. in respect of moneys received on account of the partnership. W. died, & G. & M., his exors., accounted to B. for sums to which A. had he been alive, would have been entitled. On bill filed by B. against the representatives of W. the ct. directed the accounts of what was due from W. to A. at A.'s death, what became due from W. to A.'s estate, & what since W.'s death had been received by his representatives in respect of debts due to the partnership firm, to be taken.

The statute is not applicable in the case of an exor. (*KNIGHT BRUCE, L.J.*).—*ALLEN v. WILSON* (1851), 18 L. T. O. S. 180, L. J.

1737. ———.]—**Outstanding assets & liabilities.]**—The estate of one of two partners is not, after his death, discharged from a partnership debt by the circumstance that the creditor continues his transactions with the survivor, & forbears, for some years, at the survivor's request, to take any steps to enforce payment of his debt. *Secus*, where the transactions show that the creditor has accepted the liability of the survivor in discharge of the liability of the partnership. After the death of one of two partners, the survivor cannot set up Statute of Limitations as a bar to a demand against the assets of deceased. *Qu.*: whether deceased's representatives can set up the statute, so long as the survivor continues liable to the payment of the debt, & deceased's estate is consequently liable to be called upon by the survivor for contribution.—*WINTER v. INNES* (1838), 4 My. & Cr. 101; 2 Jur. 981; 41 E. R. 40, L. C.

Annotations:—*Consd.* *Way v. Bassett* (1845), 5 Hare, 55. *Distd.* *Brown v. Gordon* (1853), 22 L. J. Ch. 65. *Refd.* *Fordham v. Wallis* (1853), 10 Hare, 217; *Thompson v.*

the dissolution of the partnership, & at the end of six years from that date is a bar to an action for accounts, although one of the partners has continued the partnership business & got in outstanding accounts within six years.—*SMITH v. SMITH*, [1926] N. Z. L. R. 311.—*N.Z.*

1732 v. ———.]—*MOSTERT v. MOSTERT*, [1913] T. P. D. 255.—*S. AF.*

entitled to the rents during the life of the lunatic ; (2) the trustee was liable to account for such rents as he had received ; (3) the husband was liable for an occupation rent, but the separate estate of the married woman was not liable, there having been no specific contract on her part.—*WRIGHT v. CHARD* (1860), 1 De G. F. & J. 567 ; 29 L. J. Ch. 415 ; 2 L. T. 104 ; 6 Jur. N. S. 476 ; 8 W. R. 334 ; 45 E. R. 481, L. JJ.

Annotations :—*Generally*, *Mentd.* *Johnson v. Gallagher* (1861), 3 De G. F. & J. 494 ; *London Chartered Bank of Australia v. Lemprière* (1873), L. R. 4 P. C. 572 ; *Kevan v. Crawford* (1877), 6 Ch. D. 29.

1749. — — — — —.]—In 1833 A. died intestate as to his real estate, but having appointed by will, never proved, his brother B. his exor., & leaving two infant daughters his heirs in coparcenary. In 1834 one of the daughters, while still an infant, died, whereupon her moiety of her father's real estate descended upon her surviving sister, who married during infancy & was still under the disability of coverture. Upon the death of A., B. entered into possession of the whole of A.'s real estate, & received the rents thereof from that period up to his death in 1858. B., during his possession, paid the interest on a mtge. created by A. Considerable sums had also been laid out in improvements by B. Upon B.'s death, his widow continued in possession of A.'s real estate, & she paid off & took a transfer to herself of the above mtge. In 1860 a bill was filed by the surviving daughter of A. & her husband against B.'s widow & administratrix & his infant heir for an account of the rents of A.'s real estate from his death in 1833. B.'s infant son, by his answer, claimed the benefit of Real Property Limitation Act, 1833 (c. 27), as to the whole of A.'s real estate, but at the bar the right of female pltf. to the moiety of the lands which descended upon her from her father was admitted :—*Held* : the entry of B., who was named as the exor. in A.'s will, & was the uncle of his infant daughters, could not be considered as that of a stranger, & an account was directed of the rents of A.'s real estate received by B. as bailiff from A.'s death up to his death in 1858, & by B.'s widow, as mtgee. in possession since the death of B., & an inquiry was also directed as to the sums laid out in improvements by B.—*PELLEY v. BASCOMBE* (1863), 4 Giff. 390 ; 2 New Rep. 263 ; 33 L. J. Ch. 100 ; 9 L. T. 317 ; 9 Jur. N. S. 1120 ; 11 W. R. 766 ; 66 E. R. 758 ; *affd.* (1865), 5 New Rep. 231, L. JJ.

Effect of Trustee Act, 1888 (c. 59), s. 8.]—
See Part VI., Sect. 1, sub-sect. 1, ante.

C. Charities.

Recovery of trust property.]—*See CHARITIES, Vol. VIII., pp. 353–355, Nos. 1498–1519.*

Accounts against trustees.]—*See CHARITIES, Vol. VIII., pp. 381, 382, Nos. 1941–1962.*

D. Claims Against Lunatics.

See, generally, LUNATICS.

1750. Whether limitation applicable—Lunatic executrix—Claim for legacy.]—*BOLDERO v. HALPIN, Ex p. HAWES, No. 896, ante.*

1751. — Claim for past maintenance—As against lunatic's estate—Petition in lunacy by committee.]—*WILKINSON v. WILKINSON, No. 1851, post.*

1752. — — — — — Arrears for six years only.]—
A claim for the past maintenance of a lunatic being simply a debt of the lunatic, the ct. will not pay out of the lunatic's estate in ct. more than six years' arrears of such maintenance.—*Re HARRIS* (1880), 49 L. J. Ch. 327, L. J.

1753. — — — — —.]—Where a lunatic was tenant for life of one fund, & had absolute interest in another fund, the ct. directed the maintenance of the lunatic to be provided for out of the fund to which she was entitled for life, in exoneration of the property to which she was absolutely entitled. *Qu.* : whether a person who supplies a lunatic, knowing her to be such, with necessaries, can recover the amounts by action at law. But the ct., sitting in lunacy, & acting in its discretion, directed repayment to testator's estate of moneys expended in the maintenance of a lunatic, but limited it to moneys expended during the six years prior to testator's death.—*Re WEAVER* (1882), 21 Ch. D. 615 ; 48 L. T. 93 ; 47 J. P. 68 ; 31 W. R. 224, C. A.

Annotations :—*Reid.* *Re Newbegin's Estate, Eggleton v. Newbegin* (1887), 36 Ch. D. 477. *Mentd.* *Wilson v. Turner* (1883), 52 L. J. Ch. 270 ; *Re Lofthouse* (1885), 29 Ch. D. 921 ; *Re Rhodes, Rhodes v. Rhodes* (1890), 44 Ch. D. 94 ; *Birkenhead Union Grdus. v. Brookes* (1906), 95 L. T. 359.

1754. — — — — —.]—A pauper lunatic who had been maintained by the guardians since Nov. 1, 1889, became entitled on Oct. 14, 1895, to a sum of money as one of the next of kin of an uncle. The guardians in Feb. 1898, applied in lunacy for the appointment of a receiver of the fund & payment thereout of the cost of the lunatic's maintenance for the then preceding six years. On Jan. 31, 1899, an order was made in lunacy appointing a receiver & directing him to pay to the guardians £95 14s. for the maintenance of the lunatic from Oct. 14, 1895, to Feb. 14, 1899, & to apply the balance for the future maintenance of the lunatic. The lunatic died on June 29, 1899 :—*Held* : the claim of the guardians for the maintenance of the lunatic for the part of the six years prior to Oct. 14, 1895, was a valid legal debt, & was not affected by the order in lunacy, & the guardians could enforce their claim against the lunatic's estate now that she was dead.—*Re TAYLOR, EDMONTON UNION v. DEELY, [1901] 1 Ch. 480 ; 70 L. J. Ch. 332 ; 84 L. T. 35, C. A.*

1755. — — — — — Effect of payment on account—By receiver of lunatics' property.]—A pauper lunatic can plead Statute of Limitations as a defence to a claim by guardians of the poor for arrears of maintenance, but the same answers can be made to that plea as in the case of any ordinary action for debt.

When the receiver in lunacy of a pauper lunatic, acting under a general order of the ct. directing him to apply the lunatic's income for her maintenance & benefit, had during a number of years made payments on account of the arrears of maintenance to the guardians of the poor :—*Held* : the guardians were entitled to recover from the lunatic's estate the whole of the amount still owing for arrears of maintenance, & not merely the arrears of maintenance for the six years prior to the commencement of the proceedings.—*WANDSWORTH UNION v. WORTHINGTON, [1906] 1 K. B. 420 ; 75 L. J. K. B. 285 ; 95 L. T. 331 ; 70 J. P. 191 ; 54 W. R. 422 ; 22 T. L. R. 284 ; 50 Sol. Jo. 273 ; 4 L. G. R. 320.*

PART VII. SECT. 2, SUB-SECT. 2.—D.

g. Whether limitation applicable.]—The ct. will not pay debts contracted by a lunatic before he became of unsound mind, when such debts are barred by the Statute of Limitations.—*Re KENRICK, [1907] 1 I. R. 480.—IR.*

Sect. 2.—Application of statutes by analogy: Subsect. 2, D., E., F. & G. Sects. 3, 4 & 5.]

1756. — Creditor restrained from proceeding—Recovery of solicitors' costs in lunacy proceedings.]—An order of lunacy directing the taxation of the costs, charges & expenses incurred by the solrs. employed in prosecuting the commission in lunacy, & subsequently as the solrs. of the committees, & directing an inquiry whether it would be fit & proper to raise these costs, etc., by sale or mtge. of the lunatic's real estate, did not constitute them a judgment debt, nor make them a charge in equity upon such real estate; but such costs, etc., were considered as a simple contract debt due by the lunatic for necessities.

The lapse of six years during the lunatic's life will not bar a debt of this description; for the Ct. of Ch. will take judicial notice in a suit to obtain payment out of his assets after his death that any action against the lunatic for the recovery of the claim would have been restrained by the Lord Chancellor on petition in lunacy.—**STEDMAN v. HART** (1854), Kay, 607; 2 Eq. Rep. 816; 23 L. J. Ch. 908; 18 Jur. 744; 2 W. R. 462; 69 E. R. 258.

Annotation:—Distd. Re Watson, Stamford Union v. Bartlett, [1899] 1 Ch. 72.

1757. Time running pending lunacy proceedings—Effect on subsequent proceeding.]—In 1825 the holder of a promissory note brought an action against the maker, who became lunatic, whereupon the lunatic & his committee filed a bill to restrain proceedings in the action, on the ground of alleged insufficiency of consideration for the note; & upon the motion for an injunction an order was made by consent staying proceedings in the action & the suit with liberty for the holder of the note to go in & establish his claim in the lunacy. He accordingly took proceedings to support his claim before the Master in Lunacy who however disallowed it, & in Aug. 1830, made his report without including in it the name of the holder of the note as a creditor. The lunatic died in Mar. 1843; & in Feb. 1844, the holder of the note filed a creditor's bill against the representatives of the lunatic:—*Held*: pltf. was not entitled to be relieved from the effect of Statute of Limitations.—**ROCK v. COOKE** (1847), 1 De G. & Sm. 675; 17 L. J. Ch. 93; 10 L. T. O. S. 283; 12 Jur. 5; 63 E. R. 1246.

Claims founded upon statute.]—See Nos. 61, 62, *ante*.

E. Contracts of Wife with Husband.

See **HUSBAND & WIFE**, Vol. XXVII., pp. 211, 212, Nos. 1831–1833.

F. Fraud.

See Part VIII., *post*.

G. Mistake.

See Sect. 4, *post*.

SECT. 3.—FRAUD.

See Part VIII., *post*.

PART VII. SECT. 4.

1758 i. Analogy of Statute of Limitation—Time runs from discovery of mistake.]—**RICHARDSON v. WHITE** (1891), 4 Q. L. J. 80.—**AUS.**

1758 ii. — — —.]—**SAAYMAN v. LE GRANGE** (1879), Buch. 10.—**S. AF.**

1758 iii. — — —.]—**VAN DER BYL**

v. VAN DER BYL & Co. (1899), 16 S. C. 338.—**S. AF.**

1761 i. — Money paid under mistake.]—Where compensation money was paid by a railway co. to a tenant for life in 1871, the co. were ordered to pay the amount over again to the persons entitled in remainder whose title accrued within six years of the

SECT. 4.—MISTAKE.

Mistake generally, see **MISTAKE**.

1758. Analogy of Statute of Limitation—Time runs from discovery of mistake.]—In cases of mistake, the time of limitation, which by analogy to that prescribed by Statute of Limitations, 1623 (c. 16), is held to bar the remedy in cts. of equity, begins to run from the time of the discovery of the mistake.—**BROOKSBANK v. SMITH** (1836), 2 Y. & C. Ex. 58; Donnelly, 11; 6 L. J. Ex. Eq. 34; 160 E. R. 311.

*Annotations:—***Consd. Eccl. Comrs. for England v. N. E. Ry.** (1877), 4 Ch. D. 845. **Expld. Baker v. Courage**, [1910] 1 K. B. 56. **Distd. Re Robinson, McLaren v. Public Trustee**, [1911] 1 Ch. 502. **Refd. Denys v. Shuckburgh** (1840), 4 Y. & C. Ex. 42.

1759. — Right to account—Laches in discovery of mistake.]—A. by a voluntary settlement conveyed two shares in certain mines to trustees for ninety-nine years, if A. should so long live, in trust for A.'s brother-in-law B., during the said term, if he should so long live, with remainder as to one share, in trust, for A.'s sister C.; & as to the other share, in trust for D., the son of B. & C., to hold to them respectively for the residue of the said term, if they should so long respectively live. Upon the death of B. in A.'s lifetime, C. & D. entered into possession of their respective shares. A. afterwards, by a deed of gift, executed in 1826, conveyed all his remaining interest in the premises to D., & died in 1830. After A.'s death, C. continued by mistake in possession of the share which had been settled upon her, until her death in 1835. In 1839, D., upon examination of the deed of 1826, which was in his possession, found out the mistake, & he immediately filed his bill against the exors. of C. for an account of the rents & profits received by her since the death of A.:—*Held*: inasmuch as D. had been guilty of laches in not finding out the mistake earlier, by the means which were in his power, he was entitled to an account only for the period allowed by analogy to Statute of Limitations; which in this case was six years before the filing of the bill, & an additional period during which he was abroad.

Where the rents of mines are reserved by means of payment of produce in specie, the profits will be considered as accruing to the lessor at the time of receiving such produce, & not at the time of the sale of it; & therefore, the statute will run from the time of such receipt, & not from the time of such sale.—**DENYS v. SHUCKBURGH** (1840), 4 Y. & C. Ex. 42; 5 Jur. 21; 160 E. R. 912.

*Annotations:—***Consd. Gibbs v. Guild** (1881), 8 Q. B. D. 296; **Baker v. Courage**, [1910] 1 K. B. 56. **Refd. Eccl. Comrs. for England v. N. E. Ry.** (1877), 4 Ch. D. 845. **Mentd. Roberts v. Eberhardt** (1853), 2 Eq. Rep. 780; **Adair v. New River Co. & Metropolitan Water Board** (1908), 25 T. L. R. 193.

1760. — Money paid under mistake—Trust funds.]—**HARRIS v. HARRIS** (No. 2), No. 1665, *ante*.

1761. — — —.]—An action brought in the Ch. Div. by one *cestui que trust* against another *cestui que trust* to recover money wrongly paid by the trustee to the latter under a common mistake of fact is in the nature of a common law action for money had & received, & the ct., acting on the analogy of Statute of Limitation, 1623 (c. 16), will hold the claim to be barred after the lapse of six years. The case would be different if the claim

time of bringing the action.—**YOUNG v. MIDLAND RY. CO.** (1892), 19 A. R. 265; 22 S. C. R. 190.—**CAN.**

1761 ii. — — —.]—Where money has been voluntarily paid under a mistake of fact the right of action for its recovery does not arise until notice of the mistake has been given, & a

were made in an action in which the ct. was administering the trust estate. There, if there were assets to which the overpaid *cestui que trust* was entitled, the ct. would adjust the accounts as between the parties entitled, & lapse of time would be no bar.—*Re ROBINSON, McLAREN v. PUBLIC TRUSTEE*, [1911] 1 Ch. 502; 80 L. J. Ch. 381; 104 L. T. 331; 55 Sol. Jo. 271.

Annotations:—*Apld. Re Croyden, Hincks v. Roberts* (1911), 55 Sol. Jo. 632. *Refd. Re Rivers, Pullen v. Rivers*, [1920] 1 Ch. 320.

SECT. 5.—LACHES AND ACQUIESCENCE.

See, generally, EQUITY, Vol. XX., pp. 524-541, Nos. 2488-2587; ESTOPPEL, Vol. XXI., pp. 347 *et seq.*

Accounts.—*See* EQUITY, Vol. XX., pp. 277-279, Nos. 370-390.

Annuity deed—Impeachment of validity.—*See* RENTCHARGES & ANNUITIES.

Agency—Ratification by delay in repudiating.—*See* AGENCY, Vol. I., p. 412, No. 1095.

—**Delay in election as to claim against agent or principal.**—*See* AGENCY, Vol. I., p. 577, Nos. 2186, 2187.

—**Delay in demanding payment in respect of agent's contract.**—*See* AGENCY, Vol. I., p. 583, Nos. 2220-2223.

Bankers—Delay in presenting cheque.—*See* BANKERS, Vol. III., pp. 202, 203, Nos. 464-469.

Bankruptcy—Failure to prove debts.—*See* BANKRUPTCY, Vol. IV., p. 322, Nos. 3013-3017.

—**Refund of dividends paid.**—*See* BANKRUPTCY, Vol. IV., pp. 497, 498, Nos. 4477, 4481, 4482.

Trustee lying by while bankrupt traded.—*See* BANKRUPTCY, Vol. V., pp. 734, 735, Nos. 6358, 6359.

—**Loss of right to disclaim.**—*See* BANKRUPTCY, Vol. V., pp. 938, 939, Nos. 7668-7675.

Bills of exchange—Delay in presenting.—*See* BILLS OF EXCHANGE, Vol. VI., pp. 227 *et seq.*, Nos. 1422 *et seq.*

Bottomry bonds—Enforcements in Admiralty.—*See* ADMIRALTY, Vol. I., pp. 123, 124, Nos. 299, 300.

Building societies—Delay in examining accounts of defaulting secretary.—*See* BUILDING SOCIETIES, Vol. VII., pp. 464, 465, No. 63.

Contracts—Election to rescind.—*See* CONTRACT, Vol. XII., p. 348, No. 2894.

—**Money had & received.**—*See* CONTRACT, Vol. XII., p. 554, No. 4600.

Companies—The prospectus.—*See* COMPANIES, Vol. IX., pp. 130-133, 142-144, Nos. 686-719, 789, 792, 807.

—**Rectification of register.**—*See* COMPANIES, Vol. IX., pp. 222, 223, Nos. 1419-1430.

—**Contract to take shares.**—*See* COMPANIES, Vol. IX., pp. 256-258, Nos. 1590-1605.

—**Forfeiture of shares.**—*See* COMPANIES, Vol. IX., pp. 339, 428, 431, 432, Nos. 2144, 2778, 2802-2804.

Proceedings by liquidator.—*See* COMPANIES, Vol. X., pp. 901, 902, Nos. 6156-6158.

Copyright—Delay in application for injunction.—*See* COPYRIGHT, Vol. XIII., pp. 221, 222, Nos. 598-602.

The Crown—Whether affected.—*See* CONSTITUTIONAL LAW, Vol. XI., pp. 522, 523, Nos. 276-283.

Crown practice—Application for mandamus.—*See* CROWN PRACTICE, Vol. XVI., p. 324, Nos. 1370 *et seq.*

—**Laches by Attorney-General.**—*See* CROWN PRACTICE, Vol. XVI., pp. 485, 486, Nos. 3674-3679.

Church property—Validity of disposition.—*See* ECCLESIASTICAL LAW, Vol. XIX., pp. 499, 500, No. 3560.

Church rates—Repayment of charges.—*See* ECCLESIASTICAL LAW, Vol. XIX., p. 520, No. 3830.

Executors & administrators—Revocation of grant.—*See* EXECUTORS, Vol. XXIII., p. 248, Nos. 3034-3036.

—**Delay of creditor in recovering legacy against legatee.**—*See* EXECUTORS, Vol. XXIII., pp. 432, 433, Nos. 5039-5041.

—**Action for devastavit.**—*See* EXECUTORS, Vol. XXIV., pp. 670, 671, Nos. 6977-6981.

—**Accounts.**—*See* EXECUTORS, Vol. XXIV., pp. 686, 687, Nos. 7125-7127.

—**Actions against representative.**—*See* EXECUTORS, Vol. XXIV., pp. 736, 737, No. 7652.

—**Action by creditor.**—*See* EXECUTORS, Vol. XXIV., p. 806, No. 8349.

Family arrangements—Action to set aside.—*See* FAMILY ARRANGEMENTS, Vol. XXIV., pp. 963, 964, Nos. 150-158.

Foreign judgments—Loss of rights under.—*See* CONFLICT OF LAWS, Vol. XI., p. 467, No. 1226.

Fraud.—*See* MISREPRESENTATION & FRAUD.

Fraudulent & voidable conveyances—Avoidance or confirmation.—*See* FRAUDULENT & VOIDABLE CONVEYANCES, Vol. XXV., pp. 216, 281, 282, Nos. 499, 500, 1067-1074.

Gifts—Setting aside.—*See* CONTRACT, Vol. XII., pp. 102, 103, 112, Nos. 628, 733, 737.

Guarantee—Laches by creditors.—*See* GUARANTEE, Vol. XXVI., pp. 185-190, Nos. 1419-1465.

Infants—Claim to property by parent.—*See* INFANTS, Vol. XXVIII., p. 192, No. 499.

—**Repudiation of settlement.**—*See* INFANTS, Vol. XXVIII., pp. 211, 212, Nos. 704-707.

—**Legal proceedings.**—*See* INFANTS, Vol. XXVIII., pp. 332-334, Nos. 2006-2012.

Injunction—Effect of delay & acquiescence on right to.—*See* INJUNCTION, Vol. XXVIII., pp. 420 *et seq.*

Insurance—Return of premium.—*See* INSURANCE, Vol. XXIX., p. 371, Nos. 2977-2979.

Judgments & orders—Amendment setting aside a new trial.—*See* PRACTICE.

Mistake.—*See* MISTAKE.

Mortgage.—*See* MORTGAGE.

Patents—Relief against infringement.—*See* PATENTS.

Settlements.—*See* SETTLEMENTS.

Solicitors—Dealings between solicitors & client.—*See* SOLICITORS.

Specific performance.—*See* SPECIFIC PERFORMANCE.

Trusts.—*See* TRUSTS & TRUSTEES.

Wills.—*See* WILLS.

request or demand for repayment made; & the periods of limitation do not begin to run until then.—*ASSETS CO., LTD. v. R.* (1902), 22 N. Z. L. R. 459.—N.Z.

h. *Effect of—In bringing action.*—*HURRO PROSHAD ROY v. GOPAUL DASS DUTT* (1882), 1 L. R. 9 Calc. 255; 12 C. L. R. 129; L. R. 9 Ind.

App. 82.—IND.

k. *Period of limitation.*—*Re JONES'S ESTATE*, [1914] 1 I. R. 188.—IR.

Part VIII.—Fraud and the Statutes of Limitation.

SECT. 1.—CLAIMS IN EQUITY.

SUB-SECT. 1.—WHERE NO STATUTE APPLICABLE. A. General Rule.

1762. No limitation of time in case of fraud.]—Where there is fraud, & such fraud is concealed, no length of time can bar.

A. under pretence that B. was instrumental in procuring a beneficial marriage for C. obtained a bond from C. to B. for 1,000 guineas, as a reward for his services. The bond was paid when due; but in nine years afterwards C. discovered the whole to be a gross imposition in A. & that he received all the money. On a bill brought, A. was decreed to repay C. the whole money, with interest & costs.—**BOOTH v. WARRINGTON (EARL)** (1714), 4 Bro. Parl. Cas. 163; 2 E. R. 111.

*Annotations:—***Refd.** *Re Baillie & Jaffray, Ex p. Bolton* (1832), 1 Deac. & Ch. 556; *Eccl. Comrs. for England v. N. E. Ry.* (1877), 4 Ch. D. 845; *Gibbs v. Guild* (1882), 9 Q. B. D. 59; *Betjemann v. Betjemann*, [1895] 2 Ch. 474; *Re McCallum, McCallum v. McCallum*, [1901] 1 Ch. 143; *Oelkers v. Ellis*, [1914] 2 K. B. 139. **Mentd.** *Ord v. Smith* (1725), *Cas. temp. King*, 9.

1763. —.] — **WATLINGTON v. WILKINSON** (1729), 1 Barn. K. B. 270; 94 E. R. 184.

1764. —.]—(1) Statute of Limitations no plea where the bill charges a fraud.

(2) Then it should be charged by the bill, that the fraud was discovered within six years before the bill was filed.—**SOUTH SEA CO. v. WYMONDSELL** (1732), 3 P. Wms. 143; 24 E. R. 1004.

*Annotations:—***As to (1)** **Refd.** *Re Baillie & Jaffray, Ex p. Bolton* (1832), 1 Deac. & Ch. 556; *Brooksbank v. Smith* (1836), 2 Y. & C. Ex. 58; *Gibbs v. Guild* (1882), 9 Q. B. D. 59; *Re Mansell, Ex p. Norton* (1892), 66 L. T. 245; *Molloy v. Mutual Reserve Life Insee.* (1906), 94 L. T. 756. **As to (2)** **Refd.** *Eccl. Comrs. for England v. N. E. Ry.* (1877), 4 Ch. D. 845.

1765. —.]—Where fraud appeared in a stated account, the whole decreed to be opened, though of twenty-three years standing.—**VERNON v. VAWDRY** (1740), 2 Atk. 118; Barn. Ch. 280; 2 Eq. Cas. Abr. 12; 26 E. R. 474.

*Annotations:—***Refd.** *Allfrey v. Allfrey* (1849), 1 Mac. & G. 87. **Mentd.** *Adey v. Arnold* (1852), 2 De G. M. & G. 432; *Holland v. Holland* (1869), 4 Ch. App. 450, n.

1766. —.]—When fraud is charged, deft. cannot plead Statute of Limitations to the discovery of his title, but must answer to the fraud.—**BICKNELL v. GOUGH** (1747), 3 Atk. 558; 26 E. R. 1121.

1767. —.]—Fraudulent conveyance set aside as against a purchaser with notice, notwithstanding a great length of time which had elapsed since the original transaction.—**ALDEN v. GREGORY** (1764), 2 Eden, 280; 28 E. R. 905.

1768. —.]—Under particular circumstances of fraud, imposition, & delay, a ct. of equity will decree an account of rents & profits of an estate, after an adverse possession of fifty years.—**STACKPOOLE v. DAVOREN** (1780), 1 Bro. Parl. Cas. 9; 1 E. R. 382.

1769. —.]—Demurrer, to a bill charging fraud in a misrepresentation of the value of an estate to vendor, on the ground that the transaction was twenty-seven years old, & had been confirmed by a deed twenty-three years since, disallowed.—**DELORAINÉ (EARL) v. BROWNE** (1792), 3 Bro. C. C. 633; 29 E. R. 739.

*Annotations:—***Refd.** *Hercy v. Dinwoody* (1793), 4 Bro. C. C. 257; *Pickering v. Stamford* (1795), 2 Ves. 581; *Pearson v. Belchier* (1799), 4 Ves. 627; *Chalmer v. Bradley* (1819), 1 Jac. & W. 51; *Re Newhouse, Ex p. Newhouse* (1841), 10 L. J. Bcy. 38. **Mentd.** *Campbell v. Graham* (1831), 1 Russ. & M. 453.

1770. —.]—Interest & costs decreed against a steward, upon fraud, wilful concealment, etc., & in such cases, generally, there is no limitation of time.—**HARDWICKE (EARL) v. VERNON** (1808), 14 Ves. 504; 33 E. R. 614.

*Annotations:—***Refd.** *Teed v. Beere* (1859), 28 L. J. Ch. 782; *Re Whitehead, Ex p. Burnand's Exor.* (1860), 2 L. T. 776. **Mentd.** *Ormond v. Hutchinson* (1809), 16 Ves. 94; *Pearse v. Green* (1819), 1 Jac. & W. 135; *Oddy v. Secker* (1854), 2 Sm. & G. 193; *Springett v. Dashwood* (1860), 2 Giff. 521; *Makepeace v. Rogers* (1865), 5 New Rep. 399; *Turner v. Burkinshaw* (1867), 2 Ch. App. 488; *Rishton v. Grissell* (1870), L. R. 10 Eq. 393; *Harsant v. Blaine, Macdonald* (1887), 56 L. J. Q. B. 511.

1771. —.]—Fraudulent sales had been made by the first tenant for life; his son died in his lifetime; the tenancy for life continued to exist for above thirty-five years after these fraudulent sales. On the tenant in remainder becoming entitled, he filed a bill to redeem:—**Held**: he was not barred by the lapse of time.—**BANDON (EARL) v. BECHER** (1835), 3 Cl. & Fin. 479; 9 Bli. N. S. 532; 6 E. R. 1517.

*Annotations:—***Mentd.** *R. v. Saddlers' Co.* (1863), 10 H. L. Cas. 404; *Ellis v. M'Henry* (1871), L. R. 6 C. P. 228.

1772. —.]—A. was the solr. & land agent of B., who was desirous of selling an estate, & in a letter to A. expressed his readiness to sell it for 13,000 guineas. The estate consisted of two portions, & a land valuer, whose valuation was not shown to have been communicated by A. to B., put upon the two portions separate values, which, added together, exceeded the 13,000 guineas. A. sold part of the estate to C. for a sum exceeding the valuer's estimate of that portion, & then purchased the other portion for a sum much less than that stated in the estimate, but which, added to C.'s purchase-money, just made up 13,000 guineas. A. pretended that the latter purchase was made by one of his relatives, & the conveyance from B. was executed to that relative, but immediately afterwards a conveyance was executed from the relative to A., & in that conveyance was a recital that the purchase-money was furnished by A. These facts were not discovered till thirty-seven years afterwards, & then B. filed his bill against the representatives of A., who had died seventeen years before, to set aside the latter conveyances, & to have an account:—**Held**: the circumstances of the transaction were of a fraudulent nature, & therefore furnished an answer to the objection arising upon the length of time during which the transaction had remained unimpeached.—**CHARTER v. TREVELYAN** (1844), 11 Cl. & Fin. 714; 8 Jur. 1015; 8 E. R. 1273, H. L.

*Annotations:—***Refd.** *Manby v. Berwicke* (1857), 3 K. & J. 342. **Mentd.** *Clanricarde v. Henning* (1861), 5 L. T. 168.

1773. —.]—Where an entry in an administrator's account, which had been settled, was shown to be fraudulently made, the whole account was opened, notwithstanding the lapse of forty years since the death of the intestate, seventeen since the settlement of the account, & more than two since the discovery of the entry complained of.—**ALLFREY v. ALLFREY** (1849), 1 Mac. & G. 87; 1 H. & Tw. 179; 13 L. T. O. S. 250; 13 Jur. 269; 41 E. R. 1195.

*Annotations:—***Mentd.** *Williamson v. Barbour* (1877), 9 Ch. D. 529; *Gething v. Keighley* (1878), 9 Ch. D. 547; *Ward v. Sharp* (1884), 53 L. J. Ch. 313.

1774. —.]—**IRVINE v. KIRKPATRICK**, No. 1781, *post*.

1775. — While party defrauded ignorant of fraud.]—*WATLINGTON v. WILKINSON* (1729), 1 Barn. K. B. 270; 94 E. R. 184.

1776. — —.]—When it is said that a person who fraudulently receives or possesses himself of trust property is converted by the ct. into a trustee, the expression is used for the purpose of describing the nature & extent of the remedy against him. But as the remedy is given on the ground of fraud, it is governed by the principle, that the right of the party defrauded is not affected by lapse of time, nor, generally speaking, by anything done or entitled to be done, so long as he remains, without any fault of his own, in ignorance of the fraud that has been committed.—*ROLFE v. GREGORY* (1865), 4 De G. J. & Sm. 576; 5 New Rep. 257; 34 L. J. Ch. 274; 12 L. T. 162; 11 Jur. N. S. 98; 13 W. R. 355; 46 E. R. 1042, L. C.

Annotations :—*Consd.* *Oelkers v. Ellis*, [1914] 2 K. B. 139. *Refd.* *Stone v. Stone* (1869), 5 Ch. App. 74; *Bull Coal Mining Co. v. Osborne*, [1899] A. C. 351; *Armstrong v. Jackson*, [1917] 2 K. B. 822.

1777. — Although party sued not privy to fraud.]—The intentional concealment by a mother of a [voluntary] conveyance of property by her to her daughter is a "concealed fraud" against the daughter, whatever the mother's motive for concealment may have been.

The "concealed fraud," which under Real Property Limitation Act, 1833 (c. 27), s. 26, will prevent the running of the Real Property Limitation Acts against a pltf. claiming real property must, according to the principles which have been always acted upon by cts. of equity, be the fraud of, or in some way imputable to, the person setting up the statutes, or of some one through whom that person claims.—*Re McCALLUM, McCALLUM v. McCALLUM*, [1901] 1 Ch. 143; 70 L. J. Ch. 206; 83 L. T. 717; 49 W. R. 129; 17 T. L. R. 112; 45 Sol. Jo. 98, C. A.

Annotations :—*Refd.* *Re Levesley, Goodwin v. Levesley* (1915), 60 Sol. Jo. 142; *Re Coole, Coole v. Flight*, [1920] 2 Ch. 536.

B. What Amounts to Fraud.

1778. Deliberate concealment.]—*BOOTH v. WARRINGTON* (EARL), No. 1762, *ante*.

1779. —.]—*LEWELLIN v. MACKWORTH*, No. 1313, *ante*.

1780. —.]—An agreement between two brothers, the younger of whom disputed the legitimacy of the elder, for a division of the family estates, rescinded after a lapse of nineteen years; the legitimacy of the elder being established on the trial of an issue directed, & the younger brother having been apprized at the time of the agreement of a private ceremony of marriage which had passed between their parents, & not having communicated that fact to the elder, & not possessing a legal power, on the supposition of the elder brother's illegitimacy, to secure to him the benefits stipulated in the agreement.—*GORDON v. GORDON* (1821), 3 Swan. 400; 36 E. R. 910.

Annotations :—*Mentd.* *Watkin & Bligh v. Brent* (1836), 1 Curt. 264; *Stewart v. Stewart* (1839), 6 Cl. & Fin. 911; *Malone v. Malone* (1841), 8 Cl. & Fin. 179; *Nelthorpe v. Holgate* (1844), 1 Coll. 203; *Watts v. Hyde* (1846), 2 Coll. 368; *Hayward v. Purssey* (1849), 3 De G. & Sm. 399; *Hoghton v. Hoghton* (1852), 15 Beav. 278; *Smith v. Pincombe* (1852), 3 Mac. & G. 653; *Lawton v. Camplon* (1854), 18 Beav. 87; *Baker v. Bradley* (1855), 7 De G. M. & G. 597; *Bainbrigge v. Moss* (1856), 3 Jur. N. S. 58; *Holmes v. Powell* (1856), 8 De G. M. & G. 572; *Bentley v. Mackay* (1862), 31 Beav. 143; *Micholls v. Corbett* (1866), 34 Beav. 376; *Smith v. Mogford* (1873), 21 W. R. 472; *Fane v. Fane* (1875), L. R. 20 Eq. 698; *Lovell v. Wallis* (1884), 50 L. T. 681.

1781. —.]—Deeds will not be set aside after thirty-seven & thirty-nine years from their dates, on the grounds of misrepresentation & concealment, unless the averments in the pleadings & proof of fraudulent representation & concealment are precise in their character. Although length of time be no bar to fraud, yet it is a circumstance to be taken into consideration by the ct. in forming its judgment. No time will run to protect & screen fraud. A ct. of equity will overleap the barrier of time to get at the fraudulent parties & their deeds, & to undo those deeds, & to prevent any one, whether accomplice or innocent, from profiting by the fruits of fraud (LORD BROUGHAM).—*IRVINE v. KIRKPATRICK* (1850), 17 L. T. O. S. 32, H. L.

1782. Abuse of confidential relationship—Solicitor & client.]—*BLAIR v. BROMLEY*, No. 1790, *post*

1783. — —.]—A solr., being entrusted with moneys from time to time, professed to lay them out upon ample & perfect security, only mentioning that one was reversionary. The solr. died, & it was discovered that the mtgors. in every case were not worth suing, & two had been bkpts., & he had himself purchased one security, but as to some railway shares he had been a loser. On claim filed alleging fraud, after six years, & a contention on the part of the general creditors that it was a case for damages for negligence & not for fraud:—*Held*: in all the cases in some shape the estate of the deceased solr. was liable; & although accounts had been rendered, & might be regarded as settled, they were still open to surcharge & falsification; & where, as in this case more than six years had elapsed, the remedy was in equity for gross negligence amounting to fraud.—*SMITH v. POCOCKE* (1854), 2 Drew. 197; 2 Eq. Rep. 368; 23 L. J. Ch. 545; 18 Jur. 478; 2 W. R. 285; 61 E. R. 694.

Annotations :—*Refd.* *Dooby v. Watson* (1888), 39 Ch. D. 178. *Mentd.* *British Mutual Investment Co. v. Cobbold* (1875), L. R. 19 Eq. 627.

1784. — —.]—A purchase of real estate by a solr. from his client set aside, with costs, after an interval of upwards of twenty years, upon the ground of unfair dealing & suppression of facts which ought to have been disclosed, upon the part of the solr.—*GRESLEY v. MOUSLEY* (1858), 1 Giff. 450; 27 L. J. Ch. 779; 31 L. T. O. S. 311; 4 Jur. N. S. 728; 6 W. R. 807; 65 E. R. 995; *on appeal* (1859), 4 De G. & J. 78, L. JJ.

Annotations :—*Mentd.* *Lyddon v. Moss* (1859), 4 De G. & J. 104; *Clanricarde v. Henning* (1861), 30 Beav. 175; *Turner v. Turner, Hall v. Turner* (1880), 28 W. R. 859.

1785. Fraud upon court—Petition for payment out.]—In 1814 W. died intestate seised of a freehold estate. On his death his widow entered into possession, & continued to receive the rents until 1829. W.'s heir-at-law died in 1822. In 1829 the property was taken under an Act of Parliament, & the purchase-money was paid into ct. Upon petition, in 1829, by the widow & J., the heir of the heir-at-law of W., the rents were ordered to be paid to the widow for her life, & then to J. for his life. The widow died in 1834, & J. died in 1863. Upon petition by those claiming under the will of J. for payment of the money out of ct., a claim was made by the devisees of the heir-at-law of W., who alleged fraud & misrepresentation by petitioners in 1829:—*Held*: their claim was barred by lapse of time, & they could not set up the case of fraud upon the petition; but leave was given to them to file a bill, the order upon the petition not to be drawn up for ten days.—*Re CHARING CROSS ACT, Ex p. BREACH* (1864), 10 L. T. 396; 10 Jur. N. S. 982; 12 W. R. 769.

Sect. 1.—Claims in equity: Sub-sect. 1, C.; sub-sect. 2, A. & B.]

C. When Time Begins to Run.

1786. From discovery of fraud.]—The cause of action within Statute of Limitations arises when the party has the right to apply to a ct. of equity. As where a reversion, alleged to have been fraudulently purchased, descends in equity to the heir by the death of the ancestor. *Semble*: the time of limitation begins to run from the time when the fraud is discovered, either in the lifetime of the ancestor, or upon the descent.—*WHALLEY v. WHALLEY* (1821), 3 Bli. 1; 4 E. R. 506, L. C.

Annotations:—*Refd.* Brooksbank v. Smith (1836), 2 Y. & C. Ex. 58; *Gibbs v. Guild* (1881), 8 Q. B. D. 296. *Mentd.* Portmore v. Taylor (1831), 4 Sim. 182; *Bennett v. Colley* (1833), Coop. temp. Brough. 248.

1787. —.]—In cases of fraud, time runs in bar of relief from that period only at which the party injured became cognisant of his rights & injuries.

A steward & agent, being employed to sell an estate, purchased part of it himself at an under-value, & secretly, in the name of another person. All actions & matters of difference between the parties were afterwards submitted to arbitration; an award was made, & mutual releases executed. The ct., forty-seven years after the purchase, & twenty-eight years after the award, set aside the purchase, holding that the principal having been kept ignorant of the fraud, was not bound by the lapse of time.—*TREVELYAN v. CHARTER* (1835), 4 L. J. Ch. 209; *subsequent proceedings* (1837), 6 L. J. Ch. 274; *affd. sub nom. CHARTER v. TREVELYAN* (1844), 11 Cl. & Fin. 714, H. L.

Annotations:—*Consd.* Manby v. Bewicke (1857), 3 K. & J. 342; *Clanricarde v. Henning* (1861), 30 Beav. 175. *Refd.* Vane v. Vane (1873), 28 L. T. 320.

1788. —.]—Where a trust is created by the act of the parties, no time is a bar to relief, but where there is no trust, except such as is created by the decree of the ct. on setting aside the transaction, time runs from the discovery of the circumstances which constituted the right to relief.

In 1807, a solr. agreed to purchase an estate from his client, but the conveyance was not executed until 1823. The client changed his solr. in 1826 & died in 1829, fully aware of his rights. A bill filed in 1859 by persons claiming through the client, to set aside the transaction, was dismissed on the ground of the great lapse of time, the ct. holding that pltf's. had no better title to relief than the client would have had if living.—*CLANRICARDE (MARQUIS) v. HENNING* (1861), 30 Beav. 175; 30 L. J. Ch. 865; 5 L. T. 168; 7 Jur. N. S. 1113; 9 W. R. 912; 54 E. R. 855.

Annotation:—*Refd.* Molloy v. Mutual Reserve Life Insee. (1906), 94 L. T. 756.

1789. Fraud by tenant for life—Action by remainderman on becoming entitled.]—*BANDON (EARL) v. BECHER*, No. 1771, ante.

1790. Fraud by one partner—Dissolution of partnership—Action against other partner.]—A. & B. having for many years been partners in business as solrs., dissolved their partnership in 1834, & the business continued to be carried on by A. alone, until 1841, when he became bkpt., & it was then discovered that a sum of money which had been paid by a client into the joint account of the firm at their banker's in 1829, for the purpose of investment, & which A. had shortly afterwards represented to have been invested

accordingly, & on which he had regularly paid interest on that footing, had, instead of being invested, been appropriated by him to his own use. Upon a bill filed by the client against B. to make him liable for the money:—*Held*: although pltf. might have a right of action at law for the money, he had also a concurrent remedy, on the ground of fraud, in equity. In equity the effect of the misrepresentation, so far as regarded Statute of Limitations, was the same as if it had been made on the day the fraud was discovered, notwithstanding the partnership had been dissolved more than six years before.—*BLAIR v. BROMLEY* (1847), 2 Ph. 354; 16 L. J. Ch. 495; 11 Jur. 617; 41 E. R. 979, L. C.

Annotations:—*Consd.* Eccl. Comrs. for England v. N. E. Ry. (1877), 4 Ch. D. 845. *Expld.* *Gibbs v. Guild* (1882), 9 Q. B. D. 59. *Consd.* *Moore v. Knight*, [1891] 1 Ch. 547; *Thorne v. Heard*, [1894] 1 Ch. 599. *Expld.* *Whitwam v. Watkin* (1898), 78 L. T. 188. *Refd.* *Imperial Gas Light & Coke Co. v. London Gas Light Co.* (1854), 10 Exch. 39; *Hunter v. Gibbons* (1856), 1 H. & N. 459; *Eager v. Barnes & Bridger* (1862), 7 L. T. 408; *Re Cameron's Coalbrook, etc., Co., Ex p. Hunt* (1863), 2 New Rep. 50; *Alliance Bank v. Tucker* (1867), 17 L. T. 13; *Hughes v. Twisden* (1886), 55 L. J. Ch. 481; *Re Fountaine, Fountaine v. Amherst* (1909), 78 L. J. Ch. 648. *Mentd.* *Ingram v. Thorp* (1848), 7 Hare, 67; *Wilson v. Short* (1848), 6 Hare, 366; *Coomer v. Bromley* (1852), 5 De G. & Sm. 532; *Bishop v. Jersey* (1854), 2 Drew. 143; *Bourdillon v. Roche* (1858), 27 L. J. Ch. 681; *Essell v. Hayward* (1860), 24 J. P. 819; *Slim v. Croucher* (1860), 8 W. R. 347; *Re Partridge & Edwards, Ex p. Bellamy* (1862), 6 L. T. 696; *Sawyer v. Goodwin* (1867), 36 L. J. Ch. 578; *St. Aubyn v. Smart* (1868), 3 Ch. App. 646; *Ramshire v. Bolton* (1869), L. R. 8 Eq. 294; *Plumer v. Gregory* (1874), L. R. 18 Eq. 621; *Phosphate Sewage Co. v. Hartmont* (1877), 5 Ch. D. 394; *Biggs v. Bree* (1881), 51 L. J. Ch. 64; *Re Mutual Aid Permanent Benefit Bldg. Soc., Ex p. James* (1883), 49 L. T. 530; *Botjomann v. Betjemann* (1895), 73 L. T. 2; *Mara v. Browne*, [1895] 2 Ch. 69.

SUB-SECT. 2.—APPLICATION OF STATUTES BY ANALOGY.

A. In General.

1791. When analogy applicable—Receipt by trustee of moneys—Receipt a fraud upon cestui que trust—Though cestui que trust not entitled to money.]—Although where a trustee receives money upon an express trust & wastes it, Statute of Limitations does not run against the claim of the cestui que trust, yet where a trustee receives money not belonging to the cestui que trust, but which the cestui que trust can claim on the ground that the receipt of it was a fraud upon him, Statute of Limitations will run against the claim of the cestui que trust from the time when he discovers the fraud.—*METROPOLITAN BANK v. HEIRON* (1880), 5 Ex. D. 319; 43 L. T. 676; 29 W. R. 370, C. A.

Annotations:—*Consd.* *Lister v. Stubbs* (1890), 45 Ch. D. 1; *Re Sharpe, Re Bennett, Masonic & General Life Assoc. v. Sharpe*, [1892] 1 Ch. 154. *Expld.* *Re Sale Hotel & Botanical Gardens Co., Hesketh's Case* (1897), 77 L. T. 681. *Refd.* *Re Fitzroy, Bessemer Steel, etc., Co.* (1884), 50 L. T. 144; *The Pongola* (1895), 73 L. T. 512. *Mentd.* *Clarkson v. Davies*, [1923] A. C. 100.

1792. When time begins to run—Discovery of fraud—What amounts to discovery—Notice to company directors of acts of one director.]—S., a promoter, & subsequently a director, of the co., made an arrangement with the syndicate of vendors by which he was to receive a thousand B. shares in the co. in consideration of his taking or placing five hundred A. shares. He subsequently received his thousand B. shares. Notice of this transaction was, after the formation of the co. given to the directors, but the board which received the notice

PART VIII. SECT. 1, SUB-SECT. 1.—C.

1786 i. From discovery of fraud.]—*RAMASAWMY MUDALI v. VALAYUDA MUDALI* (alias AIYATHORAY MUDALI)

(1869), 4 Mad. 266.—IND.

1786 ii. —.]—In cases of fraud time in order to bar the remedy, will not begin to run, till the party acquires

a knowledge of the facts constituting the fraud.—*BLANNERHASSETT v. DAY* 2 Ball & B. 104, 118, 129.—

consisted of persons more or less implicated in the transaction, & no action was taken in the matter. The co. was afterwards wound up, & the liquidator took out a summons to recover from S. the value of the thousand B. shares, on the ground that his having received them was, under the circumstances, a misfeasance as against the co. It was contended that he was barred by Statute of Limitations from making this claim, the co. having, through its directors, received notice of the transaction more than six years previously:—*Held*: though notice to the directors of a co. was *prima facie* notice to the co., yet when, as in this case, it was certain that the directors would not communicate the information to the shareholders it was not, & this claim therefore was not barred by Statute of Limitations.—*Re FITZROY BESSEMER STEEL, ETC. CO., LTD.* (1884), 50 L. T. 144; 32 W. R. 475; *on appeal* (1885), 33 W. R. 312, C. A.

Annotation:—*Mentd.* Ladywell Mining Co. v. Brookes, Ladywell Mining Co. v. Huggons (1886), 55 L. T. 284.

1793. ——— **Construction of document by court.**—In 1890 pltf. effected a policy of insurance on his life with defts., relying upon the inducements of its agent that, *inter alia*, he would have to pay only a fixed periodical premium. In 1898 a claim was for the first time made on pltf. for payment of an increased premium. Pltf., being desirous not to forfeit his policy, paid the amount demanded under protest. In Apr. 1898, he issued a plaint in the county ct. to recover a sum as an overpayment, but the county ct. judge in May, 1898, decided that he was not entitled to succeed. Meetings of policy holders were held from time to time in 1900, when it was resolved to bring an action in the name of pltf. against defts. But it was subsequently determined to await the decision of the ct. in an action which had been instituted against defts. by another policy holder.

That other action was tried in July, 1902, when the judge held that defts. had no right to increase the premiums as the age of the assured increased. Defts. appealed, & the Ct. of Appeal took a different view, but held that the policy was tricky & could be rescinded. The House of Lords in July, 1904, affirmed the decision of the Ct. of Appeal. In Sept. 1904, pltf. issued his writ in the present action, claiming rescission of his policy on the ground of misrepresentations:—*Held*: the county ct. judge having in May, 1898, decided what was the true meaning of the policy, & his decision not having been appealed from, pltf. must be taken to have known at that date what was the nature of the contract between defts. & himself & all the facts which would have enabled him to bring an action for misrepresentation; & Statute of Limitations was therefore a bar to the present action, the period at which the statute began to run being that at which pltf. knew the facts & not that at which he ascertained the proper construction to be placed upon them.—*MOLLOY v. MUTUAL RESERVE LIFE INSURANCE CO.* (1906), 94 L. T. 756; 22 T. L. R. 525, C. A.

Annotation:—*Consd.* Oelkers v. Ellis, [1914] 2 K. B. 139.

—— **Wrongful taking of minerals.**—See Subsect. 2, B., *post*.

B. Wrongful Taking of Minerals.

See, generally, MINES.

1794. What amounts to concealment of fraud — Omission to keep plans of working.—Pltfs., the owners of coal mines, discovered in 1872 that defts. more than six years previously had, when working an adjoining colliery, worked a large quantity of pltfs.' coal by breaking their boundary.

There had been no subsidence of the surface or anything to put pltfs. on inquiry, & defts., in plans which they kept of the workings in their own mine, had not marked the illegal workings:—*Held*: the omission in the plans was not sufficient to constitute a case of concealed fraud so as to entitle pltfs. to an account & damages.—*DAWES v. BAGNAIL* (1875), 23 W. R. 690.

Annotation:—*Consd.* *Re Astley & Tyldesley Coal Co. & Tyldesley Coal Co.* (1899), 80 L. T. 116.

1795. ——— **Negligence.**—The encroachment upon the bounds of, & abstraction of coal from, an adjoining mine by underground working, although tortious, does not, when the arbitrator finds mere negligence on the one side, & no laches on the other, raise such an inference of fraud or concealment of fraud as to oust the operation of Statute of Limitations.—*Re ASTLEY & TYLDESLEY COAL & SALT CO. & TYLDESLEY COAL CO.* (1899), 68 L. J. Q. B. 252; 80 L. T. 116; 15 T. L. R. 154, D. C.

Annotation:—*Reid.* Cayzer, Irvine v. Board of Trade (1926), 95 L. J. K. B. 1054.

1796. When time begins to run—Fraudulent taking—From discovery of taking.—Where, by underground working, deft. had taken the coal of his neighbour, the ct. limited the account to six years, but intimated that the amount wrongfully abstracted being proved, the *onus* of proof would lie on the wrongdoer to show that it was not taken within the six years. *Semble*: the account would not be so limited, if the coal had been abstracted intentionally, & steps had been taken to conceal the fact & prevent discovery.—*DEAN v. THWAITE* (1855), 21 Beav. 621; 52 E. R. 1000.

Annotations:—*Consd.* *Eccl. Comrs. for England v. N. E. Ry.* (1877), 4 Ch. D. 845. *Expld.* *Bulli Coal Mining Co. v. Osborne*, [1899] A. C. 351. *Reid.* *Vane v. Vane* (1873), 8 Ch. App. 383; *Dawes v. Bagnall* (1875), 23 W. R. 690; *Trotter v. Maclean* (1879), 13 Ch. D. 574; *Re Astley & Tyldesley Coal & Salt Co. & Tyldesley Coal Co.* (1899), 68 L. J. Q. B. 252. *Mentd.* *Powell v. Aiken* (1858), 4 K. & J. 343; *Rains v. Buxton* (1880), 43 L. T. 88.

1797. ——— **—**—The owner of a mine commenced to work from his own mine into an adjoining mine vested in trustees, in the *bonâ fide* belief that he was about to obtain from them a contract authorising him so to work, & gave to one of the trustees notice that he was about to commence working:—*Held*: the working, though no contract was afterwards entered into & the trustees had no power to make one, ought to be treated on the same footing as if it had been commenced inadvertently, & in taking an account of the minerals gotten without authority deft. was allowed the cost of severing them, as well as the cost of bringing them to bank. But, from the time that notice was given to deft. that no contract would be made with him authorising him to work, his working was treated as fraudulent, & he was allowed only the cost of bringing the minerals to bank. So long as a wrongful working is to be treated as inadvertent Statute of Limitations applies, & the account will only be directed for six years from the issue of the writ. But the *onus* is on deft. to show that minerals gotten by him were gotten before the six years.

The provisions of Statute of Limitations, 1623 (c. 16), in respect of a trespass apply to proceedings in the Ch. Div. of a like nature, unless there is some equitable circumstance which repels the application of the statute, such as fraud.—*TROTTER v. MACLEAN* (1879), 13 Ch. D. 574; *sub nom.* *TROTTER v. MACLEAN*, *TROTTER v. VAUGHAN*, *TROTTER v. FLETCHER*, 49 L. J. Ch. 256; 42 L. T. 118; 28 W. R. 244.

Annotations:—*Consd.* *Bulli Coal Mining Co. v. Osborne*, [1899] A. C. 351. *Reid.* *Rains v. Buxton* (1880), 14 Ch. D.

Sect. 1.—Claims in equity: Sub-sect. 2, B. Sect. 2: Sub-sects. 1 & 2.]

537; *Re Astley & Tyldesley Coal & Salt Co. & Tyldesley Coal Co.* (1899), 68 L. J. Q. B. 252. **Mentd.** *Jolcey v. Dickinson* (1881), 45 L. T. 643.

1798. ——— In absence of laches of plaintiff.]—Although cts. of equity are not within the words of Statute of Limitations, yet they are within its spirit & meaning, & have uniformly adopted its rules.

Where applts. had furtively for a series of years taken resps.' coal by means of a wilful & secret underground trespass; & no laches was attributable to resps. in not discovering the existence of the wrongful workings by applts.:—**Held:** on a summons issued by the latter in the winding up of applt. co., they were entitled to recover from applts. the market value of all the coal worked & gotten by them from resps.' land, no allowance being made for the cost of working.

To such a claim Statute of Limitations has no application. So long as there has been no laches by the party defrauded it is immaterial whether or not there have been on the part of the wrongdoer active measures to prevent detection.—**BULLI COAL MINING CO. v. OSBORNE**, [1899] A. C. 351; 68 L. J. P. C. 49; 80 L. T. 430; 47 W. R. 545; 15 T. L. R. 257, P. C.

Annotation:—**Expld.** *Oelkers v. Ellis*, [1914] 2 K. B. 139.

1799. ——— Inadvertent taking—From date of working.]—**DEAN v. THWAITE**, No. 1796, *ante*.

1800. ———.]—**TROTTER v. MACLEAN**, No. 1797, *ante*.

1801. ——— From date of discovery.]—Pltfs., who were owners of a coal mine, claimed damages against the owners of an adjoining mine for having broken their barriers & worked their coal. The wrongful acts were committed in 1863 while the adjoining mine was being worked by the Hartlepool Ry. co. The boundaries of the two mines were settled by mutual agreement in 1862, & after some lengthy negotiations a release was executed in 1864, by which all previous wrongful acts were condoned & released on both sides. An Act of Parliament was passed in 1863 by which the Hartlepool Ry. co. were to sell their mines within five years; & in 1865 the said railway co. was amalgamated with deft. co., & all their assets & liabilities were transferred to them:—**Held:** Statute of Limitations only commenced to run from the time of the discovery of the wrongful acts, there being no laches attributable to the pltfs. for not having discovered the damage prior to 1870, two years before the filing of the bill.—**ECCLESIASTICAL COMRS. FOR ENGLAND v. NORTH EASTERN RY. CO.** (1877), 4 Ch. D. 845; 47 L. J. Ch. 20; 36 L. T. 174.

Annotations:—**Expld.** *Gibbs v. Guild* (1881), 8 Q. B. D. 296. **Consd.** *Re Astley & Tyldesley Coal & Salt Co. & Tyldesley Coal Co.* (1899), 68 L. J. Q. B. 252; *Bulli Coal Mining Co. v. Osborne*, [1899] A. C. 351. **Refd.** *Trotter v. Maclean* (1879), 13 Ch. D. 574.

SECT. 2.—SIMPLE CONTRACTS AND TORTS.

SUB-SECT. 1.—FRAUD AND FRAUDULENT MISREPRESENTATION.

See Statute of Limitations, 1623 (c. 16), & generally, MISREPRESENTATION & FRAUD.

PART VIII. SECT. 2, SUB-SECT. 1.

1802 i. Whether fraud bar to operation of statute.]—**FREEMAN v. DE BLOIS** (1912), 11 E. L. R. 573.—**CAN.**

1802 ii. ———.]—No length of time is a bar to relief in the case of fraud, in the absence of laches on the part of

the person defrauded.—**TWYFORD v. BISHOPRIC** (1914), 28 W. L. R. 934; 7 W. R. 102; 20 D. L. R. 871.—**CAN.**

1802 iii. ———.]—**BANK OF MADRAS v. MULTAN CHAND KANYALAL** (1904), 1 L. R. 27 Mad. 343.—**IND.**

1802 iv. ———.]—**BARBER v. HOUSTON**

(1885), 18 L. R. Ir. 475.—**IR.**

1802 v. ———.]—**DOUGLAS v. SANDER (FRANZ) & Co.**, [1902] A. C. 437.—**S. AF.**

1. From when time runs.]—In case of fraudulent misrepresentation, the Statute of Limitations begins to

1802. Whether fraud bar to operation of statute.]—**BREE v. HOLBECH**, No. 1804, *post*.

1803. ———.]—Pltf. employed deft. in 1808 to lay out money for him in the purchase of an annuity, & discovered in Feb. 1814, that the security provided by deft. was void with deft.'s own knowledge at the time of the purchase. In Jan. 1820, pltf. sued deft. in *assumpsit* for breach of an implied contract to provide good security:—**Held:** the action proceeding on the contract & not on the fraud, the Statute of Limitations was a good bar.—**BROWN v. HOWARD** (1820), 2 Brod. & Bing. 73; 4 Moore, C. P. 508; 129 E. R. 885.

Annotations:—**Consd.** *Gibbs v. Guild* (1881), 46 L. T. 248. **Refd.** *Davis v. Bank of England* (1824), 2 Bing. 393; *Granger v. George* (1826), 5 B. & C. 149; *Howell v. Young* (1826), 5 B. & C. 259; *Philpott v. Kelley* (1835), 3 Ad. & El. 106; *East India Co. v. Odithurn* (1849), 7 Moo. P. C. C. 85; *Re Triston* (1850), 1 L. M. & P. 74.

——— Fraudulent concealment of causes of action.]—**See Nos. 1814–1819, post.**

1804. Fraud must be of party invoking statute.]—

A personal representative having found among the papers of deceased a mtge. deed & having assigned it more than six years ago for the mtge. money, affirming & reciting in the deed of assignment that it was a mtge. deed made or mentioned to be made between the mtgor. & mtgee. for that sum, the assignee shall not recover back the mtge. money, although it shall turn out that the mtge. was a forgery, & that the assignee did not discover the forgery till within six years before he brings his action, unless the assignor knew it to be a forgery.

There may be cases which fraud will take out of the Statute of Limitations (**LORD MANSFIELD**).—**BREE v. HOLBECH** (1781), 2 Doug. K. B. 654; 99 E. R. 415.

Annotations:—**Consd.** *Brown v. Howard* (1820), 2 Brod. & Bing. 73. **Appld.** *Re Baillie & Jaffray, Ex p. Bolton* (1832), 1 Deac. & Ch. 556. **Consd.** *Gibbs v. Guild* (1881), 8 Q. B. D. 296. **Refd.** *Clark v. Hougham* (1823), 2 B. & C. 149. **Mentd.** *Cripps v. Reade* (1796), 6 Term Rep. 606; *Jones v. Ryde* (1814), 5 Taunt. 488; *Edwards v. McLeay* (1815), Coop. G. 308; *Clare v. Lamb* (1875), L. R. 10 C. P. 334; *Allen v. Richardson* (1879), 13 Ch. D. 524; *Jolliffe v. Baker* (1883), 11 Q. B. D. 255.

1805. ———.]—**THORNE v. HEARD**, No. 1535, *ante*.

1806. From when time runs—From discovery of facts entitling action to be brought.]—The exors. of the obligor in a bond, who have paid the interest on the principal sum, secured thereby in full, without deducting the property tax, during the existence of that tax, under a misrepresentation, that that was required by the terms of the bond, whereas it, on the contrary, provided for such deduction, are entitled to have the whole amount of that duty refunded, on the closing of the account, notwithstanding a space of more than six years had elapsed since the last of the payments; & the master having, on a reference to him to ascertain what was due for principal & interest on the bond, disallowed this claim of the exors., the account was referred back to him by the ct. But such claim cannot be sustained in respect of a payment of the tax by the obligor himself, with a knowledge of the law & the facts.—**SMITH v. ALSOP** (1824), McCle. 622; 13 Price, 823; 148 E. R. 261.

1807. ———.]—**HACKNEY v. KNIGHT** (1891), 7 T. L. R. 254.

1808. ——— Or when by due diligence fraud would have been discovered.]—Under the Statute

[of Limitations] delay deprives a man of his right to rescind on the ground of fraud, & the only question to be considered is from what time the delay is to be reckoned. It had been decided & the rule was adopted by the statute, that the delay counts from the time when by due diligence the fraud might have been discovered (JESSEL, M.R.).—REDGRAVE v. HURD (1881), 20 Ch. D. 1; 51 L. J. Ch. 113; 45 L. T. 485; 30 W. R. 251, C. A.

Annotations:—**Refd.** Hughes v. Twisden (1886), 55 L. J. Ch. 481; Aaron's Reefs v. Twiss, [1896] A. C. 273; Merino v. Mutual Reserve Life Insee. (1904), 21 T. L. R. 167. **Mentd.** Mathias v. Yetts (1882), 46 L. T. 497; Mullens v. Miller (1882), 31 W. R. 559; Roots v. Snelling (1883), 48 L. T. 216; Smith v. Chadwick (1884), 9 App. Cas. 187; Smith v. Land & House Property Corp. (1884), 28 Ch. D. 7; Newbigging v. Adam (1886), 34 Ch. D. 582; Re Liberian Government Concessions & Exploration Co. (1892), 9 T. L. R. 136; Re Metropolitan Coal Consumers' Assocn., Karberg's Case, [1892] 3 Ch. 1; Davis v. Ohrlly (1898), 14 T. L. R. 260; Whittington v. Seale-Hayne (1900), 82 L. T. 49; Re Law, Law v. Law (1904), 74 L. J. Ch. 169; Nash v. Calthorpe, [1905] 2 Ch. 237; Mair v. Rio Grande Rubber Estates, [1913] A. C. 853; Wells v. Smith, [1914] 3 K. B. 722; Armstrong v. Jackson, [1917] 2 K. B. 822; Goldrei, Foucard v. Sinclair & Russian Chamber of Commerce in London, [1918] 1 K. B. 180; Compagnie Chemin de Fer Paris-Orleans v. Leeston Shipping Co. (1919), 36 T. L. R. 68; Dawsons v. Bonnin, [1922] 2 A. C. 413.

1809. ———. ———.]—GIBBS v. GUILD, No. 1819, *post*.

1810. ——— **As between partners—Time does not run till circumstances arouse suspicion.**—B. & W., who were partners in a bank, agreed to take R. into partnership with them. W., who took no actual part in the business, & was known to R. not to do so, joined with B. in producing to R., during the negotiations, as a true account of the affairs of the bank, a paper stating the amount in which it was indebted to customers to be £11,000, the amount being in fact £26,000. R. entered into the partnership without examining the books & continued in it for four years, taking no part in the business & never examining the books. At the end of that time the bank turned out to be insolvent. R. then filed a bill against B. & W.'s exors., asking to have the partnership agreement rescinded, & to have an indemnity against the debts of the concern:—**Held:** the lapse of time was no bar to pltf., for that although he had means of ascertaining the representation to be untrue, he was entitled as between him & the persons who made it to believe it to be true, & was not bound to make inquiry until there was something to raise suspicion.—RAWLINS v. WICKHAM (1858), 3 De G. & J. 304; 28 L. J. Ch. 188; 5 Jur. N. S. 278; 44 E. R. 1285; *sub nom.* RAWLINS v. WICKHAM, WICKHAM v. BAILEY, 32 L. T. O. S. 231; 7 W. R. 145, L. JJ.

Annotations:—**Appld.** Betjemann v. Betjemann, [1895] 2 Ch. 474. **Refd.** Redgrave v. Hurd (1881), 20 Ch. D. 1. **Mentd.** Scholefield v. Tompler (1859), John. 155; Conybeare v. New Brunswick & Canada Ry. (1860), 1 Giff. 339; Gorsuch v. Cree (1860), 8 C. B. N. S. 574; Davies v. Marshall (1861), 10 C. B. N. S. 697; Evans v. Robins (1863), 11 L. T. 211; Graham v. Wickham (1865), 2 De G. J. & Sm. 497; Hallows v. Fernie (1867), L. R. 3 Eq. 520; Re Overend, Gurney, *Ex p.* Oakes & Peek (1867), L. R. 3 Eq. 576; Re Reese River Silver Mining Co., Smith's Case (1867), 2 Ch. App. 604; Overend, Gurney v. Gurney (1869), 17 W. R. 719; Peek v. Gurney (1873), L. R. 6 H. L. 377; A.-G. v. Ray (1874), 9 Ch. App. 402, n.; Re Royal Victoria Palace Theatre Syndicate, Moore & De la Torre's Case (1874), L. R. 18 Eq. 661; Panama & South Pacific Telegraph Co. v. India Rubber, Gutta Percha & Telegraph Works Co. (1875), 10 Ch. App. 520, n.; Lacey v. Hill, Leney v. Hill (1876), 4 Ch. D. 537; Hart v. Swaine (1877), 7 Ch. D. 42; Edwick v. Hawkes

(1881), 18 Ch. D. 199; Mathias v. Yetts (1882), 46 L. T. 497; Jolliffe v. Baker (1883), 11 Q. B. D. 255; Re Mount Morgan West Gold Mine, *Ex p.* West (1887), 56 L. T. 622; Adam v. Newbigging (1888), 13 App. Cas. 308; Lagunas Nitrate Co. v. Lagunas Syndicate, [1899] 2 Ch. 392; Hindle v. Brown (1907), 98 L. T. 44.

1811. ———. ———.]—BETJEMANN v. BETJEMANN, No. 1743, *ante*.

1812. ——— **Fraud discovered during bankruptcy proceedings—Time runs on cessation of bankruptcy.**—C., a broker, sold without authority bonds left with him by A., a customer, for safe custody, & misappropriated the proceeds. C. became bkpt., & the sale being then discovered A. proved for the value. The creditors passed a resolution under Bkpcy. Act, 1869 (c. 71), s. 28, accepting a proposal that T., a friend of the bkpt., should pay a composition of 6d. in the pound on all the debts in due discharge thereof, & on such payment the bkpcy. should be annulled. A. received the composition but did not otherwise assent to the arrangement. In Aug. 1880, the bkpcy. was annulled. In May, 1886, an order in the Ch. Div. was made for administration of an estate of C., who had died in the interval:—**Held:** as the debt was incurred by fraud which was not discovered till after the adjudication & an action could not be brought while the bkpcy. was in force the Statute of Limitations did not begin to run till the bkpcy. was annulled & as an order for administration was made within six years from that time A. was entitled to prove in the administration for the unpaid part of his debt.—Re CROSLY, MUNNS v. BURN (1887), 35 Ch. D. 266; 57 L. T. 298; 35 W. R. 790, C. A.

Annotation:—**Consd.** Re Benzon, Bower v. Chetwynd, [1914] 2 Ch. 68.

1813. ——— **Misrepresentation by directors in prospectus—Time runs from date of subscription.**—(1) Civil Procedure Act, 1833 (c. 42), s. 3, which provides that "all actions for penalties, damages or sums of money given to the party grieved by any statute" must be brought within two years after the cause of action, applies only to penal actions—i.e. actions for penalties, or damages or sums of money in the nature of penalties, & does not apply to an action by a shareholder in a co., under Directors Liability Act, 1890 (c. 64), s. 3, to recover from the directors compensation for loss or damage sustained by him by reason of untrue statements in the prospectus of the co. on the faith of which he subscribed for his shares.

(2) *Seemle:* the cause of action in such a case accrues at the time when the shares are subscribed for, & the action must, under Statute of Limitations (c. 16), be brought within six years from that date.—THOMSON v. CLANMORRIS (LORD), [1900] 1 Ch. 718; 69 L. J. Ch. 337; 82 L. T. 277; 48 W. R. 488; 16 T. L. R. 296; 44 Sol. Jo. 346; 8 Mans. 51, C. A.

Annotations:—*As to* (1) **Appld.** Shinman v. Lyons (1922), 38 T. L. R. 560; Jarvis v. Surrey County Council, [1925] 1 K. B. 554.

SUB-SECT. 2.—FRAUDULENT CONCEALMENT OF CAUSE OF ACTION.

1814. **Whether fraud bar to operation of statute—At common law.**—Pltf. after six years is entitled to a discovery of a fraud. A fraud is a bar to the Statute of Limitations at law.—WORTHINGTON v. WILKINSON (1729), Mos. 244; 25 E. R. 375, L. C.

run from the time of the misrepresentation, not from the time of its discovery, by pltf., nor from the time that damages accrued.—DICKSON v. JARVIS (1838), 5 O. S. 694.—CAN.

m. ———.]—BOGARDUS v. WEL-
LINGTON (1900), 27 A. R. 530.—CAN.

PART VIII. SECT. 2, SUB-SECT. 2.
n. *Whether fraud bar to operation*

of statute.—LARKIN v. GOOD (1823-1900), 2 Ont. Dig. 2852.—CAN.

o. ———.]—The Statute of Limitations will not be allowed to run against

*Sect. 2.—Simple contracts and torts: Sub-sect. 2.
Sect. 3: Sub-sects. 1 & 2.]*

1815. ———.]—It is no answer to a plea of the Statute of Limitations that pltf. was prevented by the fraud of deft. from knowing of the cause of action until after the time of limitation had expired.

A count stated, that defts. bored into certain gas pipes of pltf's., & affixed gas pipes of defts. thereto, & kept them so affixed for a long time, without the knowledge of pltf's., by means whereof large quantities of pltf's.' gas flowed out of their pipes; that defts., maliciously contriving to prevent pltf's. from discovering the trespasses so committed till six years should have elapsed, fraudulently & without pltf's.' knowledge, cut off from pltf's.' gas pipes, the gas pipes of defts. so affixed thereto, & fraudulently, & without pltf's.' knowledge, stopped & plugged up the gas pipes of pltf's. where the gas pipes of defts. had been so affixed; by means whereof pltf's. were prevented from discovering the trespasses until six years from their commission had elapsed, & thereby the remedy of pltf's. by action became barred:—*Held*: the count disclosed a good cause of action.—*IMPERIAL GAS LIGHT & COKE CO. v. LONDON GAS LIGHT CO.* (1854), 10 Exch. 39; 2 C. L. R. 1230; 23 L. J. Ex. 303; 18 Jur. 497; 2 W. R. 527; 156 E. R. 346.

Annotations:—*Dbtd.* *Gibbs v. Guild* (1882), 9 Q. B. D. 59. *Apld.* *Armstrong v. Milburn* (1885), 54 L. T. 247. *Consd.* *Osgood v. Sunderland* (1914), 111 L. T. 529. *Refd.* *Bonomi v. Backhouse* (1858), 27 L. J. Q. B. 378; *Trotter v. Maclean* (1879), 13 Ch. D. 574; *Bull Coal Mining Co. v. Osborne*, [1899] A. C. 351.

1816. ———.]—To a plea of the Statute of Limitations, in an action of trespass or trespass on the case for making excavations & taking & carrying away coal, etc., pltf. will not be allowed to reply as an equitable answer, under C. L. P. Act, 1854 (c. 125), that the trespasses, etc., were underground, & had been fraudulently concealed from pltf. till within six years before suit.—*HUNTER v. GIBBONS* (1856), 1 H. & N. 459; 28 L. T. O. S. 290; 2 Jur. N. S. 1249; 5 W. R. 91; 156 E. R. 1281; *sub nom.* *HUNTER v. GIBBONS*, *DUDLEY v. GIBBONS*, 26 L. J. Ex. 1.

Annotations:—*Dbtd.* *Gibbs v. Guild* (1882), 9 Q. B. D. 59. *Apld.* *Armstrong v. Milburn* (1885), 54 L. T. 247. *Consd.* *Osgood v. Sunderland* (1914), 111 L. T. 529. *Refd.* *Eccl. Comrs. for England v. N. E. Ry.* (1877), 4 Ch. D. 845; *Bull Coal Mining Co. v. Osborne*, [1899] A. C. 351. *Mentd.* *Reis v. Scottish Equitable Life Assce. Soc.* (1857), 2 H. & N. 19; *Wheulton v. Hardisty* (1857), 8 E. & B. 232; *Bartlett v. Wells* (1862), 1 B. & S. 836; *Thames Iron Works & Ship Building Co. v. Royal Mail Steam Packet Co.* (1862), 13 C. B. N. S. 358.

1817. ———.]—In an action against a solr. for negligence where the Statute of Limitations is pleaded a reply stating that owing to the action & deliberate fraud of deft. pltf. did not discover & did not have the means of discovering deft.'s negligence, until within six years next before the action was brought, is no answer to the plea of the statute.—*ARMSTRONG v. MILBURN* (1885), 54 L. T. 27; 2 T. L. R. 222, D. C.; *affd.* (1886), 54 L. T. 723; 2 T. L. R. 615, C. A.

Annotation:—*Folld.* *Osgood v. Sunderland* (1914), 111 L. T. 529.

1818. ———.]—Deft. did certain work for pltf. in 1904. In 1912 pltf. discovered that the work was defective, & not as specified in the contract. Pltf. now brought an action for breach of contract, alleging fraudulent concealment. Deft. denied liability, & in addition pleaded the Statute of Limitations. On the evidence the

judge held that the work had been badly done & that steps had been taken to conceal it. On the question of law deft. submitted that in an action such as the present which before Jud. Act, 1873 (c. 66), could be brought only in a common law ct., a plea of the Statute of Limitations could not be met by a reply of fraudulent concealment:—*Held*: in a purely common law action the plea of the Statute of Limitations was an absolute defence.—*OSGOOD v. SUNDERLAND* (1914), 111 L. T. 529; 30 T. L. R. 530.

1819. ——— *Effect of Judicature Acts.*]—In an action to recover by way of damages money lost by the fraudulent representations of deft., a reply to a defence of Statute of Limitations that pltf. did not discover & had not reasonable means of discovering the fraud within six years before action, & that the existence of such fraud was fraudulently concealed by deft. until within such six years:—*Held*: good.

I understand the cts. of equity to deal with the Statute of Limitations as they deal with every other legal right, whether existing by statute or common law, not by abrogating it, but by saying, on principles well understood in those cts., that in some particular cases it is unjust that the party should be allowed to exercise those rights. They say that where the cause of action & the knowledge of the cause of action are contemporaneous, there the statute runs in cts. of equity as it runs at common law, but that where the existence of the cause of action is concealed from the person who ought to take advantage of it, by the fraud of the person who creates it, such person shall not take advantage of the wrong which he himself has done, & that a fresh cause of action accrues from the moment that the fraud is discovered, & that to that fresh cause of action the Statute of Limitations will be applied by the cts. of equity (*LORD COLERIDGE, C.J.*).

I am of opinion that Jud. Act, 1873 (c. 66), did not alter or touch Statute of Limitations at all, & that that statute still applies to the circumstances which constituted the actions named in it, that is to say, that if the circumstances would have constituted an action on the case or an action of trespass, although the action which involves the remedy sought would not now be called an action on the case or an action of trespass, yet, notwithstanding, Statute of Limitations applies to it, if the facts are such as would have supported an action on the case or an action of trespass (*BRETT, L.J.*).

In cases in which the only remedy was in the cts. of equity, but where the transaction was such as was within the meaning of the Statute of Limitations, it is admitted & cannot be denied that the cts. of equity, whether by analogy or whether they considered themselves bound by the statute, . . . did recognise the binding authority of the statute (*BRETT, L.J.*).—*GIBBS v. GUILD* (1882), 9 Q. B. D. 59; 51 L. J. Q. B. 313; 46 L. T. 248; 30 W. R. 591, C. A.

Annotations:—*Expld.* *Armstrong v. Milburn* (1885), 54 L. T. 247. *Consd.* *Betjemann v. Betjemann*, [1895] 2 Ch. 474; *North American Land & Timber Co. v. Watkins* (1904), 73 L. J. Ch. 626; *Baker v. Courage* (1909), 79 L. J. K. B. 313; *Oelkers v. Ellis*, [1914] 2 K. B. 139; *Osgood v. Sunderland* (1914), 111 L. T. 529. *Refd.* *Moore v. Knight*, [1891] 1 Ch. 547; *Thorne v. Heard*, [1894] 1 Ch. 599; *Rochefoucauld v. Boustead* (1896), 66 L. J. Ch. 74; *Re Gallard, Ex p. Gallard* (1897), 66 L. J. Q. B. 484; *Re Astley & Tyldesley Coal & Salt Co. & Tyldesley Coal Co.* (1899), 68 L. J. Q. B. 252; *Bull Coal Mining Co. v. Osborne*, [1899] A. C. 351; *Beer v. Prudential*

a pltf. in cases where the existence of his cause of action is not discovered because of the alleged concealed fraud

of deft.—*TREMEER v. BLACK*, [1924] 2 D. L. R. 520; [1924] 2 W. W. R. 97; 18 Sask. L. R. 260; *affg.*, [1923] 4

D. L. R. 1208; [1923] 3 W. W. R. 1322; 17 Sask. L. R. 622.—*CAN.*

Assoc. (1902), 66 J. P. 729; *Molloy v. Mutual Reserve Life Insce.* (1906), 94 L. T. 756; *Palmer v. S.* (1907), 51 Sol. Jo. 653.

1820. Active measures of concealment—Necessity for.]—Pltf. claimed to set aside certain transactions between himself & deft. relating to the purchase of shares in a mining co. & to recover moneys paid by him to deft. in respect thereof. The ground of the claim was the fraud of deft. in pretending to act as pltf.'s stockbroker while in fact selling to pltf. deft.'s own shares. The transactions took place in & before Aug. 1906. Pltf. did not discover the fraud until July, 1912. The action was commenced in Nov. 1912. Deft. used no means to conceal the cause of action. Pltf. was guilty of no laches or other default in failing to discover the fraud earlier:—*Held*: Statute of Limitations, 1623 (c. 16), was no bar to the action. —*OELKERS v. ELLIS*, [1914] 2 K. B. 139; 83 L. J. K. B. 658; 110 L. T. 332.

Annotations:—*Distd.* *Osgood v. Sunderland* (1914), 111 L. T. 529. *Refd.* *Armstrong v. Jackson*, [1917] 2 K. B. 822.

SECT. 3.—LAND OR RENT.

SUB-SECT. 1.—IN GENERAL.

See Real Property Limitation Act, 1833 (c. 27), s. 26.

1821. “Bonâ fide purchaser for value”—Purchaser without personal notice of fraud—Purchase from agent with notice.]—*VANE v. VANE*, No. 1827, *post*.

1822. Party sued must be privy to fraud.]—*Re McCallum*, *McCallum v. McCallum*, No. 1777, *ante*.

SUB-SECT. 2.—WHAT AMOUNTS TO FRAUD.

See Real Property Limitation Act, 1833 (c. 27), s. 26.

1823. Concealed fraud.]—*RAINS v. BUXTON*, No. 1055, *ante*.

1824. — What amounts to—Procuring conveyance from lunatic.]—A., a person of unsound mind, living in the family of M., became entitled as heiress-at-law to certain lands. M. received the rents & profits of such lands for thirteen years during the life of A., & eleven years after her death, when M. died. M. had procured A. to execute a will devising part of her estate, & also indentures for conveying other parts, to M. & her heirs:—*Held*: (1) M. had founded her title upon the instruments which she had procured A. to execute in her favour; her claim to the lands in question must be deemed to be under, & not against A., & there was, therefore, no adverse possession as against A. or those claiming under her; (2) *Semble*: procuring instruments of conveyance & devise to be executed by a person of unsound mind was a fraud within Real Property Limitation Act, 1833 (c. 27), s. 26; (3) after issues had been directed, on motion, to try the validity of the instruments executed by A. & whether she was of sound mind, the order being submitted to, it was no longer open to those claiming under M. to insist, at the hearing, that the claim of the heirs of A. was barred by Real Property Limitation Act, 1833 (c. 27).—*LEWIS v. THOMAS* (1843), 3 Hare, 26; 67 E. R. 283.

Annotation:—*As to* (2) *Refd.* *Manby v. Bewicke* (1857), 3 K. & J. 342.

1825. — — — Procuring compromise from person mentally incapable—Though not in fact lunatic.]—To prove that a fraud was concealed within Real Property Limitation Act, 1833 (c. 27), s. 26, which enacts that the right of a person to recover land of which he has been deprived by a concealed fraud, shall first accrue at & not before the time at which such fraud should or might with reasonable diligence be discovered, it is not sufficient to show that he was in such an imbecile & uncultivated condition of mind that it was scarcely possible, though the alleged fraud was by an open act, that he should have discovered the fraud, if the condition of his mind was not that of actual lunacy; for the ct. cannot possibly estimate for this purpose the chance which the state of mind & education of a man may afford of his making such discovery, & is, therefore, compelled to assume that every one not actually a lunatic is competent to judge of & to obtain advice concerning his rights, & to assert them if necessary. Therefore a suit cannot be maintained to set aside a compromise of an action to recover large estates made eighty years before, upon the ground that the compromise was a fraud upon pltf. in the action, & that he was a man of such dull intellect that, though cognisant of all the facts, it was necessarily a concealed fraud as to him. Any man who is not a lunatic must be considered competent to agree to a compromise of litigation in which he is engaged, the circumstances under which the compromise was made not being such as to afford evidence of fraud.—*MANBY v. BEWICKE* (1857), 3 K. & J. 342; 29 L. T. O. S. 276; 69 E. R. 1140.

1826. — — — Bankrupt's omission of estate from assets.]—In 1825 A. on his insolvency, omitted from his schedule, which he verified on oath, an estate to which he was entitled. In 1853 his assignee filed his bill against the assignees under a subsequent bkpcy. & others for the recovery of the property:—*Held*: the claim was not barred by Statute of Limitations, the case coming within the exception of Real Property Limitation Act, 1833 (c. 27), s. 26, there having been “a concealed fraud.”—*STURGIS v. MORSE* (1857), 24 Beav. 541; 53 E. R. 466; *affd.* (1858), 3 De G. & J. 1, L. JJ.

Annotations:—*Consd.* *Vane v. Vane* (1872), 8 Ch. App. 388, n. *Refd.* *North American Land & Timber Co. v. Watkins* (1904), 73 L. J. Ch. 626.

1827. — — — Misrepresentations as to rights of succession.]—Pltf., by his bill, stated to the following effect:—That an estate being limited to pltf.'s father for life, remainder to his first & other sons successively in tail, the father in 1797 intermarried with a woman who had been his mistress, & had just borne him a son; that after the marriage the parents agreed to pass off the son as legitimate, & he was always recognised as such; that pltf., who was born ten years afterwards, was the eldest, but was brought up in the belief that he was the second, legitimate son; that when the illegitimate son came of age he was informed by the father that he was illegitimate, & with that knowledge joined the father in suffering a recovery to bar the entail; that on the marriage of the illegitimate son in 1823, he & the father made an ante-nuptial settlement of the estates, which was negotiated by the wife's father, as her agent, & on her behalf, with full knowledge that the husband was illegitimate; that the father died in 1832, upon which the illegitimate son entered into

PART VIII. SECT. 3, SUB-SECT. 1.
p. Possession obtained by fraud—
Whether statute runs.]—*BUTTERFIELD*
v. MABEE (1872), 22 C. P. 230.—CAN.

q. — — —.]—*McLURE v. BLACK*
(1890), 20 O. R. 70.—CAN.
r. — — —.] — *HARGOVANDAS*

LAKHSMIDAS v. BAJIBHAI JIJIBHAI
(1890), 14 Bom. 222.—IND.
t. — — —.]—*JOHNSTON v. HOWI-*
SON (1850), 13 I. Eq. R. 463.—IR.

Sect. 3.—Land or rent: Sub-sects. 2 & 3. Part IX.
Sect. 1: Sub-sects. 1, 2 & 3.]

possession, & remained so till his death in 1842, ever since which time his eldest son had been in possession; that pltf. had never until 1866 believed or suspected, or had any reason to believe or suspect, that his elder brother was illegitimate; & the bill prayed for a declaration that pltf. was entitled to the estates, & defts., who claimed under the settlement of 1823, might be ordered to give up possession to him:—*Held*: (1) the designedly bringing up pltf. in the belief that he was the second legitimate son was a case of concealed fraud within Real Property Limitation Act, 1833 (c. 27), s. 26, & time did not begin to run against the pltf.'s right to sue in equity until the time when he might first, with reasonable diligence, have discovered the fraud; (2) a purchaser for value who, though not having any personal notice of the fraud, contracted through an agent who knew of the fraud could not protect himself under the saving in s. 26 as "a *bond fide* purchaser for value, who at the time of the purchase did not know & had no reason to believe that any such fraud had been committed," & therefore the persons claiming under the settlement of 1823 could not sustain this defence.—*VANE v. VANE* (1873), 8 Ch. App. 383; 42 L. J. Ch. 299; 28 L. T. 320; 21 W. R. 252, L. JJ.

Annotations:—As to (1) *Consd.* *Willis v. Howe*, [1893] 2 Ch. 545. *Refd.* *Lawrance v. Norreys* (1888), 39 Ch. D. 213; *Re McCallum, McCallum v. McCallum*, [1901] 1 Ch. 143.

1828. ——— **Wrongful entry under false claim.]**—Pltf. brought an action of ejectment in 1892, & alleged by his statement of claim that he was the heir-at-law of W., who died intestate in 1798, & that on his death his real estate was wrongfully taken possession of by the mother of G., an infant, in his name under the false pretence that G. was the heir-at-law of W.; that G. died an infant, & that his mother continued to hold possession of the estate in the name of R., an infant, whom she falsely asserted to be the brother of G., but who was really a supposititious child; that R. held possession of the estates after he came of age, & that he & his successors in title, including deft., fraudulently concealed these facts from the true heir of W.; that pltf. & his predecessors in title had been deprived of the estates by such concealed fraud, & that the same could not with reasonable diligence be discovered before 1879, when they became partially known; that pltf. was an infant at that time, & did not attain his majority until 1887. Def. moved to have the statement of claim struck out as frivolous & vexatious & filed an affidavit showing that the story of R. being a supposititious child was publicly spoken of in newspapers & otherwise as early in 1853, & had been made the ground of previous unsuccessful actions of other claimants against deft. & his predecessors:—*Held*: the allegations in the statement of claim as to the entry in 1798 on behalf of G. did not show a case of concealed fraud within Real Property Limitation Act, 1833 (c. 27), s. 26, but only a wrongful entry under a false claim; the statute began to run against pltf.'s predecessors in title in 1798, & as the possession had been adverse to pltf. & his predecessors ever since, the operation of the statute had not been suspended by the alleged fraud in 1805; & pltf. or his predecessors might with reasonable diligence have discovered the concealed fraud, if any, more than twelve years after the commencement of the action.—*WILLIS v. HOWE* (EARL), [1893] 2 Ch. 545; 62 L. J. Ch. 690; 69

L. T. 358; 41 W. R. 433; 9 T. L. R. 415; 2 R. 427, C. A.

Annotations:—*Consd.* *Thorne v. Heard*, [1894] 1 Ch. 599; *Re McCallum, McCallum v. McCallum*, [1901] 1 Ch. 143. *Apld.* *Re Levesley, Goodwin v. Levesley* (1915), 32 T. L. R. 145; *Re Coole, Coole v. Flight*, [1920] 2 Ch. 536. *Refd.* *Re Lands Allotment Co.*, [1894] 1 Ch. 616; *Johnson v. Brock*, [1907] 2 Ch. 533. *Mentd.* *Vinson v. Prior Fibres Consolidated* (1906), 51 Sol. Jo. 81.

1829. ——— **Suppression of voluntary conveyance.]**—*Re MCCALLUM, MCCALLUM v. MCCALLUM*, No. 1777, *ante*.

1830. ——— **Undelivered deed of gift—Subsequent sale & devise by donor.]**—In 1900 testator, a North Sea skipper, by a deed of gift gave his sons W. & F. in fee simple in equal moieties certain land at P. & at S. In July, 1901, he sold the land at S. & bought additional land at P. In Aug. 1901, W. died. Testator by his will, dated 1913, gave to F. all the land at P., & his residence to the children of a deceased son. Testator received the rents of the land at P. down to his death in 1914, the sons never having known of the deed of gift. F. died in 1915:—*Held*: as testator might have thought the deed non-effective until communicated to his sons, there had been no "concealed fraud" by him, & therefore he had not become a trustee for W. & F., & in the case of the land at P. Real Property Limitation Act, 1833 (c. 27), s. 26, did not apply & Statute of Limitations ran & the representatives of W. & F. were not entitled to the land at P. under the deed of gift.—*Re LEVESLEY, GOODWIN v. LEVESLEY* (1915), 32 T. L. R. 145; 60 Sol. Jo. 142.

1831. ——— **Dealing by executor with realty—No acknowledgment to heir.]**—In 1881 a woman seised in fee simple of two freehold houses & possessed of a long-leasehold shop, but not in either case to her separate use, married a solr. On May 10, 1883, she purchased the freehold reversion of the shop. She died in 1897 without ever having had any issue, having by her will, made in 1888, devised "all" her "freehold shop" to her trustees upon trust for sale & to pay a sum of £1,300 out of the proceeds to certain named persons, & "all the residue of the real estate over which" she "had a disposing power" to her husband for life, to whom she also bequeathed all other her personal estate absolutely, & from & after his death she devised "all other" her "real estate" to her trustees upon trust for sale & to pay & divide the net proceeds as therein mentioned. The husband, the sole surviving exor. & trustee, proved the will & elected to pay & paid estate duty on the real estate passing on his wife's death. He went into, & remained in, possession of all her real estate until his death in 1917, without giving any acknowledgment of the title of the heir-at-law. He appointed pltf. exors. of his will, which contained a devise & bequest of his real & residuary personal estate. Upon a summons for the determination of the parties entitled to the properties in question:—*Held*: as to the two freehold houses on the facts the husband had not been guilty of any concealed fraud within Real Property Limitation Act, 1833 (c. 27), s. 26, & the claim of the wife's heir at law was barred.—*Re COOLE, COOLE v. FLIGHT*, [1920] 2 Ch. 536; 89 L. J. Ch. 519; 124 L. T. 61; 36 T. L. R. 736; 64 Sol. Jo. 739.

1832. ——— **Such as to deprive plaintiff of rights.]**—*LAWRANCE v. NORREYS* (LORD), No. 1836, *post*.

SUB-SECT. 3.—WHEN TIME BEGINS TO RUN.

See Real Property Limitation Act, 1833 (c. 27), s. 26.

1833. Discovery of fraud—With reasonable diligence—Failure to use diligence—Limitation operative.]—Pltf. sued to recover property to which his predecessor, as he alleged, became entitled in the year 1769, & insisted that a register book containing a certificate of marriage, forming the principal link in his title, had been fraudulently mutilated in order to prevent him or his ancestors from obtaining evidence of the marriage:—*Held*: by reasonable diligence, evidence of the marriage might have been ascertained within twenty years after the alleged fraud had been committed; & pltf. had not brought his case within Real Property Limitation Act, 1833 (c. 27), s. 26.—*CHETHAM v. HOARE* (1870), L. R. 9 Eq. 571; 39 L. J. Ch. 376; 22 L. T. 57.

Annotations:—*Consd.* *Vane v. Vane* (1872), 8 Ch. App. 388, n. *Refd.* *Re Jennens, Willis v. Howe* (1880), 50 L. J. Ch. 4.

1834. ————.]—*WILLIS v. HOWE* (EARL), No. 1828, *ante*.

1835. ————.]—*VANE v. VANE*, No. 1827, *ante*.

1836. ————.]—(1) In a case of concealed fraud within Real Property Limitation Act, 1833 (c. 27), s. 26, it is not enough to prove a concealed fraud; pltf. must show that he or some person through whom he claims has been by such fraud deprived of the land sought to be recovered, &

that the fraud could not with reasonable diligence have been known or discovered more than the statutory period before the action was brought.

(2) In such an action general averments of fraud are not sufficient, the statement of claim must contain precise & full allegations of fact & circumstances leading to the reasonable inference that the fraud was the cause of the deprivation, & excluding other possible causes. In default of such allegations the ct. may, by virtue of its inherent jurisdiction, dismiss the action as an abuse of the procedure, where the claim is incapable of proof & without any solid basis.—*LAWRANCE v. NORREYS* (LORD) (1890), 15 App. Cas. 210; 59 L. J. Ch. 681; 62 L. T. 706; 54 J. P. 708; 38 W. R. 753; 6 T. L. R. 285, H. L.

Annotations:—*As to* (1) *Expld. & Apld.* *Willis v. Howe*, [1893] 2 Ch. 545. *Refd.* *Thorne v. Heard*, [1894] 1 Ch. 599; *Betjemann v. Betjemann* (1895), 73 L. T. 2; *Re McCallum, McCallum v. McCallum*, [1901] 1 Ch. 143; *Salaman v. Secretary of State in Council of India*, [1906] 1 K. B. 613. *As to* (2) *Expld.* *Bruce v. Allesbury* (1892), 36 Sol. Jo. 865. *Foll.* *Willis v. Howe*, [1893] 2 Ch. 545. *Consd.* *Salaman v. Secretary of State in Council of India*, [1906] 1 K. B. 613. *Refd.* *Haggard v. Pelicier*, [1892] A. C. 61; *Kellaway v. Bury* (1892), 66 L. T. 599; *Fletcher v. Bethom* (1893), 68 L. T. 438; *Remington v. Scoles*, [1897] 2 Ch. 1; *Woods v. Lyttelton* (1909), 25 T. L. R. 665. *Generally, Mentd.* *Re Thomas, Jaquess v. Thomas* (1894), 10 T. L. R. 367; *Dunlop Pneumatic Tyre Co. v. Rimington* (1900), 17 R. P. C. 665; *Shackleton v. Swift* (1913), 108 L. T. 400.

Part IX.—Penal Actions and Other Proceedings.

SECT. 1.—PENAL ACTIONS.

SUB-SECT. 1.—PROCEEDINGS BY THE CROWN.

See 31 Eliz. c. 5, s. 5; Crown Suits Act, 1885 (c. 104), ss. 6, 8, 10.

1837. Information must be within two years of offence.]—By 31 Eliz. c. 5, information on penal statutes must be within two years after the offence committed.—*STOWE'S CASE* (1620), Cro. Jac. 603; E. R. 515.

SUB-SECT. 2.—PROCEEDINGS BY PARTY GRIEVED.

See Civil Procedure Act, 1833 (c. 42), ss. 3, 4.

1838. Who is "party grieved"—Not officer of Goldsmiths Company.]—*ROBINSON v. CURREY*, No. 1844, *post*.

1839. ———— **Person suing for damage by riot—Riot Damages Act, 1886 (c. 38).]**—In an action against the police authority under above Act for damages caused by a riot, the cause of action is the refusal or failure of the authority to fix compensation. Such an action is not an action "for penalties, damages, or sums of money given to the party grieved, by any statute" within the Civil Procedure Act, 1833 (c. 42), s. 3, therefore the period for bringing an action limited by the sect. in respect of those actions is not applicable.

—*JARVIS v. SURREY COUNTY COUNCIL*, [1925] 1 K. B. 554; 94 L. J. K. B. 609; 132 L. T. 745; 89 J. P. 51; 41 T. L. R. 228; 69 Sol. Jo. 327;

3.—PROCEEDINGS BY

1840. Suing for whole penalty—Whether limited to one year.]—*Qu.*: if a statute give a penalty to the party grieved within three months, &, on his neglecting to sue for it within that time, to any person who will sue for same, whether a stranger who sues for the whole penalty, be a common informer within 31 Eliz. c. 5, & thereby bound to bring his action within a year? but if so, suing out a *latitat* within the year is a sufficient commencement of the action.—*CULLIFORD v. BLANDFORD* (1692), 4 Mod. Rep. 129; Holt, K. B. 522; 12 Mod. Rep. 26; Comb. 194; Carth. 232; 87 E. R. 302; *sub nom.* *CALLIFORD v. BLAWFORD*, 1 Show. 353.

Annotations:—*Consd.* *Chance v. Adams* (1695), 1 Ld. Raym. 77; *Robinson v. Currey* (1881), 7 Q. B. D. 465. *Refd.* *Brown v. Babbington* (1703), 2 Ld. Raym. 880; *Hardyman v. Whitaker* (1748), 2 East, 573, n.; *Johnson v. Smith* (1760), 2 Burr. 950; *Foster v. Bonner* (1776), 2 Cowp. 454; *Fife v. Bousfield* (1844), 6 Q. B. 100; *Dyer v. Best* (1866), L. R. 1 Exch. 152. *Mentd.* *Norris v. Mawditt* (1695), 5 Mod. Rep. 311; *Karver v. James* (1741), Willes, 255; *Lewis v. Davis* (1875), 39 J. P. 148.

PART VIII. SECT. 3, SUB-SECT. 3.

1833 i. Discovery of fraud — With reasonable diligence — Failure to use diligence — Limitation operative.]—*CLARK v. CLARK* (1882), 8 V. L. R. 303.—*AUS.*

1833 ii. ————.]—*MERCHANTS BANK v. MCKENZIE* (1900), 13 Man. L. R. 19.—*CAN.*

a. ————.]—*JUGALDAS v. AMBAS-*
J.—VOL. XXXII.

HANKAR (1888), I. L. R. 12 Bom. 501.—*IND.*

b. ————.]—*PUNNAYIL KUTTU v. RAMAN NAIR* (1907), I. L. R. 31 Mad. 230.—*IND.*

c. ————.]—*MEDLICOTT v. O'DONEL* (1809), 1 Ball & B. 156, 166.—*IR.*

d. ————.]—*ROCHE v. O'BRIEN* (1810), 1 Ball & B. 330.—*IR.*

e. ————.]—*YOUNG v. HARPER* (1889), 8 N. Z. L. R. 179.—*N.Z.*

PART IX. SECT. 1, SUB-SECT. 3.

1840 i. Suing for whole penalty—Whether limited to one year.]—Pltf. filed his information to forfeit land sold by lottery, more than five years after the sale complained of:—*Held*: too late, for the case came within 31 Eliz. c. 5, by which he was limited to one year.—*MEWBURN v. STREET* (1862), 21 U. C. R. 498.—*CAN.*

f. *Penalty to be divided.]*—*BARRETT v. JOHNSON* (1836), 2 Jo. Ex. Ir. 197.—*IR.*

Sect. 1.—Penal actions: Sub-sect. 3. Sect. 2: Sub-sects. 1, 2, 3 & 4. Sect. 3: Sub-sects. 1, 2 & 3. Sect. 4: Sub-sects. 1, 2, 3, 4, 5, 6, 7, 8, 9 & 10. Part X. Sects. 1, 2, 3, 4, 5, 6, 7, 8, 9 & 10.]

1841. ———.]—Where the whole penalty in a popular action is given to the informer he is not bound to bring such action within a year after the cause of action accrued.—*CHANCE v. ADAMS* (1696), 1 Ld. Raym. 77; 91 E. R. 948.

*Annotations:—***Refd.** *Dyer v. Best* (1866), L. R. 1 Exch. 152. **Mentd.** *Doe d. Burtwhistle v. Vardill* (1840), 6 Bing. N. C. 385; *Nixon v. Nanney* (1841), 1 Q. B. 747; *Coomber v. Berks JJ.* (1882), 9 Q. B. D. 17.

1842. ———.]—*LOOKUP v. FREDERICK* (1766), Bull. N. P. 190; *on appeal, sub nom. FREDERICK v. LOOKUP* (1767), 4 Burr. 2018.

*Annotations:—***Consd.** *Dyer v. Best* (1866), L. R. 1 Exch. 152. **Refd.** *Robinson v. Currey* (1881), 7 Q. B. D. 465. **Mentd.** *Avery v. Hoole* (1778), 2 Cowp. 825; *Evans v. Stevens* (1791), 4 Term Rep. 224; *A.-G. v. Sheriff* (1801), For. 43; *Taylor v. Willans* (1826), 11 Moore, C. P. 448.

1843. ———.]—31 Eliz. c. 5, s. 5, applies to every class of actions or statutes imposing penalties, & a person suing for a penalty for himself alone, must therefore bring his action within a year after the offence is committed in the same manner as though he sued as an informer *qui tam*.—*DYER v. BEST* (1866), L. R. 1 Exch. 152; 4 H. & C. 189; 35 L. J. Ex. 105; 13 L. T. 753; 30 J. P. 151; 12 Jur. N. S. 142; 14 W. R. 336.

*Annotations:—***Consd.** *Robinson v. Currey* (1881), 7 Q. B. D. 465. **Refd.** *Lewis v. Davis* (1875), L. R. 10 Ex. 86; *Forbes v. Samuel* (1913), 109 L. T. 599.

1844. ———.]—An action by an officer of one of the Co. of Goldsmiths mentioned in Gold & Silver Wares Act, 1844 (c. 22), for penalties under sect. 3 of that Act, is not an action by a common informer within 31 Eliz. c. 5, nor is it an action by a "party grieved" within Civil Procedure Act, 1833 (c. 42), & consequently can be brought more than two years after the cause of action accrued.

31 Eliz. c. 5, in terms is applicable only to proceedings by the Crown & to proceedings *qui tam*, & it was held . . . in *Culliford v. Blandford*, No. 1840, *ante*, that that statute did not apply to the ordinary action of a common informer suing for his own benefit. Well, if that be so (& that decision was confirmed in the Exch. Chamber & remains unimpeached) it would cover this case, even supposing the co. were suing as common informers, because there would be no Statute of Limitations applicable to them except Civil Procedure Act, 1833 (c. 42). It is said is it conceivable that there is no Statute of Limitations applicable to any action of debt by a common informer? A common informer must make an oath that the cause of action arose within a year (*BRAMWELL, L.J.*).—*ROBINSON v. CURREY* (1881), 7 Q. B. D. 465; 50 L. J. Q. B. 561; 45 L. T. 368; 46 J. P. 148; 30 W. R. 39, C. A.

*Annotations:—***Consd.** *Thomson v. Clanmorris*, [1899] 2 Ch. 523; *R. v. Canadian Northern Ry.*, [1923] A. C. 714. **Mentd.** *Saunders v. Wicl*, [1892] 2 Q. B. 321.

SECT. 2.—CRIMINAL PROCEEDINGS.

SUB-SECT. 1.—IN GENERAL.

Limitation of time for criminal proceedings.]—See CRIMINAL LAW, Vol. XIV., pp. 151–153, Nos. 1259–1283.

Commencement of prosecution.]—See CRIMINAL LAW, Vol. XIV., pp. 154, 155, Nos. 1285–1300.

Information at instance of private person—Undue delay in application.]—See CRIMINAL LAW, Vol. XIV., p. 352, No. 3710.

SUB-SECT. 2.—EXTRADITION.

See, generally, EXTRADITION, Vol. XXIV., pp. 868 et seq.

Time within which evidence must be produced—Treaty with Germany.]—See EXTRADITION, Vol. XXIV., p. 879, No. 62.

Time within which surrender may be ordered.]—See EXTRADITION, Vol. XXIV., pp. 887, 888, Nos. 141, 142.

SUB-SECT. 3.—OFFENCES RELATING TO GAME.

Commencement of prosecution.]—See GAME, Vol. XXV., pp. 374, 375, Nos. 235–240.

SUB-SECT. 4.—SUMMARY PROCEEDINGS.

See Sect. 4, post.

SECT. 3.—CROWN PRACTICE.

SUB-SECT. 1.—CERTIORARI.

Certiorari generally, see CROWN PRACTICE, Vol. XVI., pp. 398 et seq.

Time for application—Certiorari to remove for trial.]—See CROWN PRACTICE, Vol. XVI., p. 446, Nos. 3136–3138.

Certiorari to quash.]—See CROWN PRACTICE, Vol. XVI., pp. 460, 461, Nos. 3345–3360.

Certiorari to remove orders on case stated.]—See CROWN PRACTICE, Vol. XVI., pp. 479, 480, Nos. 3612, 3613.

SUB-SECT. 2.—MANDAMUS.

Mandamus generally, see CROWN PRACTICE, Vol. XVI., pp. 276 et seq.

Prerogative writ.]—See CROWN PRACTICE, Vol. XVI., p. 293, No. 1055.

Time for application.]—See CROWN PRACTICE, Vol. XVI., pp. 324–327, Nos. 1370–1407.

Action for mandamus.]—See CROWN PRACTICE, Vol. XVI., pp. 321, 322, Nos. 1331–1337.

SUB-SECT. 3.—QUO WARRANTO.

Quo warranto generally, see CROWN PRACTICE, Vol. XVI., pp. 353 et seq.

Time for application.]—See CROWN PRACTICE, Vol. XVI., pp. 365, 366, Nos. 1981–1996.

SECT. 4.—SUMMARY PROCEEDINGS.

SUB-SECT. 1.—IN GENERAL.

See Summary Jurisdiction Act, 1848 (c. 43), s. 11; & generally, MAGISTRATES; PUBLIC HEALTH; SEWERS & DRAINS.

SUB-SECT. 2.—AFFILIATION PROCEEDINGS.

Application for summons.]—See BASTARDY, Vol. III., p. 389, Nos. 272–274.

Issue of summons.]—See BASTARDY, Vol. III., p. 391, Nos. 291–298.

SUB-SECT. 3.—COMPULSORY PURCHASE OF LAND.

Assessment of purchase price & compensation—Procedure before justices.]—See COMPULSORY PURCHASE OF LAND, Vol. XI., p. 189, Nos. 688–691.

— **Interests omitted to be purchased.]—See** COMPULSORY PURCHASE OF LAND, Vol. XI., p. 282, Nos. 2103, 2104, 2106.

— **Special provisions for metropolis.]—See** COMPULSORY PURCHASE OF LAND, Vol. XI., p. 295, No. 2249.

SUB-SECT. 4.—FACTORY AND WORKSHOP OFFENCES.

Time within which proceedings must be taken.]—See FACTORIES, Vol. XXIV., p. 941, Nos. 286–289.

SUB-SECT. 5.—FISHERIES.

Time for making complaint.]—See FISHERIES, Vol. XXV., p. 62, No. 517.

SUB-SECT. 6.—FOOD AND DRUGS.

Food & Drugs generally, *see* FOOD & DRUGS, Vol. XXV., pp. 70 *et seq.*

Limitation of time for proceedings.]—See FOOD & DRUGS, Vol. XXV., p. 101, Nos. 241–243.

Institution of proceedings.]—See FOOD & DRUGS, Vol. XXV., pp. 101, 102, 125, 139, Nos. 247–249, 469, 565.

SUB-SECT. 7.—FRIENDLY SOCIETIES.

Proceedings against officers.]—See FRIENDLY SOCIETIES, Vol. XXV., p. 331, Nos. 328, 329.

Proceedings against members.]—See FRIENDLY SOCIETIES, Vol. XXV., p. 335, No. 367.

SUB-SECT. 8.—HIGHWAYS.

Highways generally, *see* HIGHWAYS, Vol. XXVI., pp. 260 *et seq.*; METROPOLIS; PUBLIC HEALTH.

Non-observance of building line.]—See HIGHWAYS, Vol. XXVI., pp. 509, 562, Nos. 2138–2141, 2567, 2572.

New street.]—See HIGHWAYS, Vol. XXVI., pp. 513, 515, Nos. 2170, 2185.

Extraordinary traffic.]—See HIGHWAYS, Vol. XXVI., pp. 471–474, Nos. 1841–1845, 1850–1865.

Recovery of apportioned expenses.]—See HIGHWAYS, Vol. XXVI., pp. 499, 500, 518, 535, 552, Nos. 2074–2077, 2203, 2204, 2343–2351, 2480–2483.

Encroachment on highways.]—See HIGHWAYS, Vol. XXVI., p. 459, Nos. 1756–1758.

SUB-SECT. 9.—MINES.

See, generally, MINES.

SUB-SECT. 10.—SEPARATION AND MAINTENANCE ORDERS.

See HUSBAND & WIFE, Vol. XXVII., pp. 560, 561, 568, Nos. 6161–6169, 6256.

Part X.—Special Periods of Limitation.

SECT. 1.—ACTS DONE UNDER STATUTORY AUTHORITY.

See PUBLIC AUTHORITIES.

SECT. 2.—ARBITRATION.

Application to set aside award—Time for.]—See ARBITRATION, Vol. II., pp. 556–559, Nos. 1870–1912.

SECT. 3.—CARRIERS.

Undue preference.]—See CARRIERS, Vol. VIII., p. 193, No. 1224.

Carriage of goods by sea.]—See Carriage of Goods by Sea Act, 1924 (c. 22), Sched., Art. III., r. 6.

SECT. 4.—COMMONS.

Award of inclosure commissioners.]—See COMMONS, Vol. XI., p. 76, No. 984.

Appeals to quarter sessions.]—See COMMONS, Vol. XI., pp. 86, 87, Nos. 1052–1057.

SECT. 5.—CONSTABLES.

Protection of constables.]—See PUBLIC AUTHORITIES; POLICE.

SECT. 6.—CUSTOMS OFFICERS.

See PUBLIC AUTHORITIES; REVENUE.

SECT. 7.—ECCLESIASTICAL MATTERS.

Proceedings in offences of clergy.]—See ECCLESIASTICAL LAW, Vol. XIX., pp. 336, 337, Nos. 1483–1486.

SECT. 8.—FATAL INJURIES.

Under Fatal Accidents Act, 1846 (c. 93).]—See NEGLIGENCE.

SECT. 9.—JUSTICES.

See MAGISTRATES; PUBLIC AUTHORITIES.

SECT. 10.—MARITIME CONVENTIONS ACT, 1911.

See SHIPPING.

SECT. 11.—**MERCHANT SHIPPING ACTS.**
See SHIPPING.

SECT. 12.—**MILITARY AUTHORITIES.**
See PUBLIC AUTHORITIES ; ROYAL FORCES.

SECT. 13.—**PRIZE LAW.**
See, generally, PRIZE LAW.

SECT. 14.—**PUBLIC AUTHORITIES PROTECTION ACT, 1893.**
See PUBLIC AUTHORITIES.

SECT. 15.—**RECOVERY OF DEBTS FROM POOR LAW GUARDIANS.**
See POOR LAW.

SECT. 16.—**WORKMEN'S COMPENSATION ACT.**
See MASTER & SERVANT.

Part XI.—Process to Prevent Statutory Bar.

SECT. 1.—**COMMENCEMENT OF ACTIONS.**

SUB-SECT. 1.—**NATURE OF PROCEEDINGS.**

1845. Claim in winding up.]—A railway co. having been projected in 1845, seven hundred persons signed the subscribers' agreement & Parliamentary contract, by which it was stipulated that the majority of the managing committee should have power to bind all the members as to payment of solrs. & others employed by them. No Act of Parliament was obtained, & this inchoate co. amalgamated with two other cos. in the same position, at which time it was agreed that a specific sum should be set apart for payment of the expenses incurred by the original co. The solrs. of this co., who had been employed by the committee of management, applied to the amalgamated co. for payment of their bill of costs. The liability was denied, & upon the winding up of the co. in 1849, the solrs. carried in their claim before the master. No decision having been then come to, the matter stood over, & the solrs. after the expiration of six years sought for payment of their debt from the general body of shareholders, the fund set apart upon the amalgamation having been already expended:—*Held*: all the members of the inchoate co. who had signed the subscribers' deed & Parliamentary contract were liable for the debt, & as the claim had been carried in before the master within six years, the solrs. were not barred by Statute of Limitations.—*Re WARWICK & WORCESTER RY. CO.* (1858), 27 L. J. Ch. 735 ; 31 L. T. O. S. 145 ; 6 W. R. 433.

1846. Action in inferior court.]—*BEVIN v. CHAPMAN* (1664), as reported in 1 Sid. 228 ; 1 Keb. 799 ; 82 E. R. 1074.

Annotations:—*Refd.* *Story v. Atkins* (1726), 2 Ld. Raym. 1427. *Mentd.* *Kinsey v. Heyward* (1698), 1 Ld. Raym.

1847. —.]—Action removed by *habeas corpus*, Statute of Limitations pleaded above, pltf. may reply, the suit below was within six years.—

MATTHEWS v. PHILLIPS (1707), 2 Salk. 424 ; 91 E. R. 369.

Annotations:—*Mentd.* *Murray v. East India Co.* (1821), 5 B. & Ald. 204 ; *Rhodes v. Smethurst* (1840), 6 M. & W. 351.

1848. —.]—The commencement of an action in an inferior ct. will prevent Statute of Limitations from attaching upon the cause of action. In such case, the replication must show explicitly that the suits in the two cts. were brought for the same cause.—*STORY v. ATKINS* (1726), 2 Ld. Raym. 1427 ; 2 Stra. 719 ; 1 Barn. K. B. 2 ; 92 E. R. 428.

Annotations:—*Refd.* *Fievet v. Manby* (1876), 35 L. T. 307. *Mentd.* *Bruce v. Wait* (1840), 1 Man. & G. 1.

1849. Scire facias.]—A *sci. fa.* on a judgment is not a mere continuation of a former suit, but creates a new right.

A judgment was obtained in 1813. It was revived by *sci. fa.* in 1828. A bill was filed in 1838 in the Ct. of Exch. in Ireland, against the representatives of the debtor, praying for an account, & that the principal & interest due on the judgment might be satisfied out of debtor's personal or real estate. Plea of Real Property Limitation Act, 1833 (c. 27), s. 40:—*Held*: the *sci. fa.* created new rights, & the plea was no bar to the suit.—*FARRELL v. GLEESON* (1844), 11 Cl. & Fin. 702 ; 8 E. R. 1269, H. L.

1850. Chancery action—Absence beyond seas.]—When deft. is out of the jurisdiction, & the bill prays process against him, when he shall come within it, the operation of Statute of Limitations is suspended, though he has neither been served nor appeared in the suit.—*HELE v. BEXLEY* (LORD), *WHITFIELD v. BOWYER*, *WHITFIELD v. KNIGHT* (1855), 20 Beav. 127 ; 52 E. R. 551.

1851. Petition in lunacy—Followed by report by master.]—A petition in lunacy, after the death of the lunatic, by his committee, & a reference to the master thereon, followed by a report, finding that a sum of money had been expended by the committee in the maintenance of the lunatic, is not

PART XI. SECT. 1, SUB-SECT. 1.

1845 i. Claim in winding up.]—*Re ACT XIX OF 1857 & GANGES STEAM NAVIGATION CO., ROBERTSON'S CASE*, 2 Ind. Jur. N. S. 180.—**IND.**

1849 i. Scire facias.]—*HUTCHINS v. O'SULLIVAN* (1847), 11 I. Eq. R. 443.—**IR.**

1849 ii. —.]—The circumstance that a judgment creditor has, pending the suit, proceeded by *sci. fa.*, is not such a repudiation of the suit by him as will disentitle him from relying on the suit as a bar to the Statute of Limitations.—*CARROLL v. DARCY* (1847), 10 I. Eq. R. 321.—**IR.**

g. Suit to recover land.]—*Re*

LODER & PUBLIC WORKS MINISTER, Ex p. SINGLETON (1898), 19 N. S. W. Eq. 41 ; 14 N. S. W. W. N. 153.—**AUS.**

h. Petition under Quieting Titles Act.]—The filing of a petition under above Act is not such a proceeding as will save the rights of a party contestant, otherwise barred by the Statute of Limitations.—*LAING v. AVERY* (1867), 14 Gr. 33.—**CAN.**

k. Claim to title of land.]—*DUMBLE v. LARUSH* (1879), 27 Gr. 187.—**CAN.**

l. Ejectment action.]—In ejectment by pltf. :—*Held*: pltf. could not recover ; the commencement of the action of ejectment prevented the

operation of the Statute of Limitations.—*YOUNG v. HOBSON* (1879), 30 C. P. 431.—**CAN.**

m. Proceedings must be bonâ fide.]—*LACHMIPAT SING ROY BAHADUR v. WAHID ALI* (1869), 2 B. L. R. A. C. 194 ; 11 W. R. 70.—**IND.**

n. —.]—*BOYD v. HIGGINSON* (1842), 5 I. Eq. R. 97.—**IR.**

p. Application for order for sale.]—*AJUDHIA PERSHAD v. BALDEO SINGH* (1894), 1 L. R. 21 Calc. 818.—**IND.**

q. Proceedings to enforce decree—Where court has no jurisdiction.]—Proceedings to enforce a decree taken *bonâ fide* before a ct. which the party *bonâ fide* believes to have jurisdiction

a proceeding which will take the claim of the committee out of Statute of Limitations, as against the heir at law of the lunatic, who was not a party to the application.—*WILKINSON v. WILKINSON* (1851), 9 Hare, 204; 22 L. J. Ch. 155; 68 E. R. 476.

SUB-SECT. 2.—DATE OF COMMENCEMENT.

1852. Suing out process—Information.]—The suing out of the process is to be considered the commencement of an information within Statute of Limitations; *semble*: the memorandum on the record is not decisive evidence of the time when the information was commenced.—*A.-G. v. BROWN* (1801), For. 110; 145 E. R. 1129.

1853. — Date of teste.]—*BRAITHWAITE v. MONTFORD* (LORD), No. 1861, *post*.

1854. — Proof of.]—(1) Deft. pleaded that the cause of action did not accrue within six years next before the commencement of the suit; pltf. replied that the cause of action did arise within six years, etc.:—*Held*: pltf. might prove a *quo minus* to have been issued within the six years, & to have been continued down to the time of deft.'s appearance.

(2) On the trial of an issue, whether the cause of action arose within six years next before the commencement of the suit, pltf. produced the roll on which the continuances appeared to have been regularly entered up. It appeared from the writs themselves, that the second writ, which was an *alias quo minus*, was tested on a day subsequent to the day of the teste of the first writ:—*Held*: the roll being right, the ct. could not look to anything else to contradict it.—*DICKENSON v. TEAGUE* (1834), 1 Cr. M. & R. 241; 4 Tyr. 450; 3 L. J. Ex. 266; 149 E. R. 1070.

1855. Last writ served—Action not duly continued.]—Where a writ issued within six years

after cause of action accrued has not been duly continued, pursuant to 2 & 3 Will. 4, c. 39, s. 10, deft. is not bound to plead such non-continuance specially; but may take advantage of it under the general plea, that the cause of action did not accrue within six years next before commencement of the suit; for, for this purpose, the last writ which is served is the commencement of the suit.—*PRATT v. HAWKINS* (1846), 15 M. & W. 399; 6 L. T. O. S. 396; 153 E. R. 905.

Annotations:—*Refd. Higgs v. Mortimer* (1848), 1 Exch. 711; *Pritchard v. Bagshawe* (1851), 11 C. B. 459.

1856. Substitution of real for nominal plaintiff.]—After amendment of a writ by substitution of the real for the nominal pltf., the commencement of the action still reckoned from the original date.—*COOMBS v. BRISTOL & EXETER RY. CO.* (1858), 1 F. & F. 206; *subsequent proceedings*, 3 H. & N. 1, 510.

Annotation:—*Refd. Clay v. Oxford* (1866), 15 L. T. 286.

Addition of defendants—Date of addition.]—*See* Sect. 2, sub-sect. 1, C. (b), *post*.

SUB-SECT. 3.—DELAY AFTER COMMENCEMENT.

1857. Whether suit need be proceeded with.]—

LAKE v. HAYES (1736), West temp. Hard. Atk. 281; 26 E. R. 180.

1858. —.]—The filing of a bill within six years after the accrual of the right to sue, although the *subpoena* be not sued out until after the expiration of that period, is sufficient to prevent the operation of Statute of Limitations in a ct. of equity.—*MORRIS v. ELLIS* (1843), 7 Jur. 413.

1859. —.]—*DIXON v. GAYFERE* (No. 1), *FLUKER v. GORDON*, No. 1502, *ante*.

SUB-SECT. 4.—EFFECT OF COMMENCEMENT.

1860. Saves statute only in action commenced.]—*MANBY v. MANBY*, No. 1911, *post*.

is a proceeding within Limitation Act, s. 14.—*JAFAR v. KAMALINI DEBI* (1900), 1 L. R. 28 Calc. 238; 5 C. W. N. 150.—**IND.**

r. —.]—*CONGREVE v. POWER* (1828), 1 Mol. 121.—**IR.**

t. Suit for mesne profits.]—*HAYS v. PADMANAND SINGH* (1905), 1 L. R. 32 Calc. 118.—**IND.**

PART XI. SECT. 1, SUB-SECT. 2.

a. Continuance between intermediate writs.]—*MCLEAN v. KNOX* (1847), 4 U. C. R. 52.—**CAN.**

b. Service of alias writ—Effect of.]—*HOLMAN v. WELLER* (1851), 8 U. C. R. 202.—**CAN.**

c. —.]—*SMITH v. GILLIES* (1858), 2 Thom. 361.—**CAN.**

d. Date of decision of court.]—So long as an actual *bond fide* contest is going on in ct. as to the judgment, there is a pending "proceeding" within Act XIV of 1859, s. 20, & the period of limitation is to be computed from the ct.'s decision.—*DHIRAJ MAHTAB CHAND BAHADUR v. BULRAM SING BABOO* (1870), 5 B. L. R. 611; 14 W. R. P. C. 21; 13 Moo. Ind. App. 479.—**IND.**

e. Amendment after expiry of period of limitation.]—*BUGBEE v. CLERGUE* (1899), 27 A. R. 96.—**CAN.**

f. —.]—*SAMINATHA v. MUTHAYYA* (1892), 1 L. R. 15 Mad. 417.—**IND.**

g. —.]—For the purposes of limitation a suit must be considered to have commenced from the date on which the plaint was originally presented & not from the date of its amendment.—*PATEL MAFATLAL*

NARANDAS v. BAI PARSON (1895), 1 L. R. 19 Bom. 320.—**IND.**

h. —.]—The date of the issue of the writ & not the date of the amendment of the statement of claim is to be taken to be the date of the commencement of proceedings as far as the operation of the Statute of Limitations is concerned. This, of course, only applies when the amendment is one of form & does not affect or prejudice any substantial right of deft.—*TESSIER v. HARVEY* (1899), 8 Nfld. L. R. 149.—**NFLD.**

k. Filing of notice of motion.]—Where an "application" is made to the ct. within the period of limitation prescribed by any Act it is deemed to be made for the purposes of limitation when the notice of motion is first filed in the proper office of the ct.—*VENKAPAIYA v. NAZERALLY TYABALLY* (1923), 1 L. R. 47 Bom. 764.—**IND.**

l. Filing of bill.]—A bill filed within time will take the case out of the operation of the Statutes of Limitation, as against the parties to it, though they have not been served with subpoena within the time.—*PURCELL v. BLENNERHASSET* (1845), 3 Jo. & Lat. 24.—**IR.**

m. Petition for sale in Chancery.]—The filing of a petition for sale in the Ch. Div. by an incumbrancer on land is a proceeding to recover money charged on the land within Real Property Limitation Act, 1874, s. 8, & prevents Statute of Limitations from running from that date against petitioner until such petition has been dismissed.—*Re STINSON'S ESTATE, Ex p. M'MUNN* (1892), 29 L. R. Ir. 490.—**IR.**

n. Administration action.]—Where

an incumbrancer who has proved his demand in an administration action presents a petition for sale in pursuance of the judgment in that action, & carries on the proceedings to a sale, the Statute of Limitations does not run against his demand after the commencement of the administration action.—*Re EBB'S ESTATE* (1893), 31 L. R. Ir. 95.—**IR.**

o. Issue of summons.]—The issue of summons on the very day on which the period of prescription would have been completed interrupts prescription notwithstanding the fact that the summons was not actually served until a day or two later.—*TARVEY v. LEACH* (1901), 16 E. D. C. 6.—**S. AF.**

PART XI. SECT. 1, SUB-SECT. 3.

p. Extension of time for service.]—Leave to serve the statement of claim ought not to be given, if the effect be to revive a cause of action barred by the Statute of Limitations at the time the application is made.—*WATSON MANUFACTURING CO. v. BOWSER* (1909), 18 Man. L. R. 425.—**CAN.**

PART XI. SECT. 1, SUB-SECT. 4.

1860 i. Saves statute only in action commenced.]—*SRINATH MAZUMDAR v. BRAJA NATH MAZUMDAR* (1870), 4 B. L. R. Ap. 99; 13 W. R. 309.—**IND.**

1860 ii. —.]—Statute of Limitations ceases to run, pending a petition, against all claims properly put forward in that petition. It does not cease to run when the claim is made in some other independent suit or action.—*IRISH LAND COMMISSION v. DAVIES* (1891), 27 L. R. Ir. 334.—**IR.**

SECT. 2.—AMENDMENTS.

SUB-SECT. 1.—OF WRIT.

A. In General.

See, generally, PRACTICE.

1861. Alteration in description of defendant—Resealing of writ—Whether amounting to re-issue.]—Where a writ of summons, tested in time to save Statute of Limitations, was resealed in consequence of an alteration in the description of deft. & the country in which he resided, & was not served until after the six years had expired:—*Held*: the resealing did not amount to a re-issuing of the writ, & it was not necessary for pltf. to show when the resealing took place.

We must take it for granted that the writ was sued out on the day of its teste. The action must be taken to have been then commenced (BAYLEY, B.). *BRAITHWAITE v. MONTFORD* (LORD) (1834), 2 Cr. & M. 408; 4 Tyr. 276; 3 L. J. Ex. 91; 149 E. R. 818.

Annotations:—*Refd.* Gibson v. Varley (1856), 7 E. & B. 49. *Mentd.* Wippell v. Manley (1836), Tyr. & Gr. 672.

1862. — Or in number of defendants—Necessity for resealing.]—Pltf. may before service of a writ of summons in an action, correct a mistake in the name or the number of defts., & cause it to be resealed without altering the teste of the writ.—*GIBSON v. VARLEY* (1856), 7 E. & B. 49; 26 L. J. Q. B. 79; 28 L. T. O. S. 158; 3 Jur. N. S. 290; 5 W. R. 77; 119 E. R. 1166.

Annotation:—*Refd.* Clarke v. Smith (1858), 6 W. R. 260.

1863. Extending term of demise—Negotiations for settlement.]—When in consequence of delay arising from negotiations between the parties the term of the demise as laid in the declaration had expired before the cause was tried the ct. permitted the declaration to be amended by increasing the term as Statute of Limitations would have been a bar to a fresh action.—*DOE d. RABBITS v. WELSH* (1846), 1 New Pract. Cas. 500; 15 L. J. Q. B. 312; 10 Jur. 1056.

Amendments as affecting commencement of action.]—See Sect. 1, sub-sect. 2, *ante*.

B. As to Date.

See, generally, R. S. C., Ord. 28, r. 1.

1864. Whether granted.]—Pltf. applied for a rule to alter the date in the first & *alias* writ of summons from the day on which they were respectively issued to a later date, in order that a *pluries* writ might issue within a month after the date of the *alias* as amended, for the purpose of saving Statute of Limitations:—*Held*: the ct. will not authorise any alteration in the date of a writ of summons; though without such alteration Statute of Limitations will be a bar to the action.—*CAMPBELL v. SMART* (1847), 5 C. B. 196; 5 Dow. & L. 335; 17 L. J. C. P. 63; 11 Jur. 1018; 136 E. R. 851; *sub nom.* SMART v. CAMPBELL, 2 New Pract. Cas. 445; 10 L. T. O. S. 186.

Annotations:—*Refd.* Black v. Green (1854), 15 C. B. 262; Clarke v. Smith (1858), 30 L. T. O. S. 291; Nazer v. Wade (1861), 1 B. & S. 728.

1865. —.]—The ct. refused to amend the indorsement on a *pluries* writ of summons by

making the day of the date of the first writ conformable to the fact, although the debt would otherwise be barred by Statute of Limitations.—*MEDLICOTT v. HUNTER* (1850), 5 Exch. 34; 19 L. J. Ex. 191; 14 L. T. O. S. 444; 155 E. R. 15.

Annotation:—*Apld.* Pritchard v. Bagshawe (1851), 11 C. B. 459.

1866. —.]—*HARRIS v. THOMPSON* (1850), 16 L. T. O. S. 127.

1867. —.]—*CLARKE v. SMITH*, No. 1870, *post*.

1868. — To true date.]—The ct. has power, under C. L. P. Act, 1852 (c. 76), s. 222, to amend the indorsement upon a *pluries* writ of summons, issued more than five months before Oct. 24, 1852, by altering the date of the first writ to its true date, in order to save Statute of Limitations. But the ct. refused to make a similar amendment in the copy of the *pluries* writ served upon deft.—*CORNISH v. HOCKIN* (1853), 1 E. & B. 602; 22 L. J. Q. B. 142; 20 L. T. O. S. 234; 17 Jur. 1049; 1 W. R. 164; 118 E. R. 563.

Annotation:—*Refd.* Nazer v. Wade (1861), 1 B. & S. 728.

1869. — Penal action.]—The ct. will not, in a penal action, alter the term of which a declaration is entitled, to a previous term, in order to bring it within the time limited for the action.—*WOODROFFE v. WILLIAMS* (1815), 6 Taunt. 19; 1 Marsh. 419; 128 E. R. 939.

Annotation:—*Mentd.* Bernie v. Read (1845), 14 L. J. Q. B. 247.

1870. — No waiver of defendant's objection.]—The ct. has no power to alter the date of a writ of summons. Where such an alteration is made by a judge in order to prevent the operation of Statute of Limitations, deft. does not waive the objection by appearing to the writ after notice.—*CLARKE v. SMITH* (1858), 2 H. & N. 753; 27 L. J. Ex. 155; 30 L. T. O. S. 291; 6 W. R. 260; 157 E. R. 311.

1871. —.]—*BAILEY v. OWEN*, No. 1912, *post*.

1872. — Formal amendment.]—The ct. will amend *alias* & *pluries* writs of summons, by indorsing thereon the day of the date of the first writ of summons & of the return thereto, in order to save Statute of Limitations, notwithstanding the 2 & 3 Will. 4, c. 39, s. 10.—*CULVERWELL v. NUGEE* (1846), 4 Dow. & L. 30; 15 M. & W. 559; 15 L. J. Ex. 308; 153 E. R. 971.

Annotations:—*Refd.* Christie v. Bell (1847), 16 M. & W. 669; Smart v. Campbell (1847), 2 New Pract. Cas. 445; Medlicott v. Hunter (1850), 5 Exch. 34; Cornish v. Hockin (1853), 1 E. & B. 602; Nazer v. Wade (1861), 5 L. T. 604.

C. As to Parties.

(a) Plaintiffs.

See R. S. C., Ord. 16, r. 11.

1873. Description of plaintiff—Plaintiff suing in representative character.]—Pltfs. commenced an action against the deft., as administratrixes. Pleas, Statute of Limitations & that pltfs. were not administratrixes of deceased, at the time of the commencement of the suit. The letters of administration were not taken out till after the action was brought & Statute of Limitations would have been a bar to a new action. Pltfs. being surviving partners as well as administratrixes of

the case out of the Statute of Limitations.—*ARMSTRONG v. MEATH* (EARL) (1860), 13 Ir. Jur. 85.—IR.

PART XI. SECT. 2, SUB-SECT. 1.—C. (a).

1873 i. Description of plaintiff—Plaintiff suing in representative character.]—*MUHAMMAD YUSUF v. HIMALAYA BANK, LTD.* (1896), 1 L. R. 18 All. 198.—IND.

a. Striking out plaintiff.]—An amendment by striking out the name

PART XI. SECT. 2, SUB-SECT. 1.—A.

a. General rule.]—*MAKARSKY v. CANADIAN PACIFIC RY. CO.* (1904), 15 Man. L. R. 53.—CAN.

r. —.]—The ct. should amend where the opposite party has not been misled or substantially injured by the error.—*BANK OF HAMILTON v. BALDWIN* (1913), 28 O. L. R. 175; 4 O. W. N. 813; 12 D. L. R. 232.—CAN.

t. Extending term of demise.]—*DOE d. DAY v. BENNETT* (1862), 21 U. C. R. 405.—CAN.

PART XI. SECT. 2, SUB-SECT. 1.—B.

1864 i. Whether granted.]—*COMMERCIAL BANK (PRESIDENT, ETC.) v. AETNA INSURANCE CO.* (1863), 5 All. 441.—CAN.

1864 ii. —.]—There is no power to alter the date of the process.—*HUTHNANCE v. RALEIGH* (TOWNSHIP) (1897), 17 P. R. 458.—CAN.

1864 iii. —.]—A judge at *Nisi Prius* has power to amend a variance of mere time, in stating the completion of a contract in the plaint, so as to take

the deceased, the ct. allowed the writ & declaration to be amended by describing them in their former character, on payment of costs by plffs., & allowing deft. to plead *de novo*.—**TAYLOR v. LYON** (1829), 5 Bing. 333; 2 Moo. & P. 586; 7 L. J. O. S. C. P. 118; 130 E. R. 1089.

1874. — Assignees of bankrupt.—The ct. permitted plffs., in order to save Statute of Limitations, to amend the writ of summons by describing themselves as assignees of a bkpt. & defts. as the registered public officers of a banking co-partnership.—**CHRISTIE v. BELL** (1847), 16 M. & W. 669; 2 New Pract. Cas. 222; 4 Dow. & L. 690; 16 L. J. Ex. 179; 9 L. T. O. S. 79; 153 E. R. 1358.

Annotation:—**Apld.** *Goodchild v. Leadham* (1848), 1 Exch. 706.

1875. Addition of plaintiff—Co-executrix.—The ct. allowed a writ of summons to be amended by inserting the name of a co-extrix. as a co-pltf., on the ground that the right of action would otherwise have been lost by Statute of Limitations.—**LAKIN v. WATSON** (1834), 2 Cr. & M. 685; 2 Dowl. 633; 149 E. R. 936; *sub nom.* **LAKIN v. MASSIE**, 4 Tyr. 839; 3 L. J. Ex. 203.

Annotations:—**Dbtd.** *Roberts v. Bate* (1837), 6 Ad. & El. 778. **Expld.** *Brown v. Fullerton* (1844), 1 New Pract. Cas. 69. **Dbtd.** *Campbell v. Smart* (1847), 5 C. B. 196. **Refd.** *Palmer v. Beale* (1841), 5 Jur. 507; *Rennie v. Bruce* (1845), 14 L. J. Q. B. 207; *Culverwell v. Nugee* (1846), 15 M. & W. 559; *Christie v. Bell* (1847), 16 M. & W. 669; *Smart v. Campbell* (1847), 2 New Pract. Cas. 445; *Goodchild v. Leadham* (1848), 1 Exch. 706; *Garrard v. Guibilei* (1863), 13 C. B. N. S. 832.

1876. — Official assignee.—The ct. allowed plffs., assignees of a bkpt., to amend the writ of summons & subsequent proceedings, by adding the name of the official assignee as pltf., in order to save Statute of Limitations.—**BROWN v. FULLERTON** (1844), 2 Dow. & L. 251; 13 M. & W. 556; 1 New Pract. Cas. 69; 14 L. J. Ex. 79; 4 L. T. O. S. 214; 153 E. R. 233.

Annotations:—**Refd.** *Campbell v. Smart* (1847), 17 L. J. C. P. 63; *Christie v. Bell* (1847), 16 M. & W. 669; *Smart v. Campbell* (1847), 2 New Pract. Cas. 445; *Goodchild v. Leadham* (1848), 1 Exch. 706; *Garrard v. Guibilei* (1863), 13 C. B. N. S. 832; *Clay v. Oxford* (1866), 15 L. T. 286.

1877. — Co-partners.—Two members of a partnership firm having brought an action to recover the balance of an account, defts. proposed a reference of the subject matter of the suit; & plffs. having agreed thereto, an arbitrator was appointed, but, after a delay of three years, the reference was abandoned by consent. Upon the eve of the action coming on for trial, it was discovered that other persons then living were interested in the firm at the time the debt accrued. It was sworn that Statute of Limitations would be a bar to a fresh action. The ct. allowed an amendment of the writ & all subsequent proceedings, by the addition of the names of the other parties as co-plffs.—**CARNE v. MALINS** (1851), 6 Exch. 803; 2 L. M. & P. 498; 20 L. J. Ex. 434; 155 E. R. 770.

Annotations:—**Refd.** *Nazer v. Wade* (1861), 1 B. & S. 728; *Clay v. Oxford* (1866), 15 L. T. 286.

1878. — Rights of additional plaintiff barred at time of amendment.—**LAIRD v. BRIGGS** (1881), as reported in 19 Ch. D. 22, C. A.

Annotations:—**Mentd.** *Symons v. Leaker* (1885), 15 Q. B. D. 629; *Frampton v. White* (1896), 40 Sol. Jo. 275; *Roberts & Lovell v. James* (1903), 89 L. T. 282.

of the third pltf., in order to save the Statute of Limitations, was refused.—**BRICKER, BOOTH & BRICKER v. ANCELL** (1864), 23 U. C. R. 481.—**CAN.**

b. ——**CHISHOLM v. WODLENGER** (1913), 26 W. L. R. 274; 5 W. W. R. 793; 14 D. L. R. 805; 23 Man. L. R. 828.—**CAN.**

c. Substitution of plaintiff.—**HA-**

RAK CHAND v. DENONATH SAHAY, BHAGBUT PROSAD SINGH v. DENONATH SAHAY (1897), 1 L. R. 25 Calc. 409.—**IND.**

PART XI. SECT. 2, SUB-SECT. 1.—C. (b).

1880 i. Description of defendant—Name.—**RYAN v. SHEEHY** (1847), 12

1879. — — — Saving of defendant's rights.—**HUDSON v. FERNEYHOUGH** (1890), 34 Sol. Jo. 228.

(b) Defendants.

See R. S. C., Ord. 16, r. 11.

1880. Description of defendant—Name.—In an action for damage by rioters under 7 & 8 Geo. 4, c. 31, the ct. will amend the writ & subsequent proceedings, by substituting the word "borough" for the word "hundred" if pltf., by mistake has proceeded against the inhabitants of the hundred, instead of the borough & the time for bringing a new action has expired.—**HORTON v. STAMFORD (INHABITANTS)** (1833), 1 Cr. & M. 773; 2 Dowl. 96; 1 Nev. & M. M. C. 261; 3 Tyr. 869; 2 L. J. Ex. 274; 149 E. R. 611.

Annotations:—**Apld.** *Lakin v. Watson* (1834), 2 Cr. & M. 685. **Expld.** *Roberts v. Bate* (1837), 6 Ad. & El. 778. **Consd.** *Garrard v. Guibilei* (1862), 11 C. B. N. S. 616. **Refd.** *Partridge v. Wallbank* (1836), 5 L. J. Ex. 167.

1881. — — ——**BRAITHWAITE v. MONTFORD (LORD)**, No. 1861, *ante*.

1882. — — ——In an action brought against three exors., the name of one appeared in the writ as H. instead of M. After the claim would have been barred by the statute as against M., who had acted as an exor., pltf. obtained an order to amend the writ by the substitution of M.'s name for H.'s:—**Held**: M. had been properly joined as deft., & the case within the discretion vested in a judge by R. S. C., Ord. 16, r. 11.—**CHALLINOR v. RODER** (1885), 1 T. L. R. 527, D. C.

1883. — Capacity.—**CHRISTIE v. BELL**, No. 1874, *ante*.

1884. Addition of defendant—After plea.—Where parties have pleaded in abatement for non-joinder of a deft., this ct. will not set aside the plea, or allow the writ to be amended, on the ground that pltf. is barred by Statute of Limitations from bringing a fresh action; &, on motion for such amendment, the ct. refused to enter upon the consideration of facts stated on affidavit to show an equitable claim to the indulgence.—**ROBERTS v. BATE** (1837), 6 Ad. & El. 778; Will. Woll. & Dav. 307; 1 Jur. 307; 112 E. R. 298.

Annotations:—**Distd.** *Brown v. Fullerton* (1844), 13 M. & W. 556. **Consd.** *Campbell v. Smart* (1847), 5 C. B. 196; *Goodchild v. Leadham* (1848), 1 Exch. 706.

1885. — — ——(1) In an action against two exors., the ct. refused, after plea, to amend the writ of summons, by adding the name of another exor., although Statute of Limitations had run since the commencement of the suit. *Qu.*: if the amendment would have been allowed before declaration or plea.

(2) In order to save Statute of Limitations, the ct. will amend writs of summons in all cases where an amendment could have been made under the old process.—**GOODCHILD v. LEADHAM** (1848), 1 Exch. 706; 5 Dow. & L. 383; 17 L. J. Ex. 90; 10 L. T. O. S. 348; 12 Jur. 83; 154 E. R. 300.

1886. — Date of commencement of action—As against added defendants.—A bill for tithes having been filed within the period limited by Tithe Act, 1832 (c. 100), & amended after that period, for the purpose of adding another party:—**Held**: sufficient as against the last party inasmuch as the bill & amended bill formed but one record.—

I. L. R. 44.—**IR.**

1883 i. — Capacity.—**SAMINATHA v. MUTHAYYA** (1892), I. L. R. 15 Mad. 417.—**IND.**

d. Addition of defendant.—It would be an improper joinder of parties to add a party deft. where the cause of action alleged was different from the one set up against other

Sect. 2.—Amendments: Sub-sect. 1, C. (b); sub-sects. 2 & 3. Sects. 3, 4 & 5: Sub-sect. 1.]

THORPE v. MATTINGLEY (1837), 2 Y. & C. Ex. 421; 8 L. J. Ex. Eq. 9; 160 E. R. 461; *varied, sub nom.* **FLOWDEN v. THORPE** (1840), 7 Cl. & Fin. 137, H. L.

Annotations:—Mentd. **Fellowes v. Clay** (1843), 4 Q. B. 313; **Thorpe v. Plowden** (1845), 14 M. & W. 520.

1887. ———.]—A bill for tithes was filed against occupiers of lands within the time prescribed by Tithe Act, 1832 (c. 100), & the bill was subsequently, & after the period limited by the Act, amended by making the owner a party:—*Held*: the original & amended bill were but one record; & therefore, the suit was instituted against the owner within the time prescribed by the statute.—**FLOWDEN v. THORPE** (1840), 7 Cl. & Fin. 137; West, 42; 4 Jur. 211; 7 E. R. 1019, H. L.; *varying. S. C. sub nom.* **THORPE v. MATTINGLEY** (1837), 2 Y. & C. Ex. 421.

Annotations:—Mentd. **Fellowes v. Clay** (1843), 4 Q. B. 313; **Thorpe v. Plowden** (1845), 14 M. & W. 520.

1888. ———.]—A bill for an account of tithes was filed against five defts., before the expiration of the time limited by Tithe Act, 1832 (c. 100), s. 3; & after the expiration of that time, was amended under orders of the ct., & four other persons were introduced as defts.:—*Held*: the suit, as against these latter defts., must be taken to have commenced at the date at which they were actually introduced into the bill; they could not, by relation backwards, be treated as defts. to the original bill, & they were consequently entitled to the protection of the provisions of the statute.—**BYRON v. COOPER** (1844), 11 Cl. & Fin. 556; 8 Jur. 991; 8 E. R. 1212, H. L.; *reversg. S. C. sub nom.* **COOPER v. BYRON** (1839), 3 Y. & C. Ex. 467.

Annotations:—Mentd. **Cooper v. Hewson** (1840), 4 Y. & C. Ex. 269; **Waterford v. Knight** (1844), 11 Cl. & Fin. 653.

1889. Striking out defendants — Erroneously joined.]—The ct., to prevent the operation of Statute of Limitations, upon certain terms imposed upon pltf., set aside the non-suit, & gave him liberty to amend the declaration & all subsequent proceedings, by striking out the names of defts. erroneously joined in the action.—**CRAUFURD v. COCKS** (1851), 6 Exch. 287; 2 L. M. & P. 192; 20 L. J. Ex. 169; 155 E. R. 551.

1890. ——— **Failure to establish joint liability.]**—The ct., for the purpose of saving Statute of Limitations, allowed pltf., before trial, upon payment of costs, to amend the declaration & all subsequent proceedings by striking out one of defts., the other deft. being at liberty to plead the non-joinder of a co-deft. in abatement, & also to plead *de novo*, although it appeared that an action had been brought for some portion of the same subject-matter against the same defts.; in which action defts. obtained the verdict by reason of pltf. having failed to establish the joint liability of both defts.; & on a motion for a new trial in that cause on the ground of surprise, the affidavits in support of the motion stated, that pltf. could have proved the joint liability of both defts.; & though it further appeared that the application for an amendment by striking out the name of one of defts. in that case after the trial was refused by the ct., & that the evidence to be adduced in the

present action would be very similar to that relied upon in the former.—**COWBURN v. WEARING** (1853), 9 Exch. 207; 23 L. J. Ex. 81; 156 E. R. 88; *previous proceedings*, 21 L. T. O. S. 169.

SUB-SECT. 2.—SETTING UP FRESH CAUSE OF ACTION.

1891. General rule.]—Pltf. commenced two actions against defts., one in their representative capacity for work & labour in the lifetime of testator, the other in their personal character for work & labour after his death, & delivered a bill of particulars in each. It being found that items had been inserted in the particulars delivered in the action brought against them in their representative capacity:—*Held*: pltf. might amend the particulars delivered in the latter action, by the insertion of those items, as such insertion could not be said to take defts. by surprise as to the grounds of action, or operate as the introduction of a new demand; & as Statute of Limitations did not run when the action was brought against defts. in their personal capacity, but was estopped by the commencement of the suit.

Pltf. does not seek to add a fresh cause of action to that on which he originally declared for work & labour; beyond this he does not seek to recover (**ERSKINE, J.**).—**JONES v. CORRY** (1840), 6 Bing. N. C. 247; 8 Scott, 515; 9 L. J. C. P. 177; 4 Jur. 248; 133 E. R. 97.

1892. ———.]—Pltf. will not be allowed to amend by setting up fresh claims in respect of causes of action which since the issue of the writ have become barred by Statute of Limitations.—**WELDON v. NEAL** (1887), 19 Q. B. D. 394; 56 L. J. Q. B. 621; 35 W. R. 820, C. A.

Annotations:—Apld. **Hewett v. Barr**, [1891] 1 Q. B. 98; **Lancaster v. Moss** (1899), 15 T. L. R. 476. *Refd.* **Morris v. Carnarvon County Council**, [1910] 1 K. B. 159; **R. v. Wakeley**, [1920] 1 K. B. 688.

1893. ———.]—The judge has no power to give leave to amend the statement of claim by setting up a cause of action which has been barred by Statute of Limitations since the issue of the writ.—**LANCASTER v. MOSS** (1899), 15 T. L. R. 476, C. A.

1894. ———.]—It is necessary to note that the pleadings could not be amended so as to charge negligence, if amendment was necessary, since at the date of the suggested amendment such a charge would be statute-barred (**LORD PARMOOR**).—**NOCTON v. ASHBURTON (LORD)**, [1914] A. C. 932; 83 L. J. Ch. 784; 111 L. T. 641; 30 T. L. R. 602, H. L.

1895. Changing nature of action.]—In an action of debt on bond, & for money paid, the ct. refused to amend the writ of summons, which had been sued out on promises instead of in debt, in order to save Statute of Limitations; inasmuch as the remedy on the bond would remain, notwithstanding the expiration of the six years.—**PARTRIDGE v. WALLBANK** (1836), 1 M. & W. 316; 5 Dowl. 93; 5 L. J. Ex. 167; 150 E. R. 453.

Annotation:—Refd. **Roberts v. Bate** (1837), Will. Woll. & Dav. 307.

1896. ———.]—The ct. will amend a writ of summons, although more than four months have

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W. R. 41; 3 O. W. N.
1228; 3 D. L. R. 699.—CAN.

PART XI. SECT. 2, SUB-SECT. 2.

1891 i. General rule.]—Where a writ of summons in an action for a specified cause has been issued & served upon defts. out of the jurisdiction, with a

statement of claim, & defts. have appeared, an order may properly be made allowing pltf. to amend the statement of claim by adding a new claim for an entirely different cause of action, provided that it is a claim in respect of which leave to serve process out of the jurisdiction might have been obtained. Pltf. should, in respect of the Statute of Limitations running

against their added claim, be placed in the same position as if their action for the added claim had been brought at the date of the amendment.—**HOGABOOM v. MACCULLOCH** (1897), 17 P. R. 377.—CAN.

1891 ii. ———.]—**KISANDAS RUPCHAND v. RACHAPPA VITHOBA** (1909), 1 L. R. 33 Bom. 644.—IND.

elapsed since it was issued by altering the cause of action from debt to *assumpsit*, on an affidavit that if a fresh action were commenced, Statute of Limitations would be a bar; but the ct. cannot amend the copy of the writ served as they have no power over it.—*ECCLES v. COLE* (1841), 8 M. & W. 537; 1 Dowl. N. S. 34; 10 L. J. Ex. 475; 151 E. R. 1151.

Annotation:—*Refd.* *Campbell v. Smart* (1847), 17 L. J. C. P. 63.

1897. —.]—The ct. will not alter a writ of summons from “promises” to “debt,” to avoid the operation of Statute of Limitations.—*PHILLIPS v. LEWIS* (1850), 1 L. M. & P. 156; 15 L. T. O. S. 26.

SUB-SECT. 3.—OTHER AMENDMENTS.

1898. Promise laid as made to testator—By amendment laid as made to executors.—Pltfs. declared as exors. on a promise to their testator; & issue was joined on a plea of Statute of Limitations. Then pltfs. moved to amend, by laying the promise to have been made to themselves; the ct. ordered the amendment, on payment of costs & liberty for deft. to plead *de novo*.—*MARLBOROUGH'S (DUKE) EXECUTORS v. WIDMORE* (1731), 2 Stra. 890; 93 E. R. 920; *sub nom.* *MARLBOROUGH (DUCHESS) v. WHITMORE*, 1 Barn. K. B. 418; Fitz-G. 193.

Annotations:—*Consd.* *Bank of England v. Morice* (1734), Kel. W. 165. *Expld.* *Tenour v. Smith* (1754), 1 Keny. 141. *Refd.* *R. v. Ellams* (1734), Ridg. temp. H. 87; *Aubecr v. Barker* (1746), 1 Wils. 149; *Bennet v. Smith* (1757), 2 Keny. 82; *Doe d. Hardman v. Pilkington* (1769), 4 Burr. 2447; *Mace v. Lovett* (1772), 5 Burr. 2833; *Scales v. Jacob* (1826), 3 Bing. 638.

1899. Statute operating between filing of bill & demurrer.—Where the time for suit or action allowed by Statute of Limitations, had elapsed between the filing the original bill & the argument of the demurrer, leave to amend was refused.—*ALLISON v. HERRING* (1839), 9 Sim. 583; 8 L. J. Ch. 223; 59 E. R. 483.

1900. Difficult point of law—Decided in case extending over expiry of statutory period.—On Jan. 2, 1837, pltf. commenced an action of trover against the collector of customs for the port of London, to recover the value of certain tobacco, the bill of entry of which deft. had refused to sign so as to enable pltf. to obtain it on payment of the lesser duty payable on wrecked goods. The time limited for bringing such an action expired on Feb. 10. On May 13, the facts were stated on both sides in a case for the opinion of the ct., one of the questions in the case being whether or not pltf. was liable in this form of action. Pltf. suspended his proceedings, to await the decision of the Ct. of Q. B. in a case pending in that ct., which involved a similar question. That ct., having in June, 1839, decided that an action on the case would lie for the non-feasance, pltf., in the following Michaelmas Term, applied for leave to amend his declaration by adding a count in case; the ct., under the special circumstances, allowed the amendment.—*LEGGE v. BOYD* (1840), 6 Bing. N. C. 240; 8 Dowl. 272; 8 Scott, 502; 9 L. J. C. P. 170; 4 Jur. 271; 133 E. R. 95; *subsequent proceedings*, 1 Man. & G. 898.

1901. Amendment of *distringas*.—The ct. refused to amend a *distringas* for the purpose of preventing the operation of Statute of Limitations.—*NORMAN v. WINTER* (1839), 5 Bing. N. C. 279;

7 Dowl. 304; 7 Scott, 251; 8 L. J. C. P. 179; 3 Jur. 147; 132 E. R. 1112.

Annotations:—*Mentd.* *Launceston & Victoria Ry. v. Brennan* (1839), 3 Jur. 196; *Bromage v. Ray* (1841), 10 L. J. Q. B. 238; *Pearce v. Swain* (1841), 7 M. & W. 543; *King v. Hopkins* (1845), 2 Dow. & L. 637; *Peyton v. Wood* (1846), 15 M. & W. 608; *Brough v. Eisenberg* (1849), 19 L. J. Q. B. 22.

SECT. 3.—SETTING ASIDE WRIT AND SERVICE.

1902. Writ in form where defendant resides abroad—Defendant within jurisdiction.—A writ of summons in the form prescribed by C. L. P. Act, 1852 (c. 76), s. 18, where deft. is a British subject residing abroad, was issued, & from time to time renewed, though deft. had never been abroad, & had entered an appearance to the action. The ct. refused to set aside such writ & service, in order to make Statute of Limitations an available defence.—*GREEN v. BRADDYLL* (1856), 1 H. & N. 69; 27 L. T. O. S. 81; 4 W. R. 487; 156 E. R. 112.

SECT. 4.—CONCURRENT WRIT.

See R. S. C., Ord. 6, rr. 1, 2.

1903. For service out of jurisdiction—Enlargement of time.—Under R. S. C., Ord. 6, rr. 1, 2, the ct. has power to give leave for the issue of a concurrent writ for service out of the jurisdiction, although the original writ was issued for service within the jurisdiction & has been renewed, & although there is only one deft. to the action; & where the writ has been renewed such leave may be given, notwithstanding that the enlargement of time for issuing a concurrent writ may affect the operation of Statute of Limitations.—*SMALPAGE v. TONGE* (1886), 17 Q. B. D. 644; 55 L. J. Q. B. 518; 55 L. T. 44; 34 W. R. 768; *sub nom.* *Ex p. S.*, 2 T. L. R. 828, C. A. *Annotation*:—*Refd.* *The Espanoleto*, [1920] P. 223.

SECT. 5.—RENEWAL OF WRIT.

SUB-SECT. 1.—IN GENERAL.

See R. S. C., Ord. 8, r. 1.

1904. Time for renewal—How period calculated.—*Qu.*: whether the six months for which the renewed writ under C. L. P. Act, 1852 (c. 76), s. 11, is to be available are to be reckoned inclusively or exclusively of the date of the renewal? The officer, assuming the former to be the proper construction of the statute, having declined to seal a writ which upon that assumption was tendered a day too late, the ct., without expressing any opinion as to whether or not he had rightly construed the Act, directed him to seal the writ *nunc pro tunc*.—*BLACK v. GREEN* (1854), 15 C. B. 262; 139 E. R. 422; *sub nom.* *ANON.*, 3 C. L. R. 38; 24 L. J. C. P. 1; 24 L. T. O. S. 61; 18 Jur. 1017; *sub nom.* *Ex p.* —, 3 W. R. 10.

Annotations:—*Fold.* *Anon.* (1854), 3 C. L. R. 78. *Refd.* *Nazer v. Wade* (1861), 31 L. J. Q. B. 5; *Anon.* (1863), 1 H. & C. 664.

1905. —.]—A writ of summons was issued, dated Nov. 7, 1853, with a view to save Statute of Limitations. It was renewed on May 6, 1854. On Nov. 6, following, pltf. applied to the officer of the ct. to renew the writ again; but the

PART XI. SECT. 2, SUB-SECT. 3. P. R. 470.—CAN.
e. Amending by additional defence.]—*PATTERSON v. CENTRAL CANADA SAVINGS & LOAN CO.* (1897), 17

PART XI. SECT. 3.
f. General rule.]—*HOWLAND v.*

DOMINION BANK (1892), 15 P. R. 56; *affd.* (1893), 22 S. C. R. 130.—CAN.

g. —.]—*CAIRNS v. AIRTH* (1894), 16 P. R. 100.—CAN.

Sect. 5.—Renewal of writ: Sub-sects. 1 & 2. Sects.

latter refused, considering it too late, & that the six months had expired. The ct., without deciding that the renewal would be valid, directed that the writ should be renewed as of Nov. 6, *nunc pro tunc*, as the dates would appear on the record.—ANON. (1854), 3 C. L. R. 78; 24 L. J. Q. B. 23; 24 L. T. O. S. 135; 18 Jur. 1104; 3 W. R. 74.

Annotation:—**Refd.** Anon. (1863), 1 H. & C. 664.

1906. ———.—(1) The “six months” limited by C. L. P. Act, 1852 (c. 76), s. 11, are to be reckoned inclusively.

Where a writ of summons, originally issued, with a view to save Statute of Limitations, on Jan. 23, 1861, was successively renewed on three several occasions, the last of which was on July 19, 1862, & on Monday, Jan. 19, 1863, application was made to the officer to renew it again, but he refused to do so, as he considered that the six months had expired, & the application was too late; upon motion for a rule directing him to seal the writ, the ct. refused to grant the rule, on the ground that the application to renew the writ had been made too late; notwithstanding *Black v. Greene*, No. 1904, *ante*, & *Anon.* (1854), No. 1905, *ante*, in which a similar rule had been granted.

(2) *Semble*: the last day having fallen on a Sunday, the application to renew should have been made on the previous Saturday.—ANON. (1863), 1 H. & C. 664; 1 New Rep. 331; 32 L. J. Ex. 88; 7 L. T. 718; 158 E. R. 1051.

1907. ———.—**Application of rule—To writs issued before Judicature Act, 1873 (c. 66).**—R. S. C., Ord. 8, r. 1, as to the renewal of writs, applies to writs issued before as well as after above Act, & subsequently renewed.

A writ issued in 1861 was renewed in the manner prescribed by C. L. P. Act, 1852 (c. 76), s. 11, until 1890, when it was served, no leave of a ct. or judge to renew it having been obtained under R. S. C., Ord. 8, r. 1:—**Held**: the writ was no longer in force, & the service must be set aside.—*HUME v. SOMERTON* (1890), 25 Q. B. D. 239; 59 L. J. Q. B. 420; 62 L. T. 828; 55 J. P. 38; 38 W. R. 748; 6 T. L. R. 374.

Annotation:—**Mentd.** *Re R.*, [1906] 1 Ch. 730.

1908. ———.—**Extension of time—Power of court.**

—*Semble*: the time for renewing a writ of summons cannot be extended under R. S. C., Ord. 57, r. 6, where pltf.’s claim would, in the absence of such renewal, be barred by Statute of Limitations.

—*DOYLE v. KAUFMAN* (1877), 3 Q. B. D. 340, C. A. *Annotations*:—**Consd.** *Smalpage v. Tonge* (1886), 17 Q. B. D. 644. **Fold.** *Hewett v. Barr*, [1891] 1 Q. B. 98. **Refd.** *Carter v. Stubbs* (1880), 43 L. T. 746; *The Espanoleto*, [1920] P. 223.

1909. ———.—**Exceptional circumstances.**—The rule of practice is not to extend the time for renewing a writ of summons after the expiration of the twelve months from the date of the writ, where pltf.’s claim would, in the absence of such renewal, be barred by the Statute of Limitations. *Semble*: there would be a discre-

tion to extend the time in such a case under exceptional circumstances.—*HEWETT v. BARR*, [1891] 1 Q. B. 98; 60 L. J. Q. B. 268; 39 W. R. 294, C. A.

Annotation:—**Refd.** *The Espanoleto*, [1920] P. 223.

1910. Necessity for proof of renewal.—Upon a plea of Statute of Limitations, pltf. cannot avail himself of a writ issued within the six years, unless service of it within the six years or regular continuances are proved.—*MANN v. WALKER* (1850), 20 L. J. C. P. 165, n.; 15 L. T. O. S. 250.

Annotation:—**Refd.** *Pritchard v. Bagshawe* (1851), 11 C. B. 459.

1911. Effect of renewal—Action kept alive in particular court.—Where an action of debt has been commenced in a common law ct. within six years from the debt accruing, & the writ has been duly renewed, pursuant to C. L. P. Act, 1852 (c. 76), s. 11, the renewal of the writ keeps alive the debt, but only for the purposes of the particular action, & not for the purpose of taking proceedings in another ct.

In Mar. 1869, A. died, indebted to pltf. In Jan. 1875, within six years from the death of A., pltf. commenced an action for debt against deft., the administrator of A., by issuing a writ out of the Ct. of Common Pleas. This writ was never served upon deft. nor renewed. In July, 1875, while the writ remained in force, but more than six years from the death of A., pltf. took out a summons against deft. to administer the estate of A.:—**Held**: as at the date of the summons the debt was kept alive, by virtue of the writ, only for the purposes of the action in the Ct. of Common Pleas, & not for the purpose of taking proceedings in another ct., Statute of Limitations was a complete bar to pltf.’s claim.—*MANBY v. MANBY* (1876), 3 Ch. D. 101; 40 J. P. 789; *sub nom.* *FIEVET v. MANBY*, 35 L. T. 307.

Issue of concurrent writ.—*See* Sect. 4, *ante*.

Issue of new county court summons.—*See* COUNTY COURTS, Vol. XIII., p. 492, No. 429.

Under Maritime Conventions Act, 1911 (c. 57), s. 8.—*See* ADMIRALTY, Supp. I., No. 683a.

SUB-SECT. 2.—WHEN REFUSED.

See, generally, R. S. C., Ord. 8.

1912. Omission to reseal before expiry—Mistake of party or attorney.—The ct. will not allow a writ resealed too late to take a cause out of Statute of Limitations by mistake of the attorney to be resealed *nunc pro tunc* for this purpose.—*BAILEY v. OWEN* (1860), 9 W. R. 128.

Annotation:—**Refd.** *Doyle v. Kaufman* (1877), 3 Q. B. D. 7.

1913. ———.—[On the day of the expiration of a writ of summons issued under C. L. P. Act, 1852 (c. 76), pltf.’s attorney attended at the office for the purpose of having it renewed, & paid the fee; but being suddenly called away omitted to get the seal impressed in pursuance of

PART XI. SECT. 5, SUB-SECT. 1.

1908 i. Time for renewal—Extension of time—Power of court.—Where orders were made from time to time renewing a writ of summons, & it appeared that pltf. all the time knew, but did not disclose, where deft. could be served, & the Statute of Limitations, had, but for the renewals, barred pltf.’s claims, the orders were rescinded.—*MAIR v. CAMERON* (1899), 18 P. R. 484.—CAN.

1908 ii. ———.—[When a writ was not served within twelve

months from its issue, & the cause of action had in the meantime become barred by the Statute of Limitations, the ct. refused to extend the time for its renewal.—*MAGEE v. HASTINGS* (1891), 28 L. R. Ir. 288.—IR.

1909 i. ———.—**Exceptional circumstances.**—The limitation of twelve months allowed for service of a writ should not be idle, & before a writ can properly be renewed there must be some real excuse for the delay. Renewal is by no means a matter of course, & should only be granted under very exceptional circumstances.—AP-

PLEYARD v. MULLIGAN (1912), 21 O. W. R. 557; 3 O. W. N. 943; 3 D. L. R. 288.—CAN.

1909 ii. ———.—[—*MARKEY v. DOWDELL* (1852), 2 I. C. L. R. 117.—IR.

h. ———.—[—*CURRY v. BROTMAN* (1900), 4 Terr. L. R. 369.—CAN.

k. ———.—[—*DICKSON v. CAPES* (1860), 11 I. C. L. R. 334.—IR.

l. **Necessity for proper form.**—*FORD v. MCGOEY* (1855), 12 U. C. R. 505.—CAN.

sect. 11, & did not discover the mistake until it was too late to keep the writ alive by resealing, so as to save Statute of Limitations:—*Held*: (1) the ct. had no power to direct the officer to impress the seal on the writ as of the day when the attorney applied to have it renewed; (2) it would have been otherwise if the omission to reseal the writ had been occasioned by a fault of the officer of the ct.—*NAZER v. WADE* (1861), 1 B. & S. 728; 31 L. J. Q. B. 5; 5 L. T. 604; 8 Jur. N. S. 134; 121 E. R. 885.

Annotations:—*As to* (1) *Folld. Anon.* (1862), 31 L. J. Q. B. 61. *Appld. Davies v. Garland* (1876), 1 Q. B. D. 250. *Refd. Evans v. Jones* (1862), 2 B. & S. 45; *Doyle v. Kaufman* (1877), 47 L. J. Q. B. 26.

1914. — Office closed on last day.]—Where a pltf. has by inadvertence allowed the time for resealing a writ of summons to elapse without having the writ resealed, the ct. will not order it to be done *nunc pro tunc*, unless it can see that there has been some default in the conduct of one of its officers.

The last day for resealing a writ of summons, so as to save Statute of Limitations, expired on Saturday Dec. 28, within the Christmas holidays. A party who attended at the office on that day for the purpose found it shut, & the officer having refused to reseal the writ on the following Monday, Dec. 30, the ct. refused to order him to do it afterwards, *nunc pro tunc*.—*EVANS v. JONES* (1862), 2 B. & S. 45; 5 L. T. 673; 8 Jur. N. S. 641; 121 E. R. 991; *sub nom. ANON.*, 31 L. J. Q. B. 61.

Annotation:—*Refd. Davies v. Garland* (1876), 1 Q. B. D. 250.

1915. — Default in conduct of officer of court.]—*NAZER v. WADE*, No. 1913, *ante*.

1916. Original writ lost—Sealing of verified copy.]—Where an original writ of summons, issued in Jan. 1875, & renewed in July, has been lost, the ct. has no power to allow a renewal of it, under C. L. P. Act, 1852 (c. 76), s. 11, by ordering a verified copy to be sealed.—*DAVIES v. GARLAND* (1876), 1 Q. B. D. 250; 45 L. J. Q. B. 137; 33 L. T. 727; 24 W. R. 252; 2 Char. Pr. Cas. 200.

—*See, now*, R. S. C., Ord. 8, r. 3.

SECT. 6.—GRANT OF NEW TRIAL.

1917. Writ to save statute not returned—Objection too late.]—The issue, as set out in a writ of trial, stated the suing out of a former writ of summons, to meet a plea of Statute of Limitations. Pltf. having obtained a verdict, upon an issue taken on the accrual of the action within six years, the ct. refused to grant a new trial, upon an affidavit that no such writ had ever been returned, & that no continuances had been entered on the roll, & that the issue delivered contained no notice of a former writ.—*HARPER v. PHILLIPPS* (1844), 7 Man. & G. 397; 8 Scott, N. R. 115; 3 L. T. O. S. 102; 135 E. R. 166.

Annotation:—*Refd. Pritchard v. Bagshaw* (1851), 20 L. J. C. P. 161.

PART XI. SECT. 6.

1919 i. Ejectment.]—When the verdict is against evidence in an action of ejectment, & the Statute of Limitations may defeat pltf. before he can bring a second action, the ct. will grant a new trial.—*DOE d. ESTABROOKS v. HUMPHREY* (1867), 12 N. B. R. (1 Han.) 104.—*CAN.*

m. Title to land.]—A defence under the Statute of Limitations against a clear legal title is not one to be favoured, especially in cases between relations; & where the jury have leaned against such defence in support of the

honesty of the case, & there has been no misdirection, deft. must show very strong ground to entitle him to a new trial on the evidence.—*HEMMINGWAY v. HEMMINGWAY* (1854), 11 U. C. R. 237.—*CAN.*

PART XI. SECT. 7.

n. Entry of suggestion by judge.]—The entry of a suggestion under C. L. P. Act is a judgment of the ct. & gives a new starting point for the Statute of Limitations.—*McCULLOUGH v. SYKES* (1885), 11 P. R. 337.—*CAN.*

o. Proceedings in Incumbered Es-

1918. Ulterior proceedings in prospect—Nonsuit in action for crim. con.]—Pltf. in an action of crim. con. having been nonsuited in consequence of the accidental absence of his attorney the ct. granted a new trial on payment of costs, as between attorney & client, it appearing that another action might be barred by Statute of Limitations, & pltf. be thereby precluded from taking ulterior proceedings.—*AYLING v. GOLDRING* (1845), 1 C. B. 635; 135 E. R. 690.

1919. Ejectment.]—*DOE d. GOODWIN v. JOYCE* (1851), 16 L. T. O. S. 343.

1920. Action stayed pending winding up—Defendant given benefit of statute in winding up.]—Testator, in 1846, performed certain alleged services for a railway co., for which he brought an action against one of the directors. On Apr. 1, 1848, a verdict was given for deft. In the Easter Term following, a rule was obtained for a new trial, but it was not immediately proceeded with. On May 28, 1849, a winding up order was obtained against the co., & a notice having been served by pltf.'s attorney that the trial would then be proceeded with, on Aug. 1, 1851, the judge made an order that all proceedings should be stayed until such proof should have been made or exhibited, as required by Winding-up Acts, deft. being sued as a partner in or contributory to the said co. On Oct. 7, 1852, testator's extrix. lodged a claim in the master's office, which claim was disallowed by the master, on the ground that it was barred by Statute of Limitations:—*Held*: considering the order of Aug. 1, 1851, the extrix. was not barred by the statute from having a new action to determine whether or not she was a creditor of the co.; & the master's order was discharged, with leave given to the extrix. to bring such action as she might be advised, the official manager to have leave to defend the action, & any judgment recovered in the action to be dealt with as the ct. should direct.—*Re LONDON & BIRMINGHAM EXTENSION & NORTHAMPTON, DAVENTRY, LEAMINGTON & WARWICK RY. CO., Ex p. HIGGINS* (1856), 26 L. T. O. S. 270; 2 Jur. N. S. 178; 4 W. R. 277.

SECT. 7.—OTHER PROCESS.

1921. Whether defendant restrained from pleading statute—Inequitable plea of infancy.]—A woman at the time of her marriage was indebted on two promissory notes. After the marriage, the husband gave his bond for the amount to the creditor, who thereupon delivered up the notes. The bond having been put in suit the husband pleaded his infancy at the time of giving the bond. On a bill filed in this ct. for relief, the ct. ordered the notes to be returned to pltf. with directions that deft. should not plead Statute of Limitations to any action pltf. should bring on the notes or any other plea which deft. could not have pleaded at the time the bond was given. But this ct.

tates Court.]—Re COLCLOUGH (1858), 8 I. Ch. R. 330.—*IR.*

p. Proceedings in Land Commission.]—An order of the Land Commission sanctioning an advance to a tenant to enable him to purchase his holding under Purchase of Land (Ireland) Acts, 1885–1890, does not prevent the Statute of Limitations from running so as to extinguish a rentcharge issuing out of the lands.—*Re BATESON'S ESTATE*, [1895] 2 I. R. 559.—*IR.*

q. —.]—A vesting order made by Land Commission under Purchase

Sect. 7.—Other process. Part XII. Sect. 1: Sub-sects. 1 & 2.]

will not order the immediate payment of the money.—*CLARKE v. COBLEY* (1789), 2 Cox, Eq. Cas. 173; 30 E. R. 80.

Annotations:—Mentd. *Stikeman v. Dawson* (1847), 1 Do G. & Sm. 90; *Leslie v. Sheill*, [1914] 3 K. B. 607.

1922. — On setting aside interlocutory judgment.]—The ct. will not restrain deft. from pleading Statute of Limitations on setting aside a regular interlocutory judgment.—*MADDOCKS v. HOLMES* (1798), 1 Bos. & P. 228; 126 E. R. 875.

1923. — Plea of statute by solicitor—Summary jurisdiction of court.]—The ct. will not, in the exercise of its summary jurisdiction, prevent an attorney, who is deft. in an action at the suit of his client, suing as administratrix, from pleading a plea not directly to the merits, such as the plea of Statute of Limitations, even though the accrual of the statute may have been owing to his neglect in not advising pltf. to take out the letters of administration earlier.

Action by the administratrix of D. for money had & received by deft., who was an attorney, to the use of D. in his lifetime. Plea, Statute of Limitations: replication, that D. was beyond the seas when the cause of action accrued, & did not return to England before his death, & that until the grant of administration, there was no one to sue, & that the action was brought within three days after administration granted. Rejoinder, that before & at the time of the death of D., pltf.

E. was his wife, & might within a reasonable time after his death, have obtained administration of his effects; but that she suffered more than seven years to elapse after the death of D. before she took out letters of administration:—*Held*: if there were circumstances which at law prevented deft., being an attorney, from setting up the defence of Statute of Limitations, in an action on a money demand at the suit of this client, the proper way for pltf. to avail herself of them was by a surrejoinder, & not by calling on the ct., on affidavit, to interpose its summary jurisdiction & prevent deft. from pleading Statute of Limitations.—*Re TRISTON* (1850), 1 L. M. & P. 74; 15 L. T. O. S. 70.

1924. Leave to serve writ on agent refused.]—The ct. will not allow process to be served at the house of the agent of deft. out of the jurisdiction, in order to save Statute of Limitations; but pltf. must proceed according to the provisions of 2 & 3 Will. 4, c. 39, s. 10.—*FRITH v. DONEGAL* (LORD) (1834), 2 Dowl. 527.

1925. Refusal to draw up rule nisi for earlier day.]—The ct. refused to allow the rule *nisi* to be drawn up for an earlier day than by the ordinary practice it would be drawn up, upon a suggestion that the period limited by Country Bankers Act, 1826 (c. 46), for proceedings against former members, had nearly expired.—*FIELD v. MACKENZIE* (1847), 4 C. B. 705; 5 Dow. & L. 172; 16 L. J. C. P. 203; 136 E. R. 685.

Annotation:—Mentd. *Dodgson v. Scott* (1848), 6 Dow. & L. 27.

Part XII.—Pleading and Practice.

SECT. 1.—PLEADING.

SUB-SECT. 1.—IN GENERAL.

1926. Whether particular statute need be pleaded —Action in High Court.]—*ADAMS v. BARRY*, No. 826, *ante*.

1927. — — —.]—Where an action to which Public Authorities Protection Act, 1893 (c. 61), applies is brought in the county ct., & defts. desire to rely upon the fact that the action was not commenced within the time thereby limited it is sufficient to raise that defence by a notice in the form given in Form 85, of the County Ct. Forms, 1903, "that the claim is barred by a Statute of Limitations" without specifying the year, chapter & sect., or the title of the statute.

By the High Ct. rules it is required that where a statute of limitations is pleaded the pleading should state which of such statutes is relied on (*PICKFORD, J.*).—*GREGORY v. TORQUAY CORPN.*, [1911] 2 K. B. 556; 80 L. J. K. B. 981; 105 L. T. 138; 75 J. P. 446; 55 Sol. Jo. 582; 9 L. G. R. 772, D. C.; *affd.*, [1912] 1 K. B. 442, C. A.

Annotation:—Refd. *The Llandovery Castle*, [1920] P. 119.

of Land (Ireland) Acts, 1885–1891, stops Statute of Limitations running as from its date, in favour of all persons having charges on the lands in respect of which the vesting order is made.—*Re SMITHWICK'S ESTATE*, [1896] 2 I. R. 401.—*IR.*

r. — —.]—Notwithstanding an absolute order for sale, made on an incumbrancer's petition, the owner can create a valid incumbrance on the lands ordered to be sold; & such incumbrance is protected by the absolute order for sale against the

operation of the Statute of Limitations.—*Re SWANTON'S ESTATE*, [1898] 1 I. R. 157.—*IR.*

t. — —.]—*Re MORRISON'S ESTATE*, [1907] 1 I. R. 15.—*IR.*

PART XII. SECT. 1, SUB-SECT. 1.

a. Whether particular statute need be pleaded.]—*BANKS v. BELLAMY* (1880), 27 Gr. 342.—*CAN.*

b. Whether cause of action must be admitted.]—*MEYER v. BURKE* (1843), 3 Ont. Dig. 5343.—*CAN.*

1928. — Action in county court.]—In an action in the county ct. a notice of the special defence of Statute of Limitations is sufficient if the statement in the notice follows, without any addition, C. C. R., 1895, Appendix, Form 95a, which is, "that the claim for which deft. is summoned is barred by a Statute of Limitation," & deft. need not specify the particular statute on which he intends to rely.—*EATON v. TAPLEY*, [1899] 1 Q. B. 953; 68 L. J. Q. B. 638; 80 L. T. 797; 47 W. R. 463; 43 Sol. Jo. 458, D. C.

1929. — — —.]—*GREGORY v. TORQUAY CORPN.*, No. 1927, *ante*.

1930. Need not plead continuance of writ.]—*PRATT v. HAWKINS*, No. 1855, *ante*.

1931. Joint & several debts—Necessity for separate plea.]—In 1800 A., B. & C. entered into partnership as attornies, upon certain terms expressed in a memorandum. In 1808 A. died leaving B. his exor. & residuary legatee, & then B. & C. formed a partnership & agreed to share the profits equally. In Dec. 1825, their partnership was dissolved by consent. During the former partnership A. & B. had made advances, both

c. — —.]—A plea to an avowry, which amounts in one portion of it to a plea of the Statute of Limitations, & in another portion which amounts to a plea of waiver:—*Held*: bad, upon general demurrer.—*DALY v. BLOOMFIELD* (LORD) (1842), 5 I. L. R. 65.—*IR.*

d. Facts barring statute—Time for pleading.]—The Full Ct. has power to allow, on terms, an amendment for the first time of a pleading by setting up a fact which would, if proved, be a good answer to a plea of the Statute

jointly & severally, for C.'s private use; & during the latter partnership B. made similar advances. In 1827 B. became bkpt. No settlement of accounts having taken place between any of the parties, in July, 1831, B.'s assignees filed a bill against B. & C. for an account of the dealings of both partnerships, & of all the advances made by A. & B. C. pleaded Statute of Limitations, 1623 (c. 16), & Statute of Frauds Amendment Act, 1828 (c. 14), to so much of the bill as related to such advances:—*Held*: as the plea extended to the joint advances of A. & B. during the first partnership, it covered too much, & was, therefore, bad.—*ROBINSON v. FIELD* (1831), 5 Sim. 14; 58 E. R. 243.

SUB-SECT. 2.—NECESSITY TO PLEAD STATUTE.

See, now, R. S. C., Ord. 19, r. 15.

1932. General rule—Statute must be pleaded—Though right to relief appear from plaintiff's pleading.—Deft. cannot take advantage of Statute of Limitations upon pltf.'s own showing; but must plead it in bar, or demur to the declaration.—*TRANKERSLEY v. ROBINSON* (1629), Cro. Car. 163; 79 E. R. 742.

1933. — — — — —.]—In *assumpsit* Statute of Limitations must be pleaded, though the declaration allege a promise six years before.—*THURSBY v. WARREN* (1629), Cro. Car. 159; 79 E. R. 738.

Annotations:—*Refd.* *Chapple v. Durston* (1830), 1 Cr. & J. 1; *Spencer v. Hemmerde*, [1922] 2 A. C. 507.

1934. — — — — —.]—Although it appear upon the proceedings that an action was not brought within the time of limitation, yet deft. cannot take advantage of it on motion, but must plead the statute.—*HAWKINGS v. BILLHEAD* (1635), Cro. Car. 404; 79 E. R. 951.

Annotation:—*Refd.* *Chapple v. Durston* (1830), 1 Cr. & J. 1.

1935. — — — — —.]—To an action upon an executory promise deft. cannot plead *non assumpsit infra sex annos*. It is no objection to a declaration that it appears upon the face of it that the time prescribed by Statute of Limitations for bringing the action had elapsed before the declaration was delivered or filed.—*GOULD v. JOHNSON* (1702), 2 Ld. Raym. 838; 2 Salk. 422; 92 E. R. 60; *sub nom.* *BOOTH v. JOHNSON*, 7 Mod. Rep. 143.

Annotations:—*Consd.* *Chapple v. Durston* (1830), 1 Cr. & J. 1; *Irving v. Velteh* (1837), 3 M. & W. 90. *Refd.* *Hickman v. Walker* (1737), Willes, 27; *Leaper v. Tatton* (1812), 16 East, 420; *Tanner v. Smart* (1827), 5 L. J. O. S. K. B. 218.

1936. — — — — —.]—*Assumpsit* on a promise twenty years before, no benefit of the statute without pleading it.—*LEE v. ROGERS* (1663), 1 Lev. 110; 1 Keb. 566, 578; T. Raym. 86; 83 E. R. 322.

Annotations:—*Refd.* *Cole v. Hawkins* (1717), 10 Mod. Rep. 348; *Chapple v. Durston* (1830), 1 Cr. & J. 1. *Mentd.* *Serle v. Darford* (1695), 1 Ld. Raym. 120; *R. v. Paty* (1704), 2 Ld. Raym. 1105; *Somerset v. Fogwell* (1826), 5 L. J. O. S. K. B. 49; *Gledstane v. Hewitt* (1831), 1 Cr. & J. 565.

1937. — — — — —.]—If the Statute of Limitations be neither pleaded nor insisted on by the

of Limitations.—*JONES v. DAVENPORT* (1900), 7 B. C. R. 452.—**CAN.**

e. Plea of Real Property Limitation Act, 1833 (c. 27)—Necessity to rebut statutory exceptions.—A plea of sect. 40 of above Act ought to negative the exceptions contained in that sect.—*MOLONY v. O'BRIEN* (1842), 5 I. L. R.

PART XII. SECT. 1, SUB-SECT. 2.

1936 i. General rule—Statute must be

pleaded.—The Statute of Limitations to be taken advantage of must be pleaded.—*McRAE v. WOODWARD*, 3 Murd. Epit. 141.—**CAN.**

1936 ii. — — — — —.]—*KING v. GLASSFORD* (1861), 11 C. P. 490.—**CAN.**

1936 iii. — — — — —.]—*CATTANACH v. URQUHART* (1873), 6 P. R. 28.—**CAN.**

1936 iv. — — — — —.]—*FISH v. FRASER* (1875), 9 N. S. R. 514.—**CAN.**

1936 v. — — — — —.]—*RADHA PRASAD SINGH v. BHAJAN RAI* (1885), I. L. R.

answer, you cannot have the benefit of such bar.—*PRINCE v. HEYLIN* (1737), 1 Atk. 493; 26 E. R. 312, L. C.

Annotation:—*Mentd.* *Goodtitle d. Roebuck v. Oxley* (1826) 7 Dow. & Ry. K. B. 535.

1938. — — — — —.]—An administrator cannot resist a creditor's bill for an account, on the ground of length of time, without either pleading or claiming the benefit of Statute of Limitations.—*COCKSHUTT v. POLLARD* (1817), Wils. Ex. 132; 159 E. R. 851, Ex. Ch.

1939. — — — — —.]—The widow of testator, with the acquiescence of his heir, was let into possession of certain freehold houses, under an erroneous supposition that they passed by the will along with other property, in which a life interest was devised to her; & before the error was discovered or her right disputed, she died. On a bill filed by the heir against her personal representative, praying the delivery of title deeds & an account:—*Held*: as the defence of Statute of Limitations was not raised upon the pleadings, the account should be taken from the time when pltf.'s title first accrued.—*MONYPENNY v. BRISTOW* (1832), 2 Russ. & M. 117; 39 E. R. 339, L. C.

Annotations:—*Mentd.* *Hughes v. Turner* (1835), 3 My. & K. 666; *Yarnold v. Wallis* (1840), 4 Y. & C. Ex. 160; *Doe d. York v. Walker* (1844), 12 M. & W. 591; *Skinner v. Oglo* (1845), 4 Notes of Cases, 74; *Hughes v. Hosking* (1856), 11 Moo. P. C. C. 1; *Re Earl's Trust* (1858), 4 K. & J. 673; *Phillips v. Homfray* (1883), 24 Ch. D. 439.

1940. — — — — —.]—A *cestui que trust* under a will brought an action against the administratrix & the heir-at-law of the sole trustee, who had died intestate, to make his estate liable for the loss which had accrued to the trust estate owing to a breach of trust committed by him. Statute of Limitations was not pleaded, & at the trial an account was directed on the footing of the liability of the heir. He raised the defence of the statute on the further consideration:—*Held*: the statute should have been pleaded.—*Re BURGE, GILLARD v. LAWRENSON* (1887), 57 L. T. 364; 52 J. P. 20.

Cannot be raised at later stage.—

See Sect. 2, post.

1941. Defence set up by affidavit.—Upon motion for decree, where no answer had been put in, but deft. had filed an affidavit submitting that pltf.'s claim was barred by lapse of time & acquiescence, but not expressly claiming the benefit of Real Property Limitation Act, 1833 (c. 27), the ct. allowed the statute to be pleaded *ore tenus*.—*GREEN v. SNEAD* (1861), 30 Beav. 231; 31 L. J. Ch. 320; 54 E. R. 877; *sub nom.* *SNEAD v. GREEN*, 5 L. T. 301; 8 Jur. N. S. 4; 10 W. R. 36.

1942. Foreclosure claim.—Deft. in a claim [for foreclosure] may, at the hearing, avail himself of the Statute of Limitations, without pleading it.—*SNEED v. SNEED* (1851), 20 L. J. Ch. 630; 18 L. T. O. S. 86; 16 Jur. 72.

1943. Penal action.—In a penal action pltf. is at liberty to show the action commenced within a year, as well after as before the objection, that it does not appear on the record, is made.—*MAUGHAM v. WALKER* (1792), Peake, 220; *subsequent proceedings* (1793), 5 Term Rep. 98.

7 All. 677.—**IND.**

1936 vi. — — — — —.]—*PURCELL v. COLE* (1842), Long. & T. 454.—**IR.**

1942 i. Foreclosure claim.—Where a deft. in a mtge. action desires to prevent pltf. from recovering interest for a longer period than six years, he need not set up the defence of the Statute of Limitations; merely filing the usual disputing note is sufficient for this purpose.—*WRIGHT v. MORGAN* (1877), 1 A. R. 613.—**CAN.**

Sect. 1.—Pleading: Sub-sects. 3 & 4.]

SUB-SECT. 3.—ACKNOWLEDGMENT.

1944. Whether acknowledgment or original cause of action pleaded.]—(1) A bill brought by a creditor of an intestate for £100 on note, charging that the administratrix promised to pay it, as soon as she could get in effects, to which she pleaded Statute of Limitations, & that she made no promise to pay the note, too general, for she should have pleaded she made no promise to pay out of assets.

(2) If principal be barred, so is interest.

(3) A plea of Statute of Limitations must say, the cause of action has not accrued within the six years, that debt. has not promised to pay within six years, is bad.—ANON. (1743), 3 Atk. 70; 26 E. R. 843, L. C.

1945. —.—(1) In *assumpsit* against debt. as acceptor of a bill of exchange, & upon an account stated, evidence that debt. acknowledged his acceptance & that he had been liable, but said that he was not liable then, because it was out of date, & that he could not pay it, it was in his power to pay it:—*Held*: sufficient to take the case out of the statute, upon a plea of *actio non accrevit infra sex annos*.

(2) Pltf. may declare on the original promise, although he relies on the subsequent promise to take the case out of Statute of Limitations.—LEAPER v. TATTON (1812), 16 East, 420; 104 E. R. 1147.

Annotations:—As to (1) *Refd.* Hurst v. Parker (1817), 1 B. & Ald. 92; Clark v. Hougham (1823), 2 B. & C. 149; A'Court v. Cross (1825), 11 Moore, C. P. 198; Tanner v. Smart (1827), 6 B. & C. 603. As to (2) *Refd.* Irving v. Veitch (1837), Murp. & H. 313.

1946. —.—*Semble*: when the recovery of a debt has been impeded by Statute of Limitations, & pltf. relies upon a new promise, he should declare on the new promise, & not on the original cause of action. At all events, he cannot reply such new promise, to a plea of "action not accrued within six years." Nor, if he take issue on such a plea, will a qualified or conditional admission entitle him to recover, if his declaration has proceeded on the original cause of action.—TANNER v. SMART (1827), 6 B. & C. 603; 9 Dow. & Ry. K. B. 549; 5 L. J. O. S. K. B. 218; 108 E. R. 573.

Annotations:—*Consd.* Haydon v. Williams (1830), 7 Bing. 163; Bristocke v. Smith (1833), 1 Cr. & M. 483. *Refd.* Brydges v. Plumtrot (1827), 9 Dow. & Ry. K. B. 746; Pierce v. Brewster (1827), 12 Moore, C. P. 515; Burleigh v. Stott (1828), 6 L. J. O. S. K. B. 232; Gould v. Shirley (1829), 2 Moo. & P. 581; Fearn v. Lewis (1830), 4 Moo. & P. 1; Woodham v. Hollis (1833), 3 L. J. K. B. 70; Kicke v. Nokes (1834), 1 Mood. & R. 359; Wilby v. Henman (1834), 2 Cr. & M. 658; Linsell v. Bonsor (1835), 2 Bing. N. C. 241; Irving v. Veitch (1837), 3 M. & W. 90; Cheslyn v. Dalby (1840), 4 Y. & C. Ex. 238; Bateman v. Pinder (1842), 3 Q. B. 574; Gardner v. M'Mahon (1842), 3 Q. B. 561; Hart v. Prendergast (1845), 14 M. & W. 741; Smith v. Thorne (1852), 18 Q. B. 134; Fordham v. Wallis (1853), 10 Hare, 217; Deacon v. Gridley (1854), 3 C. L. R. 129; Goate v. Goate (1856), 1 H. & N. 29; Sidwell v. Mason (1857), 2 H. & N. 306; Everett v. Robertson (1858), 1 E. & E. 16; Holmes v. Mackrell (1858), 3 C. B. N. S. 789; Buckmaster v. Russell (1861), 10 C. B. N. S. 745; Hales v. Stevenson (1862), 7 L. T. 317; Cockrell v. Sparke (1863), 9 Jur. N. S. 307; Morgan v. Rowlands (1872), L. R. 7 Q. B. 493; Chasemore v. Turner (1875), L. R. 10 Q. B. 500; Quincey v. Sharpe (1876), 1 Ex. D. 72; Skeet v. Lindsay (1877), 2 Ex. D. 314; Meyerhoff v. Froehlich (1878), 4 C. P. D. 63; Green v. Humphreys (1884), 26 Ch. D. 474; Re Bethell, Bethell v. Bethell (1887), 34 Ch. D. 561; Firth v. Slingsby (1888), 58 L. T. 481; Re Hollingshead, Hollingshead v. Webster (1888), 37 Ch. D. 651; Stamford, Spalding & Boston Banking Co. v. Smith, [1892] 1 Q. B. 765; Re Macdonald, Dick v. Fraser, [1897] 2 Ch. 181; Mowbray v. Appleby (1899), 80 L. T. 805; Lusher

v. Hassard (1903), 20 T. L. R. 31; Barrett v. Davies, Same v. Withers (1904), 90 L. T. 460; Cooper v. Kendall, [1909] 1 K. B. 405; Brown v. Mackenzie (1913), 29 T. L. R. 310; Fettes v. Robertson (1921), 37 T. L. R. 581; Spencer v. Hemmerde, [1922] 2 A. C. 507.

1947. —.—To a plea of Statute of Limitations, pltf. proved a promise by debt. to pay the debt due within six years, although the original cause of action accrued thirteen years before:—*Held*: a sufficient acknowledgment to take the case out of the statute, & pltf. need not declare specially on the subsequent promise.—UPTON v. ELSE (1827), 12 Moore, C. P. 303; 5 L. J. O. S. C. P. 108.

1948. —.—A declaration, on a promissory note, payable on demand, with interest, dated July 26, 1819, alleged, that debt. had not paid either testator in his lifetime, or the extrix. since his death, the amount of the note & interest, or any part thereof, except interest on the note at the rate of £5 per cent. from the day of the date of the note, up to a certain day within six years next before the commencement of the suit. Plea, that the cause of action did not accrue within six years. Upon special demurrer:—*Held*: the plea was good, & judgment should be for debt. inasmuch as the payment of interest, within six years, etc., set forth in the declaration, was not of itself a cause of action, but a species of evidence which was to be referred to a jury, & not decided by the ct.—HOLLIS v. PALMER (1836), 2 Bing. N. C. 713; 3 Scott, 265; 2 Hodg. 55; 5 L. J. C. P. 264; 132 E. R. 275.

Annotations:—*Consd.* Marreco v. Richardson, [1908] 2 K. B. 584. *Mentd.* Hodgins v. Hancock (1845), 9 Jur. 792.

1949. —.—TOFT v. STEPHENSON (OR STEVENSON), No. 901, *ante*.

1950. — Specialty debt.]—To a declaration in covenant for non-payment of money, debt. pleaded that the cause of action did not accrue within twenty years. Replication that it did accrue within, etc.:—*Held*: under Civil Procedure Act, 1833 (c. 42), ss. 3, 5, pltf. could not, in support of this issue, give evidence of an acknowledgment by letter within the twenty years.—KEMPE v. GIBBON (1846), 9 Q. B. 609; 11 Jur. 299; 115 E. R. 1407; *sub nom.* KENT v. GIBBONS, 16 L. J. Q. B. 120; 8 L. T. O. S. 90; *subsequent proceedings* (1848), 12 Q. B. 662.

1951. Particulars of acknowledgment—Specialty debt.]—In reply to a plea, that the cause of action on a specialty did not accrue within twenty years, it is sufficient, under Civil Procedure Act, 1833 (c. 42), s. 5, to state the fact of a written acknowledgment within twenty years, without setting out the acknowledgment itself.—KEMPE v. GIBBON (1848), 12 Q. B. 662; 17 L. J. Q. B. 298; 12 Jur. 697; 116 E. R. 1019.

1952. —.—To a declaration on a specialty, debt. pleaded Civil Procedure Act, 1833 (c. 42), s. 3, to which pltf. replied, "that debt., before the commencement of the suit, made an acknowledgment that the debt remained unpaid & due to pltf. within the true intent & meaning of the Statute; & that the action was brought within twenty years after such acknowledgment:—*Held*: the replication was a pleading so framed as to prejudice the fair trial of the cause, within Common Law Procedure Act, 1852 (c. 76), s. 52, & ought to be amended by specifying the mode of acknowledgment relied on.—FORSYTH v. BRISTOWE (1853), 8 Exch. 347; 22 L. J. Ex. 70; 20 L. T.

PART XII. SECT. 1, SUB-SECT. 3.

1944 i. Whether acknowledgment or original cause of action pleaded.]—A subsequent promise to pay made after

lapse of the time of prescription, although not pleaded & although the action was founded on the original cause of debt:—*Held*: to be a good

answer to a plea of prescription & sufficient to establish pltf.'s claim.—LUBBERS & CANISIUS v. LAZARUS (1907), T. S. 901.—S. AF.

O. S. 226; 17 Jur. 46; 155 E. R. 1380; *subsequent proceedings*, 8 Exch. 716.

1953. — Conditional promise must be so pleaded.]—(1) Where a written promise to pay a debt barred by Statute of Limitations has been lost, oral evidence of the contents of the writing may be given.

(2) Such a promise, if conditional, must be declared on as conditional, notwithstanding Statute of Frauds Amendment Act, 1828 (c. 14), & notwithstanding it was given within six years from the time of contracting of the debt.—*HAYDON v. WILLIAMS* (1830), 7 Bing. 163; 4 Moo. & P. 811; 9 L. J. O. S. C. P. 16; 131 E. R. 63.

Annotations:—As to (1) Consd. Read *v.* Price, [1909] 2 K. B. 724. *Refd.* Balldon *v.* Walton (1847), 17 L. J. Ex. 357. *As to (2) Refd.* Irving *v.* Veitch (1837), 3 M. & W. 90. *Generally, Refd.* Brigstocke *v.* Smith (1833), 1 Cr. & M. 483; Courtenay *v.* Williams (1844), 3 Hare, 539.

1954. Whether proof of promise to legal personal representative sufficient—Acknowledgment to testator or representative should be pleaded as such.]—Promise laid as made to testator, who had been dead seven years. Deft. pleads *non assumpsit infra sex annos*; pltf. proves a promise to himself within four years; this does not maintain the issue.—*GREEN v. CRANE* (1705), 11 Mod. Rep. 37; 2 Ld. Raym. 1101; 88 E. R. 868; *sub nom.* DEAN *v.* CRANE, 6 Mod. Rep. 309; 1 Salk. 28.

Annotations:—Apld. Williams *v.* Gun (1710), Fortes. Rep. 177. *Consd.* Stafford *v.* Forcer (1715), 10 Mod. Rep. 311. *Folld.* Hickman *v.* Walker (1737), Willes, 27; Sarell *v.* Wine (1803), 3 East, 409. *Consd.* Pittam *v.* Foster (1823), 1 B. & C. 248; Scales *v.* Jacob (1826), 3 Bing. 638; Tanner *v.* Smart (1827), 6 B. & C. 603. *Refd.* Skinner *v.* Rebow (1731), 2 Stra. 919.

1955. — —.]—*WILLIAMS v. GUN* (1710), Fortes. Rep. 177; 92 E. R. 808.

1956. — —.]—If deft. plead Statute of Limitations to an action brought by an exor. on a promise made to testator, & pltf. reply a subsequent promise to himself, it is a departure in pleading, & therefore bad.—*HICKMAN v. WALKER* (1737), Willes, 27; 125 E. R. 1037.

Annotations:—Refd. Scales *v.* Jacob (1826), 3 Bing. 638. *Mentd.* Rhodes *v.* Smethurst (1840), 9 L. J. Ex. 330.

1957. — —.]—Evidence of an acknowledgment by deft. within six years of an old existing debt of above 6 years' standing due to pltf.'s intestate, but which acknowledgment was made after the intestate's death, will not support a count by the administrator, laying the promise to be made to his intestate.—*SARELL v. WINE* (1803), 3 East, 409; 102 E. R. 654.

Annotations:—Refd. Scales *v.* Jacob (1826), 3 Bing. 638; Tanner *v.* Smart (1827), 6 B. & C. 603; Napper *v.* Napper (1847), 9 L. T. O. S. 80.

1958. — —.]—A statement by a debtor made to an exor. that testator always promised not to press deft. for a debt, is not evidence to prove a promise to pay, made to testator within six years.—*WARD v. HUNTER* (1815), 6 Taunt. 210; 128 E. R. 1015.

Annotations:—Consd. Pittam *v.* Foster (1823), 1 B. & C. 248; Scales *v.* Jacob (1826), 3 Bing. 638. *Refd.* Tanner *v.* Smart (1827), 6 B. & C. 603.

1959. — —.]—If a new promise arose under the circumstances, still that would be a promise by the exors. & not, as here alleged, by testator (PARKE, B.).—*BROWNING v. PARIS* (1839), 5 M. & W. 117; 7 Dowl. 398; 2 Horn & H. 65; 8 L. J. Ex. 222; 151 E. R. 51.

1960. To person subsequently appointed administrator—Relation back of office.]—In 1833, pltf. married, at which time his wife was the holder of

a promissory note made by deft., & which had been given to her whilst sole. In 1834 pltf.'s wife died, after giving birth to a child. It was then agreed between pltf. (who claimed the note as the representative of his late wife) & deft., that the latter should maintain the child, & that in consideration thereof deft. should receive the rents of certain cottages which had been the property of pltf.'s wife, & that he should also retain the interest to become payable on the note. In 1839, deft. signed an indorsement on the note, to the effect, that all interest upon the note was then paid. Deft. continued to maintain the child to the time of its death in 1848. In 1853, letters of administration were granted to pltf.; & subsequently, in the same year, pltf. brought the action on the note:—*Held*: (1) the agreement between pltf. & deft., that the future maintenance of the child should be taken in part payment of the interest upon the note, & which had been acted upon within six years before action brought, was a sufficient payment of interest within the proviso of Statute of Frauds Amendment Act, 1828 (c. 14), s. 2; (2) the contract being with a person acting on behalf of intestate's estate & for its benefit, the administration had relation back to what was done after the death of the intestate & before the grant of letters of administration, so as to entitle pltf. to sue as administrator on a promise made to him as such.—*BODGER v. ARCH* (1854), 10 Exch. 333; 2 C. L. R. 1491; 24 L. J. Ex. 19; 24 L. T. O. S. 96; 156 E. R. 472.

Annotations:—As to (1) Folld. Amos *v.* Smith (1862), 1 H. & C. 238. *Apld.* Maber *v.* Maber (1867), L. R. 2 Exch. 153. *As to (2) Consd.* Baker *v.* Blaker (1886), 55 L. T. 723. *Generally, Mentd.* Kregor *v.* Hollins (1913), 109 L. T. 225.

1961. By one of two joint debtors—Action against other debtor only.]—To a plea of Statute of Limitations in an action on a promissory note, pltf. replied that the note was made by deft. jointly with one P., & that within 6 years before suit P. paid pltf. interest on the note:—*Held*: assuming the payment to have been made before the passing of Mercantile Law Amendment Act, 1856 (c. 97), the replication was bad on general demurrer.—*RIDD v. MOGGRIDGE* (1857), 2 H. & N. 567; 157 E. R. 233.

1962. Amendment of reply—To introduce plea.]—The contention in question [plea of acknowledgment] was not raised on the pleadings, but I allowed the reply to be amended (WAR-RINGTON, J.).—*Re FOUNTAINE, FOUNTAINE v. AMHERST (LORD)* (1909), 101 L. T. 83; *on appeal, sub nom. Re FOUNTAINE, Re DOWLER, FOUNTAINE v. AMHERST (LORD)*, [1909] 2 Ch. 382, C. A.

SUB-SECT. 4.—DISABILITIES.

1963. Defendant need not aver that plaintiff under no disability.]—In pleading Statute of Limitations to a bill for an account, it is not necessary to aver that pltf. have not been under any of the disabilities mentioned in the Act, unless the contrary is to be inferred from any of the statements in the bill; but such an averment, though necessary, will not, if inserted, render the plea bad.

Statute of Limitations, 1623 (c. 16), & Statute of Frauds Amendment Act, 1828 (c. 14), are to be taken as making together one law on the subject; a plea, therefore, of both these statutes is not bad on the ground of being a double plea.

1953 i. Particulars of acknowledgment—Conditional promise must be so pleaded.]—*HUNTER v. HUNTER* (1869), 1 R. 3 C. L. 138.—*IR.*

1962 i. Amendment of reply—To introduce plea.]—*BENT v. DODGE* (1924), 57 N. S. R. 456.—*CAN.*

PART XII. SECT. 1, SUB-SECT. 4.

i. Particulars must be given—Absence beyond seas—Return to this

Sect. 1.—Pleading: Sub-sects. 4, 5 & 6. Sect. 2.]

A plea of Statute of Limitations need not negative the usual general allegation that deft. has in his custody documents relating to the matters contained in the bill.

Where a bill for an account was filed by merchants against one of the joint owners of a plantation in the East Indies, stating that deft. & his partners, & also deft. personally, had an account with the merchants, the ct. would not, at the hearing of a plea of Statute of Limitations, assume that the particular accounts asked for were merchants' accounts within that statute, in the absence of any allegation in the bill to that effect.—*FORBES v. SKELTON* (1837), 8 Sim. 335; 6 L. J. Ch. 159; 1 Jur. 117; 59 E. R. 133.

1964. Particulars must be given.]—Deft. pleaded forty years' possession without account or admission of any debt to a bill, setting up an old mtge., & stating an account settled, & owing to infancy, coverture & other disabilities, plffs. could not proceed: the plea was allowed.

If infancy or coverture will avail plffs., it is not enough to say generally, that there have been infancies & covertures; for it is so completely vague an allegation that no issue can be taken upon it (*LORD LOUGHBOROUGH, C.*).—*BLEWITT v. THOMAS* (1795), 2 Ves. 669; 30 E. R. 833, L. C.

1965. — Absence beyond seas—Material dates.]—*CHEVAL v. BEAUFORT (DUKE)* (1843), 1 L. T. O. S. 108.

1966. — — — — —.]—*ALEXANDER v. MARTIN* (1843), 1 L. T. O. S. 77, 108.

1967. — — — — — Return to this "kingdom."]—*CHEVAL v. BEAUFORT (DUKE)* (1843), 1 L. T. O. S. 108.

1968. — — Coverture—Date of termination must be given.]—Plea, Statute of Limitations. Replication thereto, that when the cause of action accrued to pltf., she was a *feme covert*, the wife of B., & so remained until his death, when she became *discovert*, & that the action was commenced within six years after B.'s death. Rejoinder, that the note was payable to the order of S., pltf.; that after it was made, & before it became payable, B., then the husband of pltf., authorised her to indorse in her own name & deliver, & that she did by such authority indorse & deliver the note to F. for value by him paid; that when the note became due, it was in the hands of G., holder & indorsee thereof, & entitled to sue thereon, who then presented it for payment, & the note came into pltf.'s possession from G. by delivery, he being such holder & indorsee, & entitled to sue thereon. On special demurrer to the rejoinder:—*Held*: ill; because it was no answer to the replication, as it contained no denial of the death of B. within six years of the commencement of the suit.—*SCARPELLINI v. ATCHESON* (1845), 7 Q. B. 864; 14 L. J. Q. B. 333; 9 Jur. 827; 115 E. R. 713.

Annotations:—*Mentd.* *Dalton v. Mid. Ry.* (1853), 21 L. T. O. S. 102; *Lowe v. Peskett* (1855), 3 C. L. R. 1264.

1969. Lunacy—Person not so found—Plea of statute by quasi-committee.]—Solrs. appointed by the quasi-committee of a lunatic not so found by inquisition did work in respect of the lunatic's

real estate, the costs of which were not paid to them inasmuch as all the lunatic's income was applied for her benefit & there were no funds available. Some of these costs were, as against the quasi-committee, barred by lapse of time:—*Held*: the quasi-committee was the statutory agent of the lunatic & was not personally liable to the solrs. appointed by him to act for the lunatic; the cost of the solrs. were payable out of the estate of the lunatic; the relation of solr. & client did not exist between the solrs. & the quasi-committee, therefore the question of Statute of Limitations could not be raised by him; & if it might be raised by the judge, in the present case it ought not to be pleaded.—*Re E. G.*, [1914] 1 Ch. 927; 83 L. J. Ch. 586; 111 L. T. 95; 58 Sol. Jo. 497, C. A.

SUB-SECT. 5.—CONCEALED FRAUD.

1970. Answer to plea of statute—May be pleaded in reply—Action for damages for fraud.]—*GIBBS v. GUILD*, No. 1819, *ante*.

1971. Must be stated with particularity.]—*SOUTH SEA CO. v. WYMONDSELL*, No. 1764, *ante*.

1972. — — — — —.]—In such a case as this, where pltf. seeks to escape from Statute of Limitations on the ground of a concealed fraud, he ought to state his case with extreme particularity, so as to enable deft. to meet the case without disclosing all his title. In this case the alleged settlement should have been stated so as to enable deft. to raise the defence that such a settlement never existed. . . . Pltf. had not stated his case in such a way as to enable deft. to meet it without embarrassment & without disclosing all his title. . . . Under R. S. C., Ord. 19, r. 27, I think that the ct. has jurisdiction to strike out the whole of a statement of claim if the whole of it be embarrassing (*COTTON, L.J.*).—*RIDDELL v. STRATHMORE (EARL)* (1887), 3 T. L. R. 329, C. A.

1973. — — — — —.]—*LAWRANCE v. NORREYS (LORD)*, No. 1836, *ante*.

See, generally, Part VIII., ante.

SUB-SECT. 6.—SET-OFF AND COUNTERCLAIM.

See, generally, SET-OFF.

1974. Statute must be pleaded in reply.]—Statute of Limitations must be replied specifically to a plea of set-off, & cannot be taken advantage of under the general replication of *nil debet*.—*CHAPPLE v. DURSTON* (1830), 1 Cr. & J. 1; 148 E. R. 1311.

Annotations:—*Refd.* *Beatson v. Nicholson* (1842), 6 Jur. 620; *Courtenay v. Williams* (1844), 3 Haro, 539; *Francis v. Dodsworth* (1847), 4 C. B. 202; *Rawley v. Rawley* (1876), 1 Q. B. D. 460; *Dingle v. Coppen*, *Coppen v. Dingle*, [1899] 1 Ch. 726. *Mentd.* *Ford v. Dornford* (1846), 8 Q. B. 583.

1975. Set-off must be barred when action brought—Not at date of plea of set-off.]—In cases under Statute of Limitations, 1623 (c. 16), s. 3, the statute is not a bar to a set-off, unless the six years have expired before the action is brought. Therefore where to a plea of set-off, pltf. replied that the

IBBOTSON (1902), 28 V. L. R. 688.—**AUS.**

PART XII. SECT. 1, SUB-SECT. 6.

k. Statute may be pleaded in reply.]—*WATERHOUSE ENGINE WORKS CO. v. BALL* (1903), 7 Terr. L. R. 32.—**CAN.**

1. Set-off must be barred when action

"province."]—*HAMPSON v. ABBOTT* (1842), 1 Kerr, 490.—**CAN.**

PART XII. SECT. 1, SUB-SECT. 5.

g. Answer to plea of statute—Must be pleaded in reply—Action for damages for fraud.]—*BARBER v. HOUSTON* (1884), 14 L. R. Ir. 273; 18 L. R. Ir. 475.—**IR.**

h. Necessity for specific plea.]—

Where, in an action against trustees for breaches of trust, the defence of the Statute of Limitations was raised:—*Held*: an answer to such defence, that time should not run against the beneficiaries as to any of the breaches of trust fraudulently concealed by rendering of false accounts to them until such breach of trust was discovered, must be specifically pleaded.—*BUCKLAND v.*

cause of set-off did not accrue within six years of the commencement of the suit or the pleading of the plea, the replication was held bad on special demurrer.—*WALKER v. CLEMENTS* (1850), 15 Q. B. 1046; 16 L. T. O. S. 170; 117 E. R. 755.

1976. ———.—*Re BALLARD, LOVELL v. FORESTER*, [1890] W. N. 64.

1977. Cross demands accruing at about same time—Plaintiff saving statute by issuing process.—When there are cross demands between parties, which accrued at nearly the same time, for which bills are given, both of which would be barred by Statute of Limitations, & pltf. has saved the statute by suing out process, but deft. has not, deft. may nevertheless set off these demands.—*ORD v. RUPINI* (1797), 2 Esp. 568, N. P.

1978. Form of plea—Defence as to part barred by statute—As to remainder payment.—Pltf., on a replication of Statute of Limitations to a plea of set-off, cannot on the trial reduce the amount of the set-off by showing payment of part; the payment of part ought to have been replied.—*MOORE v. WOOD* (1842), 2 Mood. & R. 407, N. P.

1979. ———.—To a plea of set-off in debt on simple contract, pltf. replied, as to £49 16s. 10d., parcel of the debt, that the causes of set-off, so far as the same related to £49 16s. 10d., did not accrue within six years, concluding with a verification; & as to the residue of the causes of action, pltf. says, that he was not nor is indebted, *modo et forma*; concluding to the country:—*Held*: the replication was bad; pltf. should in such case reply, that part of the subject matter of the set-off is barred by the statute, & that he is not indebted to deft. in any sum which, excluding the part so barred, equals the amount of pltf.'s demand.—*MEAD v. BASHFORD* (1851), 5 Exch. 336; 2 L. M. & P. 238; 20 L. J. Ex. 190; 155 E. R. 147.

1980. ———.—As to remainder never indebted.—To a declaration in *assumpsit*, deft. pleaded a set-off for £400, alleging that the sum so due to deft. was to be paid by pltf. to deft. on request, & exceeded the damages mentioned by pltf. by the non-performance of the promises in the declaration mentioned; to which pltf. replied, that the causes of set-off, so far as they related to £234. did not, nor did any of them, accrue to deft. within six years before the commencement of the suit; & that pltf. was not nor is indebted to deft. in the residue of the said sum of £400, or any part thereof, *modo et forma*, concluding with prayer of judgment. *Semble*: the replication was bad in form.—*FAIRTHORNE v. DONALD* (1844), 13 M. & W. 424; 2 Dow. & L. 675; 14 L. J. Ex. 205; 153 E. R. 177.

Annotation:—*Consd.* *Mead v. Bashford* (1851), 5 Exch. 336.

1981. Amendment of reply to plead statute—Particulars of set-off delivered after issue joined.—In an action for goods bargained & sold, where deft. pleaded a set-off, the particulars of which had not been delivered till after joinder of issue on the part of pltf., the judge considered he had no power to allow pltf. at the trial to reply Statute of Limitations to deft.'s set-off.—*BRANCKER v. CROZIER* (1867), 16 L. T. 391.

1982. Discontinuance of action—After counterclaim.—By discontinuing an action after a counterclaim has been delivered, pltf. cannot put an end to it so as to prevent deft. from enforcing against him the causes of action contained in the counterclaim.

If the argument for pltf. were right, they might draw on deft. to rely upon obtaining redress by means of a counterclaim, & then by discontinuing their action & pleading the Statute of Limitations to any action brought by him might deprive him of the rights set up by him in the counterclaim. This objection is imperfectly met by the suggestion that deft. at the time of delivering a counterclaim may issue a writ in a cross action, & thereby defeat pltf.'s defence of the Statute of Limitations (*BRETT, M.R.*).—*McGOWAN v. MIDDLETON* (1883), 11 Q. B. D. 464; 52 L. J. Q. B. 355; 31 W. R. 835, C. A.

Annotations:—*Mentd.* *Re Brown, Ward v. Morso* (1883), 52 L. J. Ch. 524; *Caroli v. Hirst* (1883), 48 L. T. 759; *Fraser v. Cooper, Hall* (1883), 31 W. R. 714; *Sykes v. Sacerdote* (1885), 53 L. T. 150; *Lewin v. Trimming* (1888), 21 Q. B. D. 230; *Amon v. Bobbett* (1889), 22 Q. B. D. 543; *Delobel Filipo v. Varty* (1893), 62 L. J. Q. B. 398; *Alcoy & Gandia Ry. & Harbour Co. v. Greenhill, Greenhill v. Alcoy, etc. Co., Trustees, Exors., & Securities Insee. Corpn. v. Alcoy, etc. Co.* (1895), 73 L. T. 452; *Kent County Council v. Folkertone Corpn.* (1905), 74 L. J. K. B. 352.

SECT. 2.—AT WHAT STAGE DEFENCE MAY BE RAISED.

By plea in defence—Necessity to plead statute.—*See* Sect. 1, sub-sect. 2, *ante*.

1983. By amendment of defence.—The ct. refused to permit a deft. to add the plea of Statute of Limitations.—*COX v. ROLT* (1761), 2 Wils. 253; 95 E. R. 795.

1984. ———.—At late stage—Costs not entire compensation to plaintiff.—Circumstances in which the ct. refused defts. leave to amend their points of defence by pleading Public Authorities Protection Act, 1893 (c. 61), where the application for leave to amend was made at a very late stage of the proceedings & where costs would not have been an entire compensation to pltf. if leave were granted.—*ARONSON v. LIVERPOOL CORPN.* (1913), 77 J. P. 176; 29 T. L. R. 325.

1985. On motion—Must be pleaded.—Statute of Limitations must be pleaded, & cannot be taken advantage of on motion.—*STILE v. FINCH* (1634), Cro. Car. 381; 79 E. R. 932.

Annotations:—*Consd.* *Spencer v. Hemmerde*, [1922] 2 A. C. 507. *Refd.* *Chapple v. Durston* (1830), 1 Cr. & J. 1.

Mentd. *Clerk v. Withers* (1704), 6 Mod. Rep. 290.

1986. On demurrer—Must be pleaded.—*Semble*: the objection of Statute of Limitations cannot be taken by demurrer, but statute must be pleaded.—*JACKSON v. ROWE* (1826), as reported in 4 L. J. O. S. Ch. 118; *on appeal* (1828), 4 Russ. 514, L. C.

Annotations:—*Mentd.* *Neesom v. Clarkson* (1842), 2 Hare, 163; *Jones v. Smith* (1843), 1 Ph. 244; *West v. Reid* (1843), 12 L. J. Ch. 245; *Hewitt v. Loosemore* (1851), 9 Hare, 449; *Phillips v. Phillips* (1862), 31 L. J. Ch. 321; *Wilson v. Hart* (1865), 2 Hem. & M. 551.

1987. ———.—Statute of Limitations must, under the new procedure, be pleaded, & cannot

brought.—*BINASE v. MAKUTSHANA* (1907), 24 S. C. 452.—S. AF.

1982 i. Discontinuance of action—After counterclaim.—*ISAAC v. MILLS* (1898), 17 N. Z. L. R. 305.—N.Z.

PART XII. SECT. 2.

1983 i. By amendment of defence.—*ROBERTS v. WARD* (1894), 26 N. S. R. 463.—CAN.

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1983 ii. ———.—*MEEHAN v. BERRY*, 22 C. L. T. 237.—CAN.

1983 iii. ———.—*LACHAPPELLE v. LE-MAY* (1907), 17 Man. L. R. 161.—CAN.

1983 iv. ———.—*BECK v. ANDERSON* (1913), 26 W. L. R. 144; 5 W. W. R. 702; 14 D. L. R. 798.—CAN.

1983 v. ———.—*ARCHBOLD v. HOWTH (EARL)* (1864), 15 I. C. L. R. 420.—IR.

1983 vi. ———.—*BONE v. SMITH* (1868), 1 R. 2 C. L. 244.—IR.

m. On demurrer.—When it appears on the face of the pleading that the cause of action accrued more than six years before the commencement of the action, the Statute of Limitations may be taken advantage of by demurrer.—*MULLIGAN v. M'DONAGH* (1860), 2 L. T. 136.—IR.

N N

Sect. 2.—At what stage defence may be raised. Sects. 3 & 4.]

be raised by demurrer.—**WAKELEE v. DAVIS** (1876), 25 W. R. 60.

Annotations:—N.F. Noyes v. Crawley (1878), 10 Ch. D. 31.
Refd. Dawkins v. Penrhyn (1877), 6 Ch. D. 318.

1988. At hearing—Must be pleaded.]—Under Legacy Duty Act, 1795 (c. 52), s. 27, a copy of an entry in the Stamp Office books, of payment of the duty on a legacy, is evidence of payment of the legacy: but the copy must be proved in the usual way.

A deft. who has answered cannot have the benefit of Statute of Limitations at the hearing, unless he has insisted on it in his answer.—**HARRISON v. BORWELL** (1839), 10 Sim. 380; 9 L. J. Ch. 72; 4 Jur. 245; 59 E. R. 662.

1989. ———.]—In a suit against exors., instituted fifteen years after the death of their testatrix, claiming, as cumulative, a personal annuity given by a codicil, there being one of like amount given to pltf. by the will, the exors., by their answer, did not set up Statute of Limitations; & admitted assets for the payment of the annuity:—**Held**: the ct. being of opinion that the annuity was cumulative, pltf. was entitled to the arrears which had accrued since the death of the testatrix.

Real Property Limitation Act, 1833 (c. 27), s. 42, does not apply to arrears of a mere personal annuity.

Where Statute of Limitations is not set up by plea, demurrer or answer, it cannot be made use of at the hearing.—**ROCH v. CALLEN** (1848), 6 Hare, 531; 17 L. J. Ch. 144; 12 Jur. 112; 67 E. R. 1274.

1990. ———.]—A bill was filed against a lunatic & his committee, in respect of a pecuniary claim against the lunatic, & the answer was filed in June 1848. The lunatic died in June 1849, & a bill of revivor & supplement was filed against his administrator in Sept. 1849, whose answer was filed in Dec. 1849, in which the benefit of Statute of Limitations was claimed. In Mar. 1849, while witnesses were in the course of being examined, a motion was made that a supplemental answer might be put in to the original bill, claiming the benefit of Statute of Limitations. The motion was refused.

Qu.: whether the benefit of Statute of Limitations might be claimed at the hearing of the causes under the above circumstances.—**PERCIVAL v. CANEY** (1850), 20 L. J. Ch. 42; *sub nom.* **PERCIVAL v. CANEY, PERCIVAL v. STANTON**, 14

1988 i. At hearing—Must be pleaded.]—**MCKINLEY v. BOWBEER** (1853), 11 U. C. R. 86.—**CAN.**

1991 i. ———.]—Re MESTON, MESTON v. GRAY (Sask.), [1925] 4 D. L. R. 887; [1925] 3 W. W. R. 656.—**CAN.**

1996 i. Not after final judgment.]—A part of the claim in this case extended beyond six years, but no application was made at the trial for leave to plead the Statute of Limitations as to this. The ct. refused to grant a new trial to enable this defence to be set up.—**COOK v. GRANT** (1882), 32 C. P. 511.—**CAN.**

n. On appeal—Not where time for appealing expired.]—Where a party applied for leave to appeal after the time for appealing, or for giving notice thereof, had expired, in order to enable him to set up the Statute of Limitations against certain creditors' claims, the ct. refused the application.—**BRIGHAM v. SMITH** (1871), 3 Ch. Ch. 313.—**CAN.**

o. ———.]—Held: although the objection that the right of action has

been prescribed is taken for the first time on the argument in appeal, the ct. is bound to entertain it & give effect to it if properly raised.—**DORION v. CROWLEY** (1886), Cass. Dig., 2nd ed. 709.—**CAN.**

p. ——— Raised by court itself.]—An Appellate Ct. can *ipso motu* raise the question of limitation for the first time, where it appears on the face of the plaint that the suit is barred.—**MOZAFFUR ALI v. GIRISH CHANDRA DAS** (1868), 1 B. L. R. A. C. 25; 10 W. R. 71.—**IND.**

q. ——— Second appeal.]—Where the question of limitation was raised for the first time on second appeal:—**Held**: it could not be decided against pltf.—**SHIVAPA v. DOD NAGKYA** (1887), 1 L. R. 11 Bom. 114.—**IND.**

r. At new trial.]—**GRANTHAM v. POWELL** (1853), 10 U. C. R. 306.—**CAN.**

t. Defence set up by supplemental answer.]—Order made allowing a supplemental answer to be filed setting

Jur. 473; subsequent proceedings, sub nom. STANTON v. PERCIVAL (1854), 5 H. L. Cas. 257, H. L.

Annotations:—Mentd. Barbat v. Allen (1852), 21 L. J. Ex. 155; **Stapleton v. Crofts** (1852), 18 Q. B. 367; **M'Neillie v. Acton** (1853), 22 L. J. Ch. 820.

1991. ———.]—Re WILLIAMS, JONES v. WILLIAMS, No. 1529, *ante*.

1992. On further consideration.]—**MORRIS v. MORRIS** (1905), 49 Sol. Jo. 236.

1993. ———.]—Re WILLIAMS, JONES v. WILLIAMS, No. 1529, *ante*.

1994. On motion in arrest of judgment.]—Non-joinder of co-exor. as deft., must be pleaded in abatement, & cannot be moved in arrest of judgment, though it appear on the declaration. Statute of Limitations is no ground of motion in arrest of judgment. Nor is an action of debt against exor. on a simple contract.—**GOODWIN v. WICKINS** (1870), 1 Freem. K. B. 6; 89 E. R. 7.

1995. After interlocutory judgment—Administratrix de bonis non.]—The ct. set aside an interlocutory judgment to enable deft., an administratrix *de bonis non*, cum, etc., to plead Statute of Limitations; the original testator having died seven years ago, & no proceedings being then pending against him, nor taken against the intermediate exor.—**JONES v. SCOTT** (1824), 2 L. J. O. S. C. P. 67.

1996. Not after final judgment.]—Defendant not allowed to plead Statute of Limitations after a regular judgment set aside.—**LEAVER v. WHICHER** (1737), Cooke, Pr. Cas. 139; 2 Com. 561; Barnes, 253; 125 E. R. 1009.

1997. ———.]—The ct. will not set aside a judgment, so as to allow the deft. to plead Statute of Limitations.—**WILLET v. ATTERTON** (1748), 1 Wm. Bl. 35; 96 E. R. 19.

SECT. 3.—ONUS OF PROOF.

1998. On plaintiff—To prove cause of action not barred by statute.]—Trespass for breaking & entering coal mines & taking away coals. Plea, *actio non accrevit infra sex annos*. To which pltf. replied in the affirmative. At the trial no evidence was given to show that the trespass was actually committed within six years:—**Held**: evidence of a promise to make compensation, made by deft. before the commencement of the action, & when he was threatened with an action for taking away coals, was not sufficient to support this issue; by which pltf. was bound to prove the affirmative, that he had a good cause of action within six

up the Statute of Limitations.—**SEATON v. FENWICK** (1877), 7 P. R. 146.—**CAN.**

a. After appointment of receiver.]—**DOWELL v. BURKE** (1845), 9 I. Eq. R. 83.—**IR.**

b. On motion for new trial.]—A deft. in ejectment who does not at the trial set up a title under the Statute of Limitations, cannot rely on the statute upon the argument of a new trial motion.—**LATOUCHE v. PENNICK & SLOANE** (1865), 13 L. T. 151.—**IR.**

PART XII. SECT. 3.

1998 i. On plaintiff—To prove cause of action not barred by statute.]—When a deft. pleads limitation, the *onus probandi* is on pltf.—**GOSSAIN DOSS KOONDOO v. SIROO KOOMAREE DEBIA** (1873), 12 B. L. R. 219; 19 W. R. 192.—**IND.**

1998 ii. ———.]—**PURNA CHANDRA MANDAL v. ANUKUL BISWAS** (1909), 1 L. R. 36 Calc. 654.—**IND.**

c. On defendant—To prove facts

years before the commencement of the suit.—**HURST v. PARKER** (1817), 1 B. & Ald. 92; 2 Chit. 249; 106 E. R. 34.

Annotations:—**Refd.** **Tanner v. Smart** (1827), 6 B. & C. 603. **Mentd.** **Pittam v. Foster** (1823), 1 B. & C. 248; **Scales v. Jacob** (1826), 3 Bing. 638; **Wilby v. Henman** (1834), 2 Cr. & M. 658; **Spencer v. Hemmerde**, [1922] 2 A. C. 507.

1999. ———.]—The onus of taking a case out of Statute of Limitations is upon pltf. (**BAYLEY, J.**).—**BEALE v. NIND** (1821), 4 B. & Ald. 568; 106 E. R. 1044.

Annotations:—**Refd.** **Frost v. Bengough** (1823), 1 Bing. 266. **Mentd.** **Fearn v. Lewis** (1830), 8 L. J. O. S. C. P. 95.

2000. ———.]—To debt for goods sold & delivered, etc., deft. pleaded the general issue, & that the action did not accrue within six years. Pltf. replied that the action did accrue within six years. At the trial, a witness on behalf of pltf. proved that he had taken a letter to deft. from pltf.'s attorney, & that deft., having read the letter, promised to pay the debt, & mentioned a certain amount as the sum due; but deft. added that he had had no dealings with pltf. for eight or nine years. No evidence was given to show when the debt was contracted, & deft. called no witnesses:—**Held**: it was incumbent upon pltf. to prove the affirmative of the issue raised on the plea of Statute of Limitations, by showing either that the cause of action arose within six years, or that the subsequent acknowledgment or promise was made in some writing signed by deft., pursuant to Statute of Frauds Amendment Act, 1828 (c. 14), & no such proof having been given, a non-suit ought to be entered.—**WILBY v. HENMAN** (1834), 2 Cr. & M. 658; 4 Tyr. 957; 4 L. J. Ex. 262; 149 E. R. 924.

In action for recovery of land.—See Sect. 4, *post*.

SECT. 4.—ACTIONS FOR RECOVERY OF LAND.

2001. Statement of claim—Must show good title—Not barred by statute.—**DAWKINS v. PENRHYN** (LORD), No. 1463, *ante*.

2002. Defence—No necessity to plead statute—May plead possession only.—Deft. does not plead the statute, he is not bound to do so according to the new rule. He puts in a defence according to the general form which the rule entitles him to do, but pltf. must have known perfectly well that they had been out of possession all this time & unless they were under some misapprehension as to the foreclosure orders, they must have known every defence is open to a deft. as against anybody who seeks to turn him out (**LINDLEY, J.**).

giving right to raise statute.—**MOHAN-SING CHAWAN v. CONDER** (1883), 1 L. R. 7 Bom. 478.—**IND.**

PART XII. SECT. 4.

2002 i. Defence—No necessity to plead statute—May plead possession only.—The question of the Statute of Limitations may be raised under the general plea of possession, it being a legal defence.—**LAURENCE v. MCQUARRIE** (1894), 26 N. S. R. 164.—**CAN.**

2002 ii. ———.]—**MILLER v. KIRWAN**, [1903] 2 I. R. 118.—**IR.**

d. ———.] **Statute pleaded—Whether section must be stated.**—**Held**: a deft. pleading the Real Property Limitation Act must set out in his statement of defence, or give particulars showing the sect. or sects. on which he relies.—**DODGE v. SMITH** (1901), 21 C. L. T. 162; 1 O. L. R. 46.—**CAN.**

2005 i. Onus of proof.—When once it has been established as against a person claiming to be entitled to land by adverse possession that he went into occupation of the land as a servant, bailie, or caretaker, the *onus* lies upon him to prove when & under what circumstances his possession of the land became a possession for himself; otherwise it will be held that the Statute of Limitations has never commenced to run in his favour.—**O'NEIL v. HART**, [1905] V. L. R. 107.—**AUS.**

2005 ii. ———.]—**GUNN v. MCINNES**, [1923] 1 W. W. R. 353.—**CAN.**

2005 iii. ———.]—One of the salient conditions requisite to establish prescriptive title is that the *onus* is on deft. to prove that the possession which he asserts is an "adverse" or "exclusive" possession.—**KENNEDY v.**

—HEATH v. PUGH (1881), 6 Q. B. D. 345; *on appeal, sub nom.* **PUGH v. HEATH** (1882), 7 App. Cas. 235, H. L.

Annotations:—**Refd.** **Harlock v. Ashberry** (1882), 19 Ch. D. 539; **Badeley v. Consolidated Bank** (1886), 34 Ch. D. 536; **Re Lake's Trusts** (1890), 63 L. T. 416; **Re Owen**, [1894] 3 Ch. 220; **Thornton v. France**, [1897] 2 Q. B. 143; **London & Midland Bank v. Mitchell**, [1899] 2 Ch. 161; **Re Lloyd, Lloyd v. Lloyd**, [1903] 1 Ch. 385; **Williams v. Thomas** (1909), 100 L. T. 630; **Re Witham, Chadburn v. Winfield**, [1922] 2 Ch. 413. **Mentd.** **Wood v. Wheeler** (1882), 22 Ch. D. 281; **Fowke v. Draycott** (1885), 29 Ch. D. 996; **Huntington v. I. R. Comrs.**, [1896] 1 Q. B. 422; **Matthews v. Usher** (1899), 68 L. J. Q. B. 988; **United Realisation Co. v. I. R. Comrs.**, [1899] 1 Q. B. 361; **Re Lovell & Collard's Contract**, [1907] 1 Ch. 249; **Copestake v. Hoper**, [1908] 2 Ch. 10; **Turner v. Walsh**, [1908] 2 K. B. 484.

2003. ———.]—In an action for the recovery of land a statement of defence alleging that deft. is in possession operates, by virtue of R. S. C., 1875, Ord. 19, r. 15, as a denial of the allegations in pltf.'s statement of claim, & requires pltf. to prove them.—**DANFORD v. MCANULTY** (1883), 8 App. Cas. 456; 52 L. J. Q. B. 652; 49 L. T. 207; 31 W. R. 817, H. L.

2004. Grant of new trial—To save statute.—**DOED. GOODWIN v. JOYCE** (1851), 16 L. T. O. S. 343.

2005. Onus of proof.—In an ejectment by the lord of a manor to recover certain land late waste of the manor, pltf. proved that S., the then owner in fee of the manor, made her will in 1800, devising the manor, etc., to V. for life, remainder to T. for life & to his heirs in tail. She died in 1808. V. died without issue in 1819, & T. then entered into possession, & with his son H. suffered a common recovery, whereby the manor was settled to T. for life, remainder to H. for life, remainder to his heirs in reversion in tail. T. died in 1855, & H. in 1857, & the present pltf. then came into possession as tenant in tail. To support Statute of Limitations, deft. attempted to prove possession prior to the death of S., but the jury thought such proof insufficient. The learned judge who tried the cause directed that the *onus* of proof of possession before the commencement of the life estates was on deft.:—**Held**: such ruling was right.—**COLE v. HEYDON** (1860), 1 L. T. 439.

2006. Action by Crown—Against person in possession for over twenty years—Crown must show title in first instance.—The title of the Crown to lands of which it has been out of possession for twenty years may be tried in the information of intrusion itself, & need not be first found by inquest of office; the only effect of 21 Jac. 1, c. 14, being to throw the *onus* of proving title in the first instance, in such a case, on the Crown.—**A.-G. v. PARSONS** (1836), 2 M. & W. 23; 2 Gale, 227; 6 L. J. Ex. 9; 150 E. R. 652.

Annotations:—**Mentd.** **A.-G. v. Churchill** (1841), 9 Dowl. 772; **Hilton v. Granville** (1847), 2 New Pract. Cas. 262.

HUSBAND, KENNEDY v. ELLISON (B.C.), [1923] 1 D. L. R. 1069.—**CAN.**

2005 iv. ———.]—**A.-G. FOR CANADA v. CUMMINGS**, [1925] 1 D. L. R. 642; 34 B. C. R. 433; *reversd.*, [1926] 1 D. L. R. 52.—**CAN.**

2005 v. ———.]—When a deft. pleads limitation, the *onus probandi* is on pltf.—**PANDURANG GOVIND v. BAL-KRISHNA HARI** (1869), 6 Bom. A. C. 125.—**IND.**

2005 vi. ———.]—**JAYAWANT JIVANRAO v. RAMCHANDRA NARAYAN** (1916), 1 L. R. 40 Bom. 239.—**IND.**

2005 vii. ———.]—**RICE v. BEGLEY**, [1920] 1 I. R. 243.—**IR.**

2005 viii. ———.]—Where land is claimed by adverse possession the *onus* of showing that an entry by the owner is not made *animus possidendi* is on the

Sect. 4.—Actions for recovery of land. Sect. 5: Sub-sects. 1 & 2. Sect. 6.]

2007. Actions in which title to land incidentally arises—How far necessary to plead statute—Replevin.]—DE BEAUVOIR v. OWEN, No. 1284, *ante*.

2008. ——— Trespass—Defendant justifying.]
—In trespass *quare clausum fregit*, deft. in his plea, deduced title by an Inclosure Act to an allotment of land, comprising the *locus in quo*, to T., a trustee for him. It then stated the entry & possession of T., until just before the time of the trespasses; gave express colour to pltf., & stated his possession at the time of the trespass under a charter of demise, without livery, & then justified the trespass as servant of T., & by his command. Pltf. replied, that deft. entered & committed the trespasses, after the passing of Real Property Limitation Act, 1833 (c. 27), s. 2, & after Dec. 1, 1833, & averred that the entry was made for the purpose of recovering the close in which, etc., & that the supposed right to enter did not first come to T. or deft., or any person through whom he claimed the estate & interest in the close, at any time within twenty years before making that entry; & that by reason thereof the supposed right of T. & deft. as his servant was extinguished:—*Held*: the replication was sufficient, & it was not necessary that it should show what deft.'s title was, & how it was barred; & if deft. wished to avail himself of the right of entry under Real Property Limitation Act, 1833 (c. 27), s. 15, he ought to have pleaded it in rejoinder.—JONES v. JONES (1847), 16 M. & W. 699; 16 L. J. Ex. 299; 9 L. T. O. S. 150; 11 Jur. 335; 153 E. R. 1371.

SECT. 5.—PROCEEDINGS BY ONE PARTY AS AFFECTING OTHERS.

SUB-SECT. 1.—STATUTE PLEADED BY SOME DEFENDANTS.

2009. How far plea enures for benefit of other defendants—Plea by one of four executors.]—Where out of four exors. one pleaded Statute of Limitations & the other three admitted the debt the ct. allowed the plea of the statute on the ground that it is of most benefit to testator's estate.—CHAFFE v. KELLAND (1637), 1 Roll. Abr. 929.

*Annotation:—*Refd. Midgley v. Midgley, [1893] 3 Ch. 282.

2010. ——— Joint answer by husband & wife—Plea by wife alone.]—In the joint answer of a husband & wife to a creditor's bill, for payment out of an estate of which the wife was administratrix, the wife alone set up Statute of Limitations as a defence to the suit:—*Held*: the interest of the wife was not so merged in the coverture that the ct. would disregard her separate defence; & the statute was, for the protection of the estate, sufficiently pleaded by the wife alone.—BEECHING v. MORPHEW (1850), 8 Hare, 129; 68 E. R. 301.

2011. ——— Action against tenant in tail & legatees—Plea by tenant in tail.]—A tenant for life discharging an incumbrance upon the estate is presumed to have intended to keep the charge alive against the inheritance for his own benefit,

& the absence of an assignment will not conclude him; but a similar presumption does not arise from the payment by a tenant for life of bond debts, which, even if assigned, only place him in the same position as any other bond creditor.

Testator, being indebted by bond, devised certain real estate to his son for life, with remainder, subject to a term for the payment of legacies to his grandson in tail, & died. Upwards of twenty years after the date of the latest of the bonds, the tenant for life & his assignee for value filed their bill against the tenant in tail & the legatees, alleging that the tenant for life had paid off the bonds, & seeking to stand in the shoes of the obligees as against the inheritance. The tenant in tail pleaded Statute of Limitations, the other legatees did not:—*Held*: the payment of the bonds by the tenant for life did not constitute him an incumbrancer on the estate, & the bonds themselves being more than twenty years old, the presumption was that they had been satisfied. *Semble*: the plea of Statute of Limitations under the circumstances, by the tenant in tail, enured for the benefit of all defts.—MORLEY v. MORLEY, HARLAND v. MORLEY (1855), 5 De G. M. & G. 610; 25 L. J. Ch. 1; 26 L. T. O. S. 99; 1 Jur. N. S. 1097; 4 W. R. 75; 43 E. R. 1007, L. C.

*Annotations:—*Mentd. Langhorne v. Harland (1856), 2 Jur. N. S. 872; Roddam v. Morley (1856), 2 K. & J. 336; Lawton v. Ford (1866), L. R. 2 Eq. 97; *Re* Tasker, Hoare v. Tasker, [1905] 2 Ch. 587.

SUB-SECT. 2.—ADMINISTRATION SUITS.

Action by creditors.]—See EXECUTORS, Vol. XXIV., pp. 737, 808, 809, Nos. 7658, 8384–8390.

Effect of judgment or order.]—See EXECUTORS, Vol. XXIV., p. 799, Nos. 8288–8290.

2012. ——— Creditor without knowledge of action.]
—Where a judgment creditor has allowed twenty years to elapse without taking steps to recover his debt, & then ascertained that during the twenty years a suit had been instituted for the benefit of the specialty creditors of his debtor, & that under a decree in the suit they had received part payment of their debts, & that there was money in ct. available for the payment of the remainder:—*Held*: he was barred by Statute of Limitations from proving his debt before the master, & receiving payment ratably with the other creditors.—BERRINGTON v. EVANS (1835), 1 Y. & C. Ex. 434; 160 E. R. 177; *previous proceedings* (1831), You. 276; *subsequent proceedings* (1839), 3 Y. & C. Ex. 384.

*Annotation:—*Refd. Bennett v. Bernard (1848), 11 L. T. O. S. 375.

2013. Action by legatees—Mortgagee of share of real property—Mortgage unknown to plaintiffs.]—HUMBLE v. HUMBLE, No. 803, *ante*.

2014. Action by residuary legatees—Effect of order—Precludes defence of statute—Against creditors coming in under the order.]—In an administration suit instituted by a residuary legatee more than twenty years after testator's death, the chief clerk's certificate found that certain legacies remained unpaid, & by the order on further consideration, liberty was given to any persons claiming to be entitled to the legacies to apply

claimant.—ALLEN v. SMELLIE (1911), 31 N. Z. L. R. 305.—N.Z.

e. Action by Crown.]—Upon the trial of an information of intrusion, to which deft. has pleaded the general issue, a verdict must pass for the Crown, if it be shown to have been in possession within twenty years.—

A.-G. v. WARD (1832), Hayes, 555.—IR.

2008 i. Actions in which title to land incidentally arises—How far necessary to plead statute—Trespass—Defendant justifying.]—MILLER v. WOLFE (1897), 30 N. S. R. 277.—CAN.

1. ——— Onus of proof.]—BOUDROIT

v. SAMPSON (1907), 41 N. S. R. 490.—CAN.

PART XII. SECT. 5, SUB-SECT. 1.

g. Absence of debtor—Some creditors allowed to plead statute—Against plaintiff creditor.]—GORMLEY v. DEBLOIS (1912), 11 E. L. R. 575; 46 N. S. R. 280.—CAN.

as to their payment. The legatees, who were not parties to the suit, having applied, under the order for payment of their legacies:—*Held*: the residuary legatee was precluded by the certificate & order from setting up Real Property Limitation Act, 1833 (c. 27).—*PROWSE v. SPURGIN* (1868), L. R. 5 Eq. 99; 37 L. J. Ch. 251; 17 L. T. 590; 16 W. R. 413.

SECT. 6.—COSTS.

2015. When disallowed—Promises made not amounting in law to acknowledgment.]—Deft. being arrested for £28 pleaded Statute of Limita-

tions as to £11, & pltf. recovered only £17. Deft. having promised orally, several times within a short period before the action, to pay the £11:—*Held*: he was not entitled to costs under 43 Geo. 3, c. 46.—*WHITE v. PRICKETT* (1838), 4 Bing. N. C. 237; 6 Dowl. 445; 5 Scott, 610; 7 L. J. C. P. 124; 2 Jur. 109; 132 E. R. 779.

Annotations:—*Consd.* Hill v. Merritt (1857), 1 H. & N. 758. *Refd.* Day v. Clarke (1838), 6 Scott, 886.

2016. — Jurisdiction of county court judge.]—A county ct. judge has no jurisdiction to deprive a successful deft. of costs merely on the ground that he has succeeded on the defence of Statute of Limitations.—*ELMS v. HEDGES* (1906), 95 L. T. 145; 22 T. L. R. 574, D. C.

Annotations:—*Refd.* Westgate v. Crowe, [1908] 1 K. B. 24; Dann v. Curzon (1910), 104 L. T. 66.

PART XII. SECT. 6.

h. When disallowed — Laches.] —*MILLER v. OSTRANDER* (1866), 12 Gr.

349.—**CAN.**

k. —.] —*MILLER v. RUNDLE* (1913), 41 N. B. R. 591; 14 E. L. R. 89.—**CAN.**

l. Effect of non-payment.]—*GRAHAM v. HAMILTON* (1892), 8 Man. L. R. 443.—**CAN.**

LIMITATION OF LIABILITY.

See ADMIRALTY; SHIPPING AND NAVIGATION.

LIQUIDATED DAMAGES.

See BUILDING CONTRACTS, ENGINEERS, AND ARCHITECTS; DAMAGES.

LIQUIDATION.

See COMPANIES; PARTNERSHIP

LIS PENDENS.

See EXECUTORS AND ADMINISTRATORS; JUDGMENTS AND ORDERS; SALE OF LAND.

LITERARY AND SCIENTIFIC INSTITUTIONS.

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Part I.—Definitions and Nature.

See Literary & Scientific Institutions Act, 1854 (c. 112), s. 33.

1. Institutions within Literary & Scientific Institutions Act, 1854 (c. 112), s. 33—Distinguished from joint stock company—Though some members shareholders.]—A society was formed in 1844 for the promotion of “moral & intellectual improvement by means of libraries for circulation & reference, newspapers & periodical publications, lectures, discussions, & classes for instruction & improvement in literature & the arts & sciences.” The society consisted of life members who had subscribed £20, of shareholders & annual subscribers, & its property was vested in trustees. No trust deed was executed, & the society was not registered under the Companies Acts:—*Held*: (1) the society was an institution within the above Act.

(2) Companies Act, 1862 (c. 89), s. 199, which deals with the winding up of unregistered cos., is only applicable to trading assocns. inasmuch as such unregistered cos. are to be wound up at their “place of business” & “business” must ordinarily be trading under the Act.

(3) Where a literary or scientific institution, not established for the purpose of gain, is dissolved by its members, its property ought to be given to

some kindred institution, to be determined in manner prescribed in Literary & Scientific Institutions Act, 1854 (c. 112), s. 30, even if the rules contain a provision that the property of the society on its dissolution is to be divided among its shareholders such a provision being contrary to the Act.

These rules contain a provision that when the society is dissolved its property shall be divided, not among those who contributed, but among the shareholders only. That is distinctly contrary to the Act of Parliament. No rules can obviate or get rid of the effect of a Public Act of Parliament (KAY, J.).

(4) Such an institution is not a joint stock co. although some of its members may be shareholders, & does not therefore come within the proviso in sect. 30 of the Act of 1854 which excepts from the operation of the sect. any institution “which shall have been founded or established by the contributions of shareholders in the nature of a joint stock co.”—*Re BRISTOL ATHENÆUM* (1889), 43 Ch. D. 236; 59 L. J. Ch. 116; 61 L. T. 795; 38 W. R. 396; 6 T. L. R. 83; 1 Meg. 452.

Annotations:—As to (4) *Distd. Re Jones, Clegg v. Ellison*, [1898] 2 Ch. 83. *Consd. Re Russell Institution, Figgins v. Baghino*, [1898] 2 Ch. 72.

See, further, Part VI., *post*.

2. — Not necessarily public or charitable.]

—(1) The above Act is not confined to institutions of a public or charitable nature, but includes private institutions established for the purposes of the Act.

(2) A literary & scientific institution founded & established by the issue of transferable shares, entitling their holders to the property of the institution, but bearing no dividend, is an institution “founded or established by the contributions of shareholders in the nature of a joint stock co.” so as to escape the operation of sect. 30 of the above Act, which forbids a distribution of the property among the members on a dissolution.—*Re RUSSELL INSTITUTION, FIGGINS v. BAGHINO*, [1898] 2 Ch. 72; 67 L. J. Ch. 411; 78 L. T. 588; 14 T. L. R. 406; 42 Sol. Jo. 508.

Annotation:—As to (2) *Consd. Re Jones, Clegg v. Ellison*, [1898] 2 Ch. 83.

3. — Horticultural society.]—A society falling within the general scope of the above Act, may be an institution in the nature of a joint stock co. within the exception in sect. 30, although not formed for purposes of profit, if it has the other usual indicia of a joint stock co.—as, for example, if it has common property derived from the contributions of its members, & held by them in transferable shares.

A horticultural society was constituted in 1844 under a deed which provided that any person who paid a certain fixed sum to the funds of the society should be a member & entitled to one share in the society, which was to be transferable by him or his legal personal representatives, & that each member should pay a fixed annual subscription, & should be entitled to admission for himself & family to the gardens of the society, but should not be entitled to any dividend or bonus, nor to any interest in the property of the society except the right to participate in the profits on a dissolution:—*Held*: the society came within the exception in sect. 30 of the above Act, & upon dissolution the property of the society became distributable among the members.—*Re JONES, CLEGG v. ELLISON*, [1898] 2 Ch. 83; 67 L. J. Ch. 504; 78 L. T. 639; 46 W. R. 577; 14 T. L. R. 412.

4. — Society for purpose of recreation.]

(1) The above Act does not authorise the establishment of institutions for the purposes of recreation

or enjoyment, *e.g.*, the playing of billiards as distinguished from the literary, scientific, & other instructional purposes specified in sect. 33 of the Act.

(2) An institution established under the Act has no implied general power of mortgaging or borrowing money, & its power to mortgage or charge its property is limited to the purposes mentioned in sect. 19. Money cannot be borrowed on mtge. by a literary or scientific institution for the purpose of erecting a billiard-room, although it may be so borrowed for the purpose of making necessary repairs of the institution's buildings.

(3) Such a body has no implied power of borrowing such as is incident to a trading or commercial undertaking.

(4) If the trustees of such an institute expend money of their own on necessary repairs of the building, they are, apart from the statute, entitled to a lien on the property of the institute for the money so spent.—*Re BADGER, MANSELL v. COBHAM (VISCOUNT)*, [1905] 1 Ch. 508; 74 L. J. Ch. 327; 92 L. T. 230; 21 T. L. R. 280.

5. Institutions within other Acts — Customs & Inland Revenue Act, 1885 (c. 51), s. 11 (3)—Includes scientific institution of special kind.]—The Institution of Civil Engineers, the property & income of which are legally appropriated & applied to the general advancement of mechanical or engineering science, not to the promotion of the professional interests of its members, is within the exemption in the above sub-sect.—*INLAND REVENUE COMRS. v. FORREST* (1890), 15 App. Cas. 334; 60 L. J. Q. B. 281; 63 L. T. 36; 54 J. P. 772; 39 W. R. 33; 6 T. L. R. 456; 3 Tax Cas. 117. H. L.

Annotations:—*Consd. Royal College of Music v. Westminster, Vestry*, [1898] 1 Q. B. 304. *Distd. Re Royal College of Surgeons of England*, [1899] 1 Q. B. 871. *Reid. Manchester Corpn. v. McAdam*, [1896] A. C. 500; *Chesterman v. Federal Taxation Comr.*, [1926] A. C. 128. *Mentd. Savoy Overseers v. Art Union of London*, [1896] A. C. 296.

Royal College of Surgeons.]—*See MEDICINE & PHARMACY.*

See, generally, REVENUE.

6. Distinguished from trading or commercial undertaking.]—*Re BADGER, MANSELL v. COBHAM (VISCOUNT)*, No. 4, *ante*.

Part II.—Property.

Conveyance of site.]—*See Literary & Scientific Institutions Act, 1854 (c. 112), ss. 1, 10.*

To whom conveyed.]—*See Literary & Scientific Institutions Act, 1854 (c. 112), s. 11.*

Who may convey.]—*See Literary & Scientific Institutions Act, 1854 (c. 112), ss. 5-7.*

What consents necessary.]—*See Literary & Scientific Institutions Act, 1854 (c. 112), ss. 6, 7.*

Apportionment of rents.]—*See Literary & Scientific Institutions Act, 1854 (c. 112), ss. 8, 9.*

7. Maintenance — Expenditure by trustees on repairs—Whether entitled to lien.]—*Re BADGER, MANSELL v. COBHAM (VISCOUNT)*, No. 4, *ante*.

See, generally, LIEN.

8. — Art gallery — Application of fund for enlarging or providing gallery—Construction of will.]—Testator, who died on Feb. 4, 1909, bequeathed to plffs. his pictures upon trust that (a) if within five years from his death there should

be established in G. a free art gallery sufficiently extensive to admit the selected pictures, his trustees should give them absolutely; or (b) the trustees might pay £30,000 to be applied in or towards enlarging a gallery. Provided that if within a specified time a sum had been subscribed which with the £30,000 would be sufficient “to provide” a satisfactory gallery the fund should be paid over. (c) If his trustees should consider that a satisfactory gallery could “be provided” for the £30,000 without contributions it might be applied accordingly. The residue was bequeathed to charities. The trustees asked that a provisional agreement between them & the G. Corpn. providing for the appropriation by the council, with the approval under Education Act, 1909 (c. 29), s. 5, of the Local Govt. Board, of certain land held by them for educational purposes as a site for the art gallery, the payment of £5,000

as its price, the income thereof to be applied for the maintenance of the gallery, the erection of the gallery by the trustees, & its maintenance by the council, might be sanctioned:—*Held*: testator must in clauses (b) & (c) have contemplated that part of the £30,000 would be applied for maintenance; testator had provided for the necessary building & adequate maintenance & endowment, & therefore the agreement providing for payment of £5,000 to the corp., for the rest of the fund to be expended in the erection, on the site proposed, of the building would be sanctioned.—*Re SHIPLEY, MIDDLETON v. GATESHEAD CORPN.* (1913), 77 J. P. 424.

9. Power to mortgage—Confined to statutory powers.]—*Re EADGER, MANSELL v. COBHAM (VISCOUNT), No. 4, ante.*

10. Power to sell—Estate purchased by voluntary contributions—Consent of Charity Commissioners not necessary.]—The Royal Society, a voluntary assocn. of learned men founded in the reign of King Charles II., in 1732, purchased, out of moneys arising from the subscriptions of the members, real estate at A., & in 1881 sold part of it. An objection was taken by the purchaser that the consent of the Comrs. under Charitable Trusts Acts, 1853 (c. 137), s. 62, & 1855 (c. 124), s. 29, was necessary on the ground that the society was

an endowed charitable institution:—*Held*: the estate having been purchased out of the moneys arising from the voluntary contributions of members which could be by the society legally applied for such purpose, the society came within the exemptions of Charitable Trusts Act, 1853 (c. 137), s. 62, & sect. 48 of the Act of 1855, & notwithstanding sect. 29 of the Act of 1855, the society had power to sell the estate without the consent of the Comrs.—*ROYAL SOCIETY OF LONDON & THOMPSON* (1881), 17 Ch. D. 407; 50 L. J. Ch. 344; 44 L. T. 274; 29 W. R. 838.

Annotations:—*Refd. Re Poor Widows Charity & Skinner* (1892), 62 L. J. Ch. 148; *Re St. John Street Wesleyan Methodist Chapel, Chester*, [1893] 2 Ch. 618; *Re Clergy Orphan Corp.* (1894), 64 L. J. Ch. 66; *A.-G. v. Foundling Hospital* (1914), 110 L. T. 894.

See, generally, CHARITIES, Vol. VIII., pp. 391 et seq.

Gifts to—Whether valid as charitable gift.]—*See CHARITIES, Vol. VIII., pp. 287, 290, 291, 320, Nos. 640, 673, 690, 1028.*

Whether void for perpetuity.]—*See CHARITIES, Vol. VIII., pp. 325 et seq.*

Whether purpose charitable.]—*See CHARITIES, Vol. VIII., pp. 257, 264, Nos. 187–195, 261.*

Larceny—In whom property laid.]—*See CRIMINAL LAW, Vol. XV., pp. 916, 917.*

Part III.—Internal Regulation.

11. Rules—Validity of—Ambiguity.]—Declaration stated that A. & others had agreed together, on becoming members of a society, that in the event of any of them leaving the society, “he should become bound to the president to forfeit twenty guineas, & to send a water colour painting to an exhibition.” To this there was a general demurrer for ambiguity. The Ct. of Exch. gave judgment for deft., on the ground that the contract disclosed in the declaration was ambiguous & meaningless:—*Held*: the judgment of the ct. below was correct.

It does not appear that there is any promise to pay. The rule may mean that the party is to forfeit or that he is to pay, but no one can tell what. It says that each member shall become bound to the president to forfeit; what that means I do not know. As to whether there was a consideration or not it is not material, as there is no promise, & there is no breach (*PATTESON, J.*).—*SHEPHERD v. DUNCAN* (1850), 15 L. T. O. S. 303, Ex. Ch.

12. ——— Cannot override statute.]—*Re BRISTOL ATHENÆUM, No. 1, ante.*

13. ——— Distribution of property on dissolution.]—*Re BRISTOL ATHENÆUM, No. 1, ante.*

14. Officers—Secretary retaining funds contrary to rules—Restraint by court.]—Where, by the rules of a society, a salaried officer is bound to pay the money he receives by virtue of his office to the treasurer of the society, & he retains moneys so received by him, & retains the same in payment of arrears of salary alleged to be due to him, the ct. will restrain him from acting as secretary.—*SHAW v. HILL* (1845), 1 Holt, Eq. 99; 9 Jur. 821; 71 E. R. 685.

Dismissal by council—At irregular meeting.]—*See No. 16, post.*

15. Committee—Power to control management

—Though conduct disapproved by general meeting.]

—A voluntary assocn. was formed for the purpose of printing & publishing the writings of S., & certain regulations were agreed to, & amongst others, “that the affairs of the society should be conducted by a committee” of twelve members elected at the annual meetings & the treasurer, & that the committee “might appoint a salaried agent or manager.” In 1854, the society having determined to establish a library, etc., & to take premises for that purpose & for that of a shop, the committee advertised for a librarian, etc., & subsequently appointed W. to the office, & resolved that he should have the premises rent & taxes free & £35 per cent. on certain profits & “that he should be allowed to carry on a retail business in New Church works & general literature for his own benefit.” On July 5, 1860, the committee resolved “that W. be manager at a salary of £75 & six months’ notice of separation on either side.” In 1855 the residue of the term in the house & premises became vested in four of the committee in trust for the society. The ground floor was converted into a shop, etc., the first floor into a library, etc., & W. was permitted to occupy the upper rooms as a residence. W. having become the publisher of spiritualistic works which the committee considered would be injurious to the society, they in July, 1860, desired W. to discontinue the publication of such works. On Aug. 2, he wrote to the committee refusing to do so, on the ground that he became their manager on the understanding that he was to be allowed to carry on an independent business. The committee then gave W. six months’ notice to terminate his engagement. On Oct. 4, the notice was withdrawn, W. having agreed to comply with the wishes of the committee. On Oct. 13, a requisition signed by several members of the society was sent to the committee, calling on them to summon a

special general meeting to take into consideration their resolutions of July, as to the publication of the works objected to, & also as to the propriety of altering the laws of the society. The committee declined to call a meeting, but on Nov. 8, they met, & passed resolutions dismissing W. from his office without notice, & requiring possession, which they immediately obtained by force, of the house & premises. On Nov. 12 & 13, general meetings, as alleged, of the society took place, & resolutions were passed approving of W.'s conduct, disapproving of that of the committee, & making alterations in the laws, & authorising W. to obtain possession which he shortly afterwards did by force, of the house & premises. Eleven of the committee, including the four trustees, then filed a bill for relief; & on motion, the ct. granted an injunction restraining W. from acting as manager, selling the books, recovering the moneys, & from publishing any spiritualistic works at the house of the society, & from disturbing pl'tfs. or their agents in the possession of the house, etc., & from carrying on his

business therein, on the ground that the legal estate was vested in the trustees, & that W. was merely a tenant at will, but without prejudice to any question as to the right of W. to recover damages.—*SPURGIN v. WHITE* (1860), 2 Giff. 473; 3 L. T. 609; 7 Jur. N. S. 15; 9 W. R. 266; 66 E. R. 198.

Annotation:—*Mentd. Collison v. Warren*, [1901] 1 Ch. 812.

— **Summoning of meetings.**—*See* No. 16, *post*.

16. Meetings—Meeting of council irregularly summoned—Remedy for.—*WILLETT v. TAVERNER* (1897), 41 Sol. Jo. 778.

— **Sunday meeting—Liability of chairman.**—*See* No. 18, *post*.

17. Enforcement of statutory objects—Mandamus.—A writ of *mandamus* will issue compelling a scientific society to carry out the provisions of a public general statute by which it is regulated.—*R. v. PHARMACEUTICAL SOCIETY* (1854), 2 W. R. 220.

Exclusion of members of voluntary associations generally, *see* CLUBS, Vol. VIII., pp. 509 *et seq*.

Part IV.—Legal Proceedings.

18. Liability of chairmen—Sunday meeting of private society.—A society was formed in a country town for providing Sunday evening lectures on art, science, literature, & sociology, to which the public were admitted on payment of small sums. The lectures were not, however, instituted for profit. A hall belonging to a limited co. in liquidation was hired, & meetings were held there on Sunday evenings, at each of which some leading inhabitant acted as chairman & introduced the lecturer, but having done so, retired from the platform & took his place amongst the audience. Actions for penalties under 21 Geo. 3, c. 49, were brought against gentlemen who had acted as chairmen of two of the meetings:—*Held*: the chairmen were not liable, as they were

not “persons managing or conducting the entertainment” within sect. 1.—*REID v. WILSON & WARD*, *REID v. WILSON & KING*, [1895] 1 Q. B. 315; 64 L. J. M. C. 60; 71 L. T. 739; 59 J. P. 516; 43 W. R. 161; 11 T. L. R. 88; 39 Sol. Jo. 94; 18 Cox, C. C. 56; 14 R. 94, C. A.

See, generally, TIME.

19. Mandamus—Enforcement of statutory objects.—*R. v. PHARMACEUTICAL SOCIETY*, No. 17, *ante*.

See, generally, CROWN PRACTICE, Vol. XVI., pp. 316 *et seq*.

Criminal proceedings—Larceny—In whom property laid.—*See* CRIMINAL LAW, Vol. XV., pp. 916, 917.

Part V.—Privileges.

Exemption from taxation—Corporation duty.—*See* REVENUE.

— **Income tax.**—*See* INCOME TAX, Vol. XXVIII., pp. 11 *et seq*.

Exemption from rates.—*See* RATES & RATING.

Part VI.—Dissolution.

20. Winding up—Liability of member for contribution.—*Re COLONIAL SOCIETY* (1850), 15 L. T. O. S. 410.

21. — Whether under Companies Acts—Society not established for profit.—*Re BRISTOL ATHENÆUM*, No. 1, *ante*.

22. — — — — —.—*Re JONES, CLEGG v. ELLISON*, No. 3, *ante*.

— — — — —.]—*See, also*, No. 20, *ante*, & *generally*, COMPANIES, Vol. X., pp. 1093 *et seq*.

23. Distribution of property—Institution not in

the nature of a joint stock company.—*Re BRISTOL ATHENÆUM*, No. 1, *ante*.

24. — Institution in the nature of a joint stock company—Exemption under Literary & Scientific Institutions Act, 1854 (c. 112), s. 30.—*Re JONES, CLEGG v. ELLISON*, No. 3, *ante*.

25. — — — — —.—*Re RUSSELL INSTITUTION, FIGGINS v. BAGHINO*, No. 2, *ante*.

— **Jurisdiction of county court judge.**—*See* Literary & Scientific Institutions Act, 1854 (c. 112), s. 30.

Part VII.—Particular Institutions.

SECT. 1.—BRITISH MUSEUM.

See 26 Geo. 2, c. 22; 27 Geo. 2, c. 16; 7 Geo. 3, c. 18; 5 Geo. 4, c. 39; 2 & 3 Vict. c. 10; 41 & 42 Vict. c. 55; 57 & 58 Vict. c. 34; 2 Edw. 7, c. 12.

26. Subject to Charitable Uses Act, 1735 (c. 36).]

—A devise of the proceeds of land to trustees for the benefit of the British Museum is within the above Act.—**BRITISH MUSEUM (TRUSTEES) v. WHITE** (1826), 2 Sim. & St. 594; 4 L. J. O. S. Ch. 206; 57 E. R. 473.

Annotations:—**Consd.** *Carne v. Long* (1858), 27 L. J. Ch. 589. **Refd.** *Beaumont v. Oliveira* (1869), 4 Ch. App. 309; *Re Verrall, National Trust for Places of Historic Interest or Natural Beauty v. A.-G.*, [1916] 1 Ch. 100. **Mentd.** *R. v. Income Tax Comrs.* (1911), 80 L. J. K. B. 788.

See, generally, **CHARITIES**, Vol. VIII., pp. 265 *et seq.*

Right to copies of books.—*See* **COPYRIGHT**, Vol. XIII., p. 200.

27. Private documents in — As evidence — Proof of antiquity of handwriting.—Permission given to exhibit an interrogatory after publication passed, to prove the antiquity of the handwriting in a book preserved in the British Museum.—**KENSINGTON (LORD) v. PUGH** (1829), 3 Y. & J. 378, Ex. Ch.

— Whether place of proper custody.]

—*See* **EVIDENCE**, Vol. XXII., p. 357, Nos. 3623–3626.

28. French book obtainable on request only—Not published so as to defeat patent.—A French treatise was placed in the British Museum library in 1863. The museum catalogue is kept with reference to authors' names; books are arranged according to subject matter; readers can under guidance search for books on particular subjects:—*Held*: there was no prior publication in England

on matter contained in the treatise, so as to avoid a patent taken out in 1876.—**OTTO v. STEEL** (1885), 31 Ch. D. 241; 55 L. J. Ch. 196; 54 L. T. 157; 34 W. R. 289; 3 R. P. C. 109.

Annotation:—**Consd.** *Harris v. Rothwell* (1887), 35 Ch. D. 416.

See, generally, **PATENTS**.

29. Power to exclude public.—**DE SOUZA v. BRITISH MUSEUM (TRUSTEES)** (1886), 2 T. L. R. 586.

30. — Remedy when exclusion ultra vires.—**CHAFFERS v. TAYLOR** (1896), 12 T. L. R. 278; 40 Sol. Jo. 374.

31. Liability for libel contained in books.—**MARTIN v. BRITISH MUSEUM (TRUSTEES) & THOMPSON** (1894), 10 T. L. R. 338.

Annotation:—**Refd.** *Vizetelly v. Mudie's Select Library*, [1900] 2 Q. B. 170.

See, generally, **LIBEL & SLANDER**.

SECT. 2.—BODLEIAN LIBRARY, OXFORD AND OTHER PUBLIC LIBRARIES.

Right to copies of books.—*See* **COPYRIGHT**, Vol. XIII., p. 200.

Private documents as evidence—Whether place of proper custody.—*See* **EVIDENCE**, Vol. XXII., p. 357, Nos. 3627, 3628.

Municipal public libraries.—*See, generally* **PUBLIC HEALTH**.

SECT. 3.—NATIONAL GALLERY.

See **National Gallery Act**, 1856 (c. 29).

LITERARY PROPERTY.

See **COPYRIGHT AND LITERARY PROPERTY**.

LIVERY SERVANTS.

See **REVENUE**.

LIVERY STABLE KEEPERS.

See **INNS AND INNKEEPERS LIEN**.

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LOAN SOCIETIES.

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Part I.—Nature and Constitution.

SECT. 1.—NATURE.

See Loan Societies Act, 1840 (c. 110).

1. Distinguished from friendly societies.] —

A society established for the purpose of lending the money raised by the contributions of its members to the members themselves is not a friendly society within 10 Geo. 4, c. 56, & 4 & 5 Will. 4, c. 40.

There are distinct Acts which regulate loan societies, & 5 & 6 Will. 4, c. 23, s. 2, actually recognises them as differing from friendly societies, & those Acts would certainly include the society in question. It is indeed true that it does not grant loans to persons who are not members, but it is merely one of its rules which prevents it from doing so, & a fresh rule may at once grant this power (WIGHTMAN, J.).—*R. v. SHORTRIDGE* (1844), 1 Dow. & L. 855; 1 New Sess. Cas. 56; *sub nom.* *R. v. SCOTT*, 13 L. J. M. C. 70; 8 J. P. 410; 8 Jur. 473; *sub nom.* *R. v. DURHAM JJ.*, 2 L. T. O. S. 353.

n:—*Refd.* *Kelsall v. Tyler* (1856), 11 Exch. 513.

SECT. 2.—CONSTITUTION.

2. Registration — Necessity for.] — A loan society, consisting of more than twenty persons, which has not been registered as a co. under Companies (Consolidation) Act, 1908 (c. 69), or been formed in pursuance of some other Act, & which lends money at interest to its members, the profits being shared by the members, is unable, by reason of its contravening Companies (Consolidation) Act, 1908 (c. 69), s. 1 (2), with regard to registration, to recover from a member the amount of moneys lent.—*WILKINSON v. LEVISON* (1925), 42 T. L. R. 97.

Annotation: *Mentd.* *Greenberg v. Cooperstein*, [1926] Ch. 657.

— **Under Companies Act.] —***See* COMPANIES, Vol. IX., pp. 72 *et seq.*

3. Enrolment — Effect of non-enrolment — Criminal prosecution for forgery.] — Under an indictment for forging a promissory note with intent to defraud A. & others, proof that the intent was to defraud a loan society, of which A. & others, to the number of more than twelve, were members, is sufficient, though such society was

unenrolled. The members are at all events partners.—*R. v. PAINTER & DAVIS* (1849), 13 J. P. 381.

—*See* Loan Societies Act, 1840 (c. 110), s. 4; Local Government Act, 1888 (c. 41), s. 3 (xv); Friendly Societies Act, 1896 (c. 25), s. 2.

4. Rules — Admissibility of unsigned rules to vary surety's contract.] —A. borrowed a sum of money from a loan society, & deft. joined him in a joint & several promissory note for the amount. At the time of the loan a printed book of the society's rules was given to deft. By these rules it was stated, that after default by the principal, notice would be given to the surety, & that if the money was not then paid, legal proceedings would be taken. The book was not signed:—*Held*: these rules did not constitute an agreement in writing contemporaneous with the note, so as to be admissible to vary the contract on the note. *Seemle*: if the rules had been admissible as such an agreement, they would not have sustained a plea, alleging "that if the money was not paid after notice to the surety, legal proceedings would be taken, but not before."—*BROWN v. LANGLEY* (1842), 4 Man. & G. 466; 5 Scott, N. R. 249; 12 L. J. C. P. 62; 134 E. R. 192.

Annotations:—*Refd.* *Webb v. Salmon*, *Webb v. Spicer* (1849), 14 L. T. O. S. 86; *Rayner v. Fussey* (1859), 28 L. J. Ex. 132.

5. — Certification of — Society entitled to benefit of Act.] —(1) A loan society established pursuant to the provisions of 5 & 6 Will. 4, c. 23, becomes entitled to the benefit of those provisions, upon its rules & regulations being certified by the barrister appointed for that purpose, & before they are enrolled at the quarter sessions.

(2) One of the rules of a loan society directed that the repayment of loans should be secured by the joint promissory note of the borrower & his sureties, but gave a form of note which was joint & several:—*Held*: a joint & several note was a note made in pursuance of the rules of the society, so as to come within the exemption from stamp duty created by 5 & 6 Will. 4, c. 23, s. 7.—*BRADBURN v. WHITBREAD* (1843), 5 Man. & G. 439; 6 Scott, N. R. 283; 12 L. J. C. P. 218; 7 J. P. 241; 7 Jur. 629; 134 E. R. 635.

Annotation:—*As to* (1) *Apld.* *Dewhurst v. Clarkson* (1854), 3 E. & B. 194.

Part II.—Administration.

SECT. 1.—VESTING OF PROPERTY IN TRUSTEES.

See Loan Societies Act, 1840 (c. 110), s. 8.

SECT. 2.—ACCOUNTS.

Duty to render annual abstract of accounts.] —

See Loan Societies Act, 1840 (c. 110), s. 27.

SECT. 3.—DEBENTURES.

Issue of.] —*See* Loan Societies Act, 1840 (c. 110), s. 9.

PART II. SECT. 4, SUB-SECT. 1.
a. Loan to person residing outside defined district.] —Deft., a person not

residing within the district defined by the society's rules, was sued on foot of a promissory note for £10:—*Held*: the

Liability for payment of.] —*See* Loan Societies Act, 1840 (c. 110), s. 10.

Payment on death of debenture-holder where no grant of representation.] —*See* Loan Societies Act, 1840 (c. 110), s. 11.

Exemption of from stamp duty.] —*See* Loan Societies Act, 1840 (c. 110), s. 9.

SECT. 4.—LOANS.

SUB-SECT. 1.—GRANTING LOANS.

Limit to loan.] —*See* Loan Societies Act, 1840 (c. 110), s. 13.

loan, being made to a person not residing within the defined district, was unauthorised as a statutory loan,

Preliminary fees.]—See Loan Societies Act, 1840 (c. 110), ss. 5, 20, 23.

6. Loans need not be confined to members.]—R. v. SHORTRIDGE, No. 1, *ante*.

7. Loans made by drawing lots among members—Not illegal under Lottery Acts.]—A society formed for making advances to its members, which selects by lot the members who are to receive advances, is not illegal under the Lottery Acts.—WALLINGFORD v. MUTUAL SOCIETY (1880), 5 App. Cas. 685; 50 L. J. Q. B. 49; 43 L. T. 258; 29 W. R. 81, H. L.

*Annotations:—***Mentd.** Edmunds v. Wallingford (1885), 14 Q. B. D. 811; Speers v. Daggers (1885), Cab. & El. 503; Purkiss v. Low (1886), 3 T. L. R. 63; Gunga Narain Gupta v. Tiluckran Chowdhry (1888), L. R. 15 Ind. App. 119; Steadman v. Hakim (1888), 58 L. J. Q. B. 57; Manger, etc. (Syndics under Bankruptcy of Rodrigues) v. Cash (1889), 5 T. L. R. 271; Lawrance v. Norreys (1890), 15 App. Cas. 210; Arnold & Butler v. Bottomley, [1908] 2 K. B. 151.

8. Security for repayment—Whether society's own certificates may be taken.]—The arts. of a mutual loan society contained a provision confining securities for repayment of advances to "real or other securities, excepting personal securities, either by bonds, bills of exchange, or promissory notes":—*Held*: (1) the loan certificates of the society were not personal securities within the exception in the arts.; (2) there is no rule of law prohibiting a co. from trafficking in its own shares.—GRIMWADE v. MUTUAL SOCIETY (1884), 52 L. T. 409; *sub nom.* Re MUTUAL SOCIETY, GRIMWADE v. MUTUAL SOCIETY, 1 T. L. R. 115.

SUB-SECT. 2.—REPAYMENT.

A. In General.

9. Action for—By unregistered society—Not maintainable.]—WILKINSON v. LEVISON, No. 2, *ante*.

B. Repayment by Instalments.

See Loan Societies Act, 1840 (c. 110), ss. 21, 22.

10. Default in payments—Right of set-off of earlier payment—Against promissory note given as security.]—By the rules of a money loan society it was provided, that each holder of shares should pay a certain sum per week upon each share, & that each member should take his share by sale or for want of a purchaser by ballot; that for each share he was to receive the sum of £40, when paid by the members, upon giving a security, to be approved of by the committee. A. purchased a £40 share, & by way of the security required, he gave, with two parties, a joint promissory note payable on demand, for £40 to the treasurer of the society. He continued the

weekly payments regularly for some time, & others were made by his sureties, & then default was made:—*Held*: in default of payment of the weekly sums, the preceding payments of the weekly sums were no evidence in support of a plea of part payment of the note.—JONES v. GRETTON (1853), 8 Exch. 773; 1 C. L. R. 666; 22 L. J. Ex. 247; 21 L. T. O. S. 167; 17 J. P. 473; 155 E. R. 1565.

*Annotation:—***Mentd.** Hope v. Meek (1855), 10 Exch. 829.

11. ———.]—A member of a money club having obtained from it a loan, gave, with two sureties, a promissory note for the amount & interest & expenses, payable to the order of the then treasurer. He, having ceased to be treasurer, indorsed the note in blank, & delivered it to the attorney of the club, in the presence of another member, who forthwith instructed the attorney to sue in his name upon it. The action was brought against the three makers; & the two sureties, severing from the principal in their pleading, pleaded denying the indorsement, & also a general plea of payment & an equitable plea of set-off, but were not allowed to plead partnership with pltf. It was proved that £21 due to the principal from the society had been carried to his credit. After verdict for pltf. for the full amount of the note, a certificate for speedy execution was obtained *ex parte*:—*Held*: the certificate was regular; & *semble*: debts, at all events upon these pleas, were not entitled to the benefit of the payment in reduction of the note; but a rule *nisi* to reduce the verdict on that ground was, reluctantly, granted. It appeared, however, upon affidavits on showing cause, that the motion had been made on behalf of the sureties without their authority; & the ct. at once granted a cross-rule to discharge the former rule on that ground, & pltf.'s affidavits not being satisfactorily answered, afterwards made that cross-rule absolute.—JENKINS v. TONGUE (1860), 29 L. J. Ex. 147.

12. ———.]—The surety on a promissory note given to secure a loan to a member of a money club formed for the purpose of raising money by means of monthly subscriptions, & lending it in small sums at interest to the members, & dividing the proceeds when the shares are fully paid up & the loans repaid, cannot rely upon the monthly subscriptions & premiums paid by his principal, as payments in reduction of his liability upon the note.—WRIGHT v. HICKLING (1866), L. R. 2 C. P. 199; 36 L. J. C. P. 40; 15 L. T. 245.

Construction of bond given to secure repayment.]—By the condition of a bond, the obligor was to pay the money by monthly instalments, & "when & as often as he should make

& invalid.—ENNISKILLEN LOAN FUND SOCIETY (TREASURER) v. GREEN, [1898] 2 I. R. 103.—IR.

b. Interest.]—EDINBURGH LIFE ASSURANCE CO. v. GRAHAM (1860), 19 U. C. R. 581.—CAN.

c. ——— Effect of assignment of mortgage.]—REID v. WHITEHEAD (1864), 10 Gr. 446.—CAN.

PART II. SECT. 4, SUB-SECT. 2.—A.

d. Action for—When brought.]—Proceedings by the treasurer or secretary of a loan society, on notes made to him for the repayment of loans, must be brought within six months from the time when the cause of complaint arose.—ATTHILL v. WOODS, [1903] 2 I. R. 305.—IR.

e. ———.]—R. (O'REILLY) v. FERMANAGH JJ., [1904] 2 I. R. 18.—IR.

f. ——— Against personal representative.]—Proceedings by the treasurer or secretary of a loan society to recover the amount of a promissory note for the repayment of a loan from the society may be taken against the personal representative of a deceased maker.—ATTHILL v. WOODS, [1903] 2 I. R. 305.—IR.

g. ———.]—The treasurer or secretary of a loan society cannot proceed by civil bill to recover the amount of a promissory note for the repayment of a loan from the society. His sole remedy is by complaint before a justice of the peace.—MOORE v. DONAGHER, [1903] 2 I. R. 290.—IR.

h. Repayment before maturity of mortgage—Mode of calculating interest.]—CRONE v. CRONE (1879), 26 Gr. 459.—CAN.

PART II. SECT. 4, SUB-SECT. 2.—B.

k. Right to change mode of repayment—Mortgage as collateral security—Terms of repayment in mortgage.]—Where a mtge. of real estate by a member of a loan assocn. incorporated under R. S. O. 1887, c. 169, executed to secure collaterally an advance to him of the amount of the maturity value of certain of his shares in the assocn., contained a covenant by the mtgor. that the monthly payments would be made according to the bye-laws of the assocn. until the shares should have matured, & also that he would make the several payments provided by the bye-laws for the time being with respect to shares & the payment thereof:—*Held*: the assocn. had power, by bye-law passed subsequent to the execution of the mtge., to change the mode of payment,

Sect. 4.—Loans: Sub-sect. 2, B. & C. Sect. 5. Part III. Sect. 1: Sub-sects. 1 & 2. Sect. 2: Sub-sects. 1, 2 & 3. Part IV.]

default in the payment of any of the said monthly instalments, he should pay to the obligees 1s. in the pound for each & every pound of the said instalment so left unpaid":—*Held*: the obligees were not entitled to anything in respect of fractional parts of a pound.

The words are, that when & so often as the obligor shall make default in the payment of any of the said monthly instalments, he shall pay to the society 1s. in the pound for each & every pound of the said instalment so left unpaid—not at the rate of 1s. in the pound (*ERLE, C.J.*).—*THREE TOWNS SOCIETY v. DOYLE* (1862), 13 C. B. N. S. 290; 1 New Rep. 26; 7 L. T. 276; 11 W. R. 22; 143 E. R. 116.

C. Liability of Surety.

Liability of surety generally, see *GUARANTEE*, Vol. XXVI., pp. 62 *et seq.*

See Loan Societies Act, 1840 (c. 110), s. 16.

14. Deviation from rules of society—Whether defence available to surety.]—A plea that a promissory note was obtained by fraud, covin & misrepresentation, pleaded by a surety in such note, was held not to be supported by proof that the note was given for money lent by plffs. at 20 per cent. interest, in the name of a joint stock co., fraudulently represented by plffs. to have been established for the purpose of lending money at 5 per cent., & to consist of shareholders, contributors & borrowers & to be governed by officers elected by such shareholders, contributors & borrowers no such co. having ever existed, & the two plffs. being the only lenders.—*GREEN v. GOSDEN* (1841), 3 Man. & G. 446; 4 Scott, N. R. 13; 11 L. J. C. P. 4; 5 Jur. 1010; 133 E. R. 1218.

Annotations:—*Reid. Cannam v. Johnson* (1847), 9 L. T. O. S. 82; *Wright v. Campbell* (1861), 2 F. & F. 393.

15. ——— Failure to inform sureties of payments in arrear.]—P. borrowed a sum of money from a loan society of which he was a member, & defts., who were not members of the society, joined him in a bond & promissory note for the amount. By the terms of the loan P. was to repay the money by weekly instalments. One of the society's rules directed the managing committee to inform the sureties when the instalments were four weeks in arrear, & empowered them to commence legal proceedings against the sureties. P. died in 1859, after having repaid a portion of the loan, but being at the time of his death more than four weeks in arrear. Defts. were not informed of this till an action was brought in 1862 on the bond & note:—*Held*: the rules of the society formed no part of defts.' contract so as to afford them any ground of equitable defence to the action.—*PRICE v. KIRKHAM* (1864), 3 H. & C. 437; 5 New Rep. 59; 34 L. J. Ex. 35; 11 L. T. 314; 29 J. P. 8; 159 E. R. 601.

16. Liability to be sued in priority to principal debtor.]—*BROWN v. LANGLEY*, No. 4, *ante*.

17. Right to set-off—Subscriptions paid by principal debtor.]—*WRIGHT v. HICKLING*, No. 12, *ante*.

SECT. 5.—EXEMPTION FROM STAMP DUTY, INCOME TAX, ETC.

See Loan Societies Act, 1840 (c. 110), ss. 9, 14.

18. Stamp duty—Promissory note made in accordance with rules.]—*BRADBURN v. WHITBREAD*, No. 5, *ante*.

19. Income tax—Sums payable for interest assessable.]—*MERSEY LOAN & DISCOUNT CO. v. WOOTTON* (1887), 4 T. L. R. 164; 2 Tax Cas. 316.

Annotation:—*Dbtd. Gresham Life Assce. Soc. v. Styles*, [1892] A. C. 309.

Part III.—Offences, Penalties and Proceedings.

SECT. 1.—OFFENCES AND PENALTIES.

SUB-SECT. 1.—UNDER STATUTE.

Failure to make annual return.]—See Loan Societies Act, 1840 (c. 110), s. 27.

SUB-SECT. 2.—CRIMINAL PROCEEDINGS UNDER GENERAL LAW AGAINST OFFICERS AND MEMBERS.

Forgery.]—See *CRIMINAL LAW*, Vol. XV., p. 1041, Nos. 1173 *et seq.*

Embezzlement.]—See *CRIMINAL LAW*, Vol. XV., pp. 926 *et seq.*

Larceny.]—See *CRIMINAL LAW*, Vol. XV., pp. 865 *et seq.*

SECT. 2.—LEGAL PROCEEDINGS.

SUB-SECT. 1.—SUMMARY JURISDICTION.

See Loan Societies Act, 1840 (c. 110), s. 16; Summary Jurisdiction Act, 1848 (c. 43), s. 11.

20. Who must take proceedings—"Treasurer

for time being.]"—(1) Proceedings to recover the amount of a promissory note, made payable to "the treasurer for the time being" of a loan society under 5 & 6 Will. 4, c. 23, must be taken by the treasurer in office when such proceedings are to be commenced, not the party who was treasurer when the note was made.

(2) Such treasurer cannot bring an action upon the note, but must proceed by complaint before a justice under 5 & 6 Will. 4, c. 23, s. 8. *Qu.*: whether the trustees of the society could sue upon such note, in virtue of the rights vested in them by sect. 4?—*TIMMS v. WILLIAMS* (1842), 3 Q. B. 413; 2 Gal. & Dav. 621; 11 L. J. Q. B. 210; 6 J. P. 685; 6 Jur. 1012; 114 E. R. 565.

Annotations:—*As to (2) Reid. Magnus v. Hall* (1843), 8 J. P. 71; *Ex p. Payne, Re Payne v. Garratt* (1850), Cox, M. & H. 311.

21. Form of order—Must be for immediate payment.]—An order for payment made by a justice of the peace, under Loan Societies Act, 1840 (c. 110), must be for immediate payment; he has no jurisdiction to order payment in a certain time from making the order.—*PARKER v. BOUGHEY*

which, according to the mtge. was by fixed monthly instalments, to a provision by which when the shares matured the mtge. should be released.—*WILLIAMS v. DOMINION PERMANENT*

LOAN Co. (1901), 1 O. L. R. 532.—*CAN.*

PART III. SECT. 1, SUB-SECT. 2.

1. Loan Corporations Act—Convic-

tion under—*Right of appeal.*—*R. v. PIERCE* (1904), 25 C. L. T. 70; 4 O. W. R. 411; 5 O. W. R. 464; 9 O. L. R. 374.—*CAN.*

(1862), 3 B. & S. 43 ; 31 L. J. M. C. 272 ; 26 J. P. 533 ; 9 Jur. N. S. 118 ; 122 E. R. 17.

See, now, Summary Jurisdiction Act, 1879 (c. 49), s. 7 ; Criminal Justice Act, 1914 (c. 58), s. 1.

SUB-SECT. 2.—PROCEEDINGS IN COUNTY COURTS.

See Loan Societies Act, 1840 (c. 110), ss. 17, 18.

SUB-SECT. 3.—PROCEEDINGS IN SUPERIOR COURTS.

See Loan Societies Act, 1840 (c. 110), s. 19.

22. Jurisdiction of court—Whether ousted by provision for application to justices.]—5 & 6 Will. 4, c. 23, authorised the trustees to lend money under certain circumstances, & to take promissory notes in the name of the treasurer as security for repayment. The Act, s. 8, authorised a justice of the peace upon complaint of the treasurer, to summon such party & award payment to be enforced by distress:—*Held*: the jurisdiction of the superior cts. was not thereby taken away ; especially in an action brought upon a promissory note, which did not appear, from the pleadings, to have been given in respect of a loan.—ALBON

v. PYKE (1842), 4 Man. & G. 421 ; 5 Scott, N. R. 241 ; 11 L. J. C. P. 266 ; 134 E. R. 172.

Annotation:—*Reid*. *Marshall v. Nicholls* (1852), 18 Q. B. 882.

23. ———.]—TIMMS *v. WILLIAMS*, No. 20, *ante*.

24. Unregistered society—Note given to two members—Whether all members must sue.]—A promissory note was given to two individuals by name, to secure an advance of the maker, out of the funds of the loan society not enrolled pursuant to 5 & 6 Will. 4, c. 23:—*Held*: in suing upon the note, it was not necessary to join all the members of the society.—BAWDEN *v. HOWELL* (1841), 3 Man. & G. 638 ; 4 Scott, N. R. 331 ; 6 Jur. 37 ; 133 E. R. 1296.

25. ——— Right to sue.]—WILKINSON *v. LEVISON*, No. 2, *ante*.

26. Trustees—Right to sue.]—TIMMS *v. WILLIAMS*, No. 20, *ante*.

27. Action by treasurer for time being—Must show that note capable of being sued on.]—The treasurer for the time being of a loan society, enrolled under Loan Societies Act, 1840 (c. 110), & suing under sect. 19 of that Act for the recovery of a loan by the society, must show by his declaration that he is suing on such a note or security as that sect. enables him to sue on.—MAGNUS *v. HALE* (1843), 1 L. T. O. S. 253 ; 8 J. P. 71.

Part IV.—Winding Up.

Winding up, generally, *see* COMPANIES, Vol. X., pp. 814 *et seq.*

28. Unregistered society—Jurisdiction to wind up under Companies Acts—Society with more than seven members.]—*Re CROWN & CUSHION LOAN FUND SOCIETY* (1850), 14 L. T. O. S. 346 ; 14 Jur. 874.

29. ———.]—An assocn. formed for the loan of sums of money to members of the society, upon security of their respective promissory notes, with interest on the amounts lent, whereby a profit may be derived to the society ; & which assocn. has come to an end:—*Held*: to be an assocn. to be wound up in the usual way under the Acts for that purpose. Where the ct. sees that a preliminary reference would have no other object than for the master to report the same facts which were in evidence before the ct., the ct. was bound to make the order of reference to wind up the affairs of the co. in the first instance.—*Re SHERWOOD LOAN CO., Ex p. SMITH* (1851), 1 Sim. N. S. 165 ; 20 L. J. Ch. 177 ; 16 L. T. O. S. 359 ; 61 E. R. 64.

Annotation:—*Apld.* *Re St. George's Benefit Bldg. Soc.* (1857), 27 L. J. Ch. 96.

30. ——— Society with less than seven members.]—On a creditor's petition for the winding up of an unregistered loan society, formed under Loan Societies Act, 1840 (c. 110), the members of which formerly exceeded seven in number, but were now only four:—*Held*: having regard to Companies Act, 1862 (c. 89), ss. 199, 200, a winding-up order could not be made when the number of members had at the date of the petition fallen

below seven.—*Re BOLTON BENEFIT LOAN SOCIETY, COOP v. BOOTH* (1879), 12 Ch. D. 679 ; 49 L. J. Ch. 39 ; 28 W. R. 164.

Annotation:—*Folld.* *Re Bowling & Welby's Contract*, [1895] 1 Ch. 663.

31. Right of member to set off deposit against loan—Loan made after notice of withdrawal.]—Pltf., the official liquidator of a co-operative loan society, registered under Loan Societies Act, 1840 (c. 110), which had been ordered by the Master of the Rolls to be wound up as an unregistered co. under Companies Acts, 1862 (c. 89), & 1867 (c. 131), & the proceedings transferred to the county ct., brought an action in the county ct. against deft., who had been a shareholder in the society, for £14, the balance due upon a bond or note, repayable by weekly instalments. By one of the rules of the society it was provided that members who were borrowers could not withdraw their deposits until the loan was repaid. Before the date of the loan deft. had given the notice required by the rules of the society to withdraw money paid by him into the funds of the society amounting to £21 13s. The notice having expired, & the directors being unable to pay in accordance with the notice, they granted the loan of £15 to deft. Deft. sought to set off the sum of £21 13s. against the sum sued for, on the ground that having given a proper notice, according to the rules, he was entitled to receive his money prior to the loan being made, & had a right of action against the society which entitled him to set off that amount against the amount sued for:—*Held*: deft. was

PART III. SECT. 2, SUB-SECT. 3.

m. Appeal to county court—Whether subsequent appeal to High Court.]—Where under Charitable Loan Societies Act, 1906, s. 6, an appeal is taken to the county ct. from a decision of a ct. of summary jurisdiction, a

further appeal from the county ct. to the judge of assize does not lie.—*STAFFORD v. TEAGUE* (1907), 41 L. L. T. 135.—IR.

n. Appeal from county court—Where jurisdiction wrongly exercised.]—Where the county court judge wrongly

exercised the jurisdiction of a ct. of first instance & gave a decree on a process brought on a loan fund note by a loan fund society as pltf., the judge of assize has jurisdiction to reverse that decree.—*BALLYJAMESDUFF LOAN FUND SOCIETY v. TIERNEY* (1907), 41 L. L. T. 187.—IR.

not entitled to set off this sum. The deposits had become a portion of the funds of the society, & were not specifically applicable to the repayment of debt.'s deposits merely by reason of the notice. It was not, in any sense of the expression, a debt due to debt., but assets of the society in the winding up; & debt. was precluded from setting off this sum under the provisions of the Companies Act, 1862 (c. 89).—*PHILLIPSON v. HALE* (1880), 43 L. T. 508; 45 J. P. 39, D. C.

32. Advance to member on security of reversion—Failure to pay instalment after voluntary winding up—Falling in of reversion.]—*CORDINGLEY v. ALLIANCE SOCIETY*, [1887] W. N. 220.

33. Priorities — Notice of withdrawal before winding up.]—*Re MUTUAL SOCIETY* (1880), 24 Ch. D. 425, n.

Annotations:—Distd. *Walton v. Edge* (1884), 10 App. Cas.

33. Consd. *Re Alliance Soc.* (1885), 28 Ch. D. 559.

34. ———.]— By the rules of a mutual loan society, which was registered as an unlimited co. under the Companies Act, 1862 (c. 69), every year a separate fund was formed by subscriptions

of members joining the society during the year. The accounts of each fund were kept distinct, & members received appropriations out of the particular fund to which they belonged. Withdrawing members were entitled, after notice, to payment in order of the date of notice, & only out of moneys received from time to time in respect of their particular fund. The society was voluntarily wound up:—*Held*: upon the true construction of the rules such withdrawing members were entitled to priority over the continuing members as to their particular fund, & the rule with regard to the withdrawal of members was a contract between the members of the society, & under it the members who had given notice of withdrawal as above mentioned had a contractual right to be paid in priority out of their particular fund, & such right was not put an end to by the winding up or by the closing of the fund.—*Re ALLIANCE SOCIETY* (1885), 28 Ch. D. 559; 54 L. J. Ch. 540; 52 L. T. 695, C. A.

Annotation:—Refd. *Botten v. City & Suburban Permanent Bldg. Soc.*, [1895] 2 Ch. 441.

PART IV.

33 i. Priorities—Notice of withdrawal before winding up.]—*ADIPURNAM PILLAI v. D'SENA* (1895), I. L. R. 19 Mad. 85.—**IND.**
o. Compromise of claims.]—*O'REILLY v. CONNOR, SAME v. ALLEN*, [1904] 2 I. R. 601.—**IR.**

LOCAL AUTHORITIES.

See CORPORATIONS; EDUCATION; ELECTIONS; HIGHWAYS, STREETS, AND BRIDGES; LOCAL GOVERNMENT; METROPOLIS; POOR LAW; PUBLIC HEALTH AND LOCAL ADMINISTRATION; SEWERS AND DRAINS; WATER SUPPLY.

LOCAL COURTS.

See COUNTY COURTS; COURTS; MAGISTRATES; MAYOR'S COURT, LONDON.

END OF VOL. XXXII.

